

PRIVILEGE CAN BE ABUSED:  
EXPLORING THE ETHICAL OBLIGATION TO AVOID  
FRIVOLOUS CLAIMS OF ATTORNEY-CLIENT PRIVILEGE

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Much is made of the ethical duty to protect attorney-client privilege. Both the ethical duty of confidentiality<sup>1</sup> and the ethical duty of zealous representation<sup>2</sup> require attorneys to vigorously defend privileged information from attempts to compel its disclosure. The notion that there might be ethical limits to such a duty is hardly ever considered and certainly not emphasized. For most lawyers, this emphasis on the importance of protecting privilege and lack of attention to the ethical limits of such claims has produced a sense that there is an unlimited ethical duty to protect privileged information from compulsory disclosure. Indeed, many lawyers seem to think that they are ethically obligated to give privilege the same level of protection given to criminal defendants. Just as criminal defendants are presumed innocent until the government has proven their guilt, lawyers often treat confidential information as privileged until the party seeking compulsory disclosure proves that it is not.

From this perspective, a claim of privilege can no more be frivolous than a plea of “not guilty,” even if the documents in question have never been examined nor the relevant law of privilege researched. “Knee-jerk” claims of attorney client privilege to any information requested are seen not as merely strategic, but as ethically required. Such conduct is buttressed by assumptions that the adversary system provides opponents a fair opportunity to challenge claims of privilege. Taken together, these assumptions produce “an important and recurring problem in civil discovery--the improper assertion of a claim of privilege.”<sup>3</sup>

In fact, neither the law of privilege nor the systemic realities of privilege litigation support application of the ultra-zealous posture of criminal defense lawyers to claims of privilege. In criminal cases, the legal presumption of innocence provides a firm foundation for the ethics of presumptively pleading a client not guilty.<sup>4</sup> In contrast, the legal burdens for proving privilege are in direct opposition to a practice of presumptively

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<sup>1</sup> American Bar Association Model Rule of Professional Conduct 1.6(a) (2004) (“ABA M.R. 1.6) (“a lawyer shall not reveal information relating to the representation of a client”).

<sup>2</sup> ABA M.R. 1.3, comment 1 (“a lawyer must . . . act . . . with zeal in advocacy upon the client’s behalf”).

<sup>3</sup> Eureka Financial Corp. v. Hartford Accident and Indemnity Co., 136 F.R.D. 179, 181 (E.D. Ca. 1991)(“blanket” privilege objections that delayed production by five years sanctioned by waiver of privilege and compelling production).

<sup>4</sup> See ABA M.R. 3.1 and comment 3 (prohibiting frivolous claims and contentions but allowing “a lawyer for the defendant in a criminal proceeding . . . [to] so defend the proceedings as to require that every element of the case be established).

claiming privilege. In matters of evidence, the presumption is in favor of the compulsion to reveal relevant evidence,<sup>5</sup> and the burden initially falls on the party claiming privilege to show that the information in question meets the multi-factor legal test for privilege.<sup>6</sup> Thus, as a matter of law, it is quite possible to make a frivolous claim of privilege.<sup>7</sup> Furthermore, courts that encounter such claims are more than willing to impose a wide range of sanctions on attorneys and/or their clients,<sup>8</sup> as such frivolous claims of privilege, even when successfully unmasked, impose unnecessary litigation costs on both clients and opposing parties,<sup>9</sup> and use up scarce judicial resources.<sup>10</sup>

The systemic problem with an ultra-zealous approach to attorney-client privilege is the fact that the adversary system does not work to fully test all claims of privilege, with the result that some, perhaps many, frivolous claims of privilege may never be

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<sup>5</sup> See United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996)(stating that attorney-client privilege is not “favored” because it “interferes with the truth seeking mission of the legal process”).

<sup>6</sup> See e.g. von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 144 (2nd Cir. 1987)(“a person claiming the attorney-client privilege has the burden of establishing all the essential elements thereof”); U.S. v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982)(“ The burden is on the proponent of the attorney-client privilege to demonstrate its applicability.”); U.S. v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983); Bouschor v. United States, 316 F.2d 451,456 (8th Cir. 1963)(“one claiming the privilege has the burden of establishing it”); U.S. v. Bump, 605 F.2d 548, 551 (10th Cir. 1979); State Farm Fire and Casualty Co. v. Superior Court, 62 Cal. Rptr. 2d 834, 843 (1997) (“When a party asserts the attorney-client privilege it is incumbent upon that party to prove the preliminary fact that a privilege exists.”). But see Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, 4TH ED. 38 (2001) (citing California statute shifting burden to opponent of privilege) (hereinafter “Epstein, THE ATTORNEY-CLIENT PRIVILEGE”).

<sup>7</sup> See *infra* cases cited in Part III, A-C.

<sup>8</sup> *Id.*

<sup>9</sup> See e.g., Starlight International Inc. v. Herlihy, 186 F.R.D. 626, 648 (D. Kansas 1999) (noting that “[d]elay and mounting attorney’s fees can equate to prejudice”); U.S. v. Western Electric Company, 132 F.R.D. 1, 1-2 (D.D.C. 1990) (detailing the three year delay produced by privilege objections to hundreds of documents that were “entirely without legal foundation, factual basis, or both”); Ost-West-Handel Bruno Bischoff GmbH v. M/V Pride of Donegal, 1997 WL 231126, at p.2-3 (S.D.N.Y.) (describing the unnecessary costs incurred by opponent when three-quarters of documents withheld as privileged “were clearly not covered by the privilege”).

<sup>10</sup> See e.g., American Medical Systems, Inc. v. National Union Fire Insurance Company of Pittsburg, Inc., 1999 WL 970341 (E.D. La 1999)(a document by document review of approximately 2800 alleged to be privileged documents revealed that a large percentage of the documents were easily recognizable as not privileged, including blank pages and copies of reported cases). See also Deborah Rhode, INSTITUTIONALIZING ETHICS, 44 Case W. Res. L. Rev.665, 670-71(1994) (noting that partisan practices such as unfounded claims of privilege both cause litigants to incur unnecessary expense and causes the general public to bear the costs “in the form of higher prices, tax deductions for legal expenses, and governmental subsidies for adjudicative and administrative proceedings”); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990) (“[B]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay”).

successfully unmasked.<sup>11</sup> Opposing parties do not always have the resources to litigate privilege claims document by document or communication by communication.<sup>12</sup> Courts do not always have the time or patience to review all such claims.<sup>13</sup> Indeed, opposing parties may never become privy to the facts that would allow them to successfully challenge the frivolous claims.<sup>14</sup> The ultimate effect of this loss of evidence on the results of litigation may range from inconsequential to devastating.

The early failures of the tobacco litigation are an example of the devastating effect of overly broad claims of privilege. As long as the tobacco companies successfully resisted discovery of their internal documents as privileged, plaintiffs were unable to prevail.<sup>15</sup> However, once the privilege claims were examined in detail, at great expense all around, it became obvious that many of the documents claimed to be privileged failed to meet even the basic elements of privilege.<sup>16</sup> Other documents met the basic elements of privilege, but were ultimately released under the crime-fraud exception to privilege. Plaintiffs were unable to make the crime-fraud argument in the early cases because the

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<sup>11</sup> Accord, Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973) (noting in Freedom of Information Act case that the “lack of knowledge by the party seeing[sic] disclosure seriously distorts the traditional adversary nature of our legal system’s form of dispute resolution”).

<sup>12</sup> See Rhode, *supra* note --, at 669 (noting that “[i]mbalances in representation, information and resources” can be “exploited” by partisan practices to “obstruct the search for truth”).

<sup>13</sup> Ronald Motley and Tucker Player, Issues in “Crime-Fraud” Practice and Procedure: The Tobacco Litigation Experience, 49 S. Cal. L. Rev. 187, 189 n. 10 (1998) (noting that courts were reluctant to engage in the review of vast numbers of documents claimed to be privileged by the tobacco company, forcing plaintiffs to choose small subsets for review with little information to determine which documents to choose). See also Jones v. Boeing Co., 1995 WL 827992 (D.Kan.) (stating that “[i]n camera procedures should be a rare procedure in discovery disputes” because “such a procedure requires a great deal of a court’s time and energy”). Accord, Vaughn v. Rosen, 484 F.2d at 826 (noting that the government’s failure to meet its burden of proof when claiming FOIA exemption for hundreds of pages of documents shifts burden to court system ill-equipped to handle it and creates likelihood that non-exempt material will be improperly found exempt).

<sup>14</sup> See Eureka Financial Corp., 136 F.R.D. at 183 (noting that when documents are withheld as privileged but specific information is not provided to justify the claim, the opposing party cannot know whether “the documents withheld under a blanket privilege objection were withheld correctly, incorrectly, or maliciously”); Delaney, Migdail & Young, Chartered v. I.R.S., 826 F.2d 124, 128 (D.C.Cir.1987) (noting that the party seeking information claimed to be privileged has a “natural handicap--an inability to argue intelligibly over the applicability of exemptions when he or she lacks access to the documents”).

<sup>15</sup> See Motley & Player, *supra* note 13, at 189 and n. 10 (1998) (“For more than forty years, the tobacco industry avoided the discovery of its nefarious activities by hiding behind discovery abuse practices and ill-founded claims of privilege.”).

<sup>16</sup> See e.g., Minnesota v. Philip Morris Inc., 1998 WL 257214 at page 6 (Minn. Dist. Ct. 1998) (“Defendants and each of them claimed privilege for documents which are clearly and inarguably not entitled to protections of privilege.”). See generally, Motley and Player, *supra* note 13, at 189 n. 10 (1998) (listing the “ever-increasing string of judicial decisions finding sets of tobacco industry documents simply not privileged in the first instance”).

fraud was only revealed in the very documents that the privilege claim prevented them from examining. Indeed, it is by no means clear that these lawsuits would ever have succeeded if the “privileged” documents showing the tobacco lawyers’ involvement in the cover-up of the addictive and cancer-causing effects of cigarette smoking had not been stolen by a disgruntled employee and provided to plaintiffs’ counsel.<sup>17</sup>

If the adversary system cannot be counted upon to effectively and consistently unmask frivolous claims of privilege, an unlimited ethical duty to assert privilege without regard to the potential legitimacy of the claim will have the effect of distorting the justice provided by our courts.<sup>18</sup> The punitive nature of sanctions imposed by courts on some egregiously frivolous claims of privilege may not be sufficient to offset the strategic value of successful, yet unwarranted, nondisclosure in the vast majority of cases. Indeed, to the extent that ethical duties of confidentiality and zealous representation seem to validate strategic, but frivolous claims of privilege, one can expect that sanctions will simply be viewed as the cost of litigation that is both effective and ethical. Such abuse has, in turn, led some to attack the scope of legal protection provided to attorney-client privilege.<sup>19</sup> However, if the ethics of privilege includes a limiting principle that makes it clear under what circumstances claiming privilege is ethical and under what circumstances claiming privilege is unethical, ethics can resume and maintain its familiar role as a counterweight to strategic concerns.<sup>20</sup> This Article will explore this limiting principle and consider whether it can be incorporated into the ethical rules to provide more balanced guidance to lawyers in their use of attorney-client privilege to resist compulsory disclosure.

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<sup>17</sup> See *id.* at 190 (describing how a “whistle-blowing paralegal at one of the tobacco industry’s law firms” finally made discovery of crucial documents previously protected by attorney-client privilege possible).

<sup>18</sup> See Rhode, *supra* note 10, at 669-70 (1994)(arguing that “partisan practices” such as “adopting strained interpretations of the attorney-client privilege” can prevent a “fair adversarial contest”).

<sup>19</sup> See Report of ABA Task Force on Attorney-Client Privilege at 1-2, 11 (May 18, 2005) (noting the “policies, practices, and procedures of government agencies that have the effect of eroding the attorney-client privilege” and arguing that abuse of the privilege “as a tactic to delay and hinder the discovery of otherwise discoverable material . . . do[es] not justify encroaching upon the protections afforded by the privilege”).

<sup>20</sup> See *id.* at 11 (arguing that control of privilege abuse should occur through ethical rules and sanctions under procedural rules, rather than by limiting the legal protection provided to privilege, and suggesting that existing rules are sufficient).

This is a difficult undertaking for three rather different reasons. First, attorney-client privilege is central to the American system of justice.<sup>21</sup> Our protection of confidential client communications through privilege is premised on the assumption that this is essential to vigorous representation of clients.<sup>22</sup> Changes to the ethical rules that undermined attorney-client privilege would therefore undermine the very role that legal ethics seeks to define and defend. Thus, any ethical limitation on assertions of attorney-client privilege must have a negligible effect on legitimately protected communications. This Article will show both that ethical limitations on the assertion of attorney-client privilege will not undermine the ethical duty of protecting privileged information and that useful guidance about impermissible claims of privilege can be provided to attorneys.

The attempt to provide specific guidance regarding frivolous claims of privilege reveals the second difficulty in this undertaking. If what is unethical is only the frivolous claim of privilege, is the law of privilege clear about what claims of privilege are frivolous? The very description of a claim as frivolous presumes a clear and unmistakable lack of legal merit. We must consider what, if any, claims of privilege so clearly lack legal merit that they should be declared to be ethically frivolous. Where the law of attorney-client privilege is too unsettled, inconsistent or convoluted, it may be impossible to declare claims of privilege frivolous and therefore unethical.<sup>23</sup> At the same time, there may be particular areas of privilege law that are more settled than others in which identification of ethically frivolous claims of privilege is possible.

Finally, even where the law of privilege is clear and settled, determinations of privilege are highly fact dependent.<sup>24</sup> Is it possible to make lawyers ethically responsible for evaluations of facts under the law? This will depend on how predictable such evaluations are. An ethical limit on privilege claims can not be merely theoretical, rather it must provide meaningful specific limits on when privilege must be asserted under the

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<sup>21</sup> See Report of ABA Task Force on Attorney-Client Privilege at 7 – 11 (May 18, 2005) (“the privilege is an important and necessary part of our judicial system”).

<sup>22</sup> See *id.* at 7 (“[t]he privilege has an important role in (i) fostering the attorney-client relationship, (ii) encouraging client candor, (iii) enhancing voluntary legal compliance, (v) increasing the efficiency of the justice system and (iv) enhancement of constitutional rights”).

<sup>23</sup> Accord, Eastway Construction Corp. v. City of New York, 637 F.Supp. 558, 578 (E.D. N.Y. 1986) (imposing minimum sanctions because “the very complexity of the law on antitrust standing makes it difficult to say with assurance that any plaintiff’s claim to have standing is obviously frivolous”).

<sup>24</sup> See e.g., Glade v. Superior Court, 76 Cal.App. 3rd 738, 743 (Cal. Ct. App., 3rd Dist. 1978) (waiver of privilege is a question of fact).

ethical duties to protect client confidentiality and to zealously represent a client's interests. This could take the form of specific practical guidance to identify the kind of factual support needed for a non-frivolous claim of privilege.

This Article takes the position that it is sufficiently possible for lawyers to predict what will be a frivolous claim of attorney-client privilege that they can be held ethically responsible for failing to avoid such claims. It proposes the addition of a comment to the Model Rules of Professional Conduct which will both alert lawyers to the ethical stakes on both sides of attorney-client privilege and provide some specific guidance on what makes a claim of privilege frivolous and therefore unethical.<sup>25</sup> At the same time, a comment to the Model Rules cannot substitute for legal expertise about attorney-client privilege. What is needed is for lawyers to both develop and use judgment about claims of attorney-client privilege. The development of such judgment can only be provided by training and education. Thus, it also the case that attention to the legal and factual analysis of claims of attorney-client privilege must be given greater emphasis in the ethical training of lawyers in law schools and in continuing legal ethics education.

## I. THE ETHICAL STATUS OF ATTORNEY-CLIENT PRIVILEGE

Legal protection of client's communications to their attorneys began in the sixteenth and seventeenth century as an accommodation to the honor of gentlemen attorneys who would otherwise have been forced to violate their oath of secrecy by being compelled to testify against their clients.<sup>26</sup> However, the justification for the privilege eventually shifted away from protecting the honor of the attorney to protecting the client's ability to obtain effective representation and thereby gain the full protection of the law.<sup>27</sup> In the absence of such a privilege, clients could only get legal advice by taking the chance that their attorney might be forced to disclose secrets that would

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<sup>25</sup> Such a rule might serve more as guidance than as a basis for discipline, as frivolous claims in general rarely receive disciplinary treatment. See Peter Joy, "The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers," 37 *Loyola of Los Angeles L.R.* 765, 806-7, 814 (2004) (arguing that regulation of frivolous litigation claims has and should remain primarily the province of judges rather than state disciplinary agencies).

<sup>26</sup> Paul R. Rice, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES*, 2d ed., at 12-13 & n. 24 (1999) (describing the emergence of attorney-client privilege in sixteenth and seventeenth century England) (hereinafter "Rice, ATTORNEY-CLIENT PRIVILEGE").

<sup>27</sup> *Id.* at 12-13 (describing how a client-centered theory arose to justify the privilege in the eighteenth century).



otherwise never come to light; thus legal advantage could only be obtained by incurring legal disadvantage.<sup>28</sup> As such a trade-off would discourage legal consultation, by the eighteenth century courts recognized that privileging client communications from compulsory disclosure was essential to the rule of law itself.<sup>29</sup> This same justification continues to guide the contemporary American jurisprudence of attorney-client privilege.<sup>30</sup>

The legal privileging of attorney-client communications provides attorneys and clients with the ability to avoid both disclosure of such communications and sanctions for failing to disclose in compulsory testimonial setting such as trials, civil discovery and grand jury hearings. In such settings, the possible applicability of attorney-client privilege to an attorney-client communication sought to be disclosed will trigger the general ethical duty of lawyers to “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”<sup>31</sup> Yet for purposes of this particular ethical duty, attorney-client privilege is just one of many legal rights or entitlements available to a client that a lawyer must protect and advance. As such, attorney-client privilege requires no more or less zeal than any other legal right or interest and has no special ethical status.

The special ethical status of attorney-client privilege arises under the ethical duty of lawyers “not [to] reveal information relating to the representation.”<sup>32</sup> The purpose of this ethical duty is the same as the purpose of the evidentiary attorney-client privilege: to

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<sup>28</sup> See Bolton v. Corp. of Liverpool, 1 My. & K. 88, 39 Eng. Rep. 614 (Ch. 1833)(“[i]t has been considered so important that a man should take legal advice, and communicate with his legal advisors freely and without apprehension of consequences hurtful to himself”); Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (attorney-client privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

<sup>29</sup> Greenough v. Gaskell, 1 My. & K. 98, 39 Eng. Rep. 618, 620-21 (Ch. 1833) (stating that “the interests of justice” require lawyers, and that, without the privilege, “everyone would be thrown upon his own legal resources”).

<sup>30</sup> Upjohn Co. v. U.S., 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981) (“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. 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.”).

<sup>31</sup> ABA M.R. 1.3, Comment 1 (2004). See also American Bar Association Model Code of Professional Responsibility [hereinafter “Model Code”], Canon 7, EC 7-1 & DR 7-102(A)(1).

<sup>32</sup> M.R. 1.6(a) (2004).

encourage clients “to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”<sup>33</sup> As some, although not all, of the information relating to the representation will typically be attorney-client privileged, the ethical duty of confidentiality requires that attorneys assert the privilege wherever necessary to prevent the compulsory disclosure of attorney-client communications.<sup>34</sup> Because this ethical duty implicates the ability of lawyers to fulfill their roles as client advisors and representatives, it is not merely a duty to advance the interests of a particular client, but a meta-ethical duty to protect the role of lawyers and the system of justice that is made possible by this role.<sup>35</sup> As a meta-ethical duty, confidentiality requires extra vigilance, because it is understood that the consequences of failure to protect confidentiality will be to undermine the profession and its achievements as a whole.

## II. THE ETHICAL BASIS OF LIMITING CLAIMS OF PRIVILEGE

Given that the ethical duty of protecting attorney-client confidences is located in the foundational ethical duty of confidentiality, and is additionally buttressed by the general duty to protect the legal interests of each particular client, it is easy to see how placing any kind of limit on claims of attorney-client privilege might be viewed as outside the ethical pale. However, there are at least two well-established ethical duties that provide a foundation for an ethical limit on claims of attorney-client privilege: the duty to provide competent representation to a client<sup>36</sup> and the duty not to make a frivolous defense.<sup>37</sup>

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<sup>33</sup> Id. at Comment 2.

<sup>34</sup> Id. at Comment 3 (noting that the duty of confidentiality encompasses attorney-client privileged information) and Comment 13 (“the lawyer should assert on behalf of the client all non-frivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege”).

<sup>35</sup> Accord, Schwimmer v. U.S., 232 F.2d 855, 863 (8th Cir. 1956)(“the attorney has the duty . . . to make assertion of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from being violated”).

<sup>36</sup> M.R. 1.1 (2004) (“A lawyer shall provide competent representation to a client.”). See also, Model Code DR 6-101(A)(2) & EC 6-2.

<sup>37</sup> M.R. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”). See also Model Code DR 7-102(A)(1) - (2) & EC 7-4.

## A. ABUSE OF PRIVILEGE AS A VIOLATION OF THE DUTY TO PROVIDE COMPETENT REPRESENTATION

In considering whether the duty to provide competent representation might implicitly make some claims of attorney-client privilege unethical, it is important to recognize that this duty is primarily client-oriented. Lack of competence is only a problem, and an ethical failing, in so far as it results in bad results for a client. In the rare case where a good result occurs fortuitously despite incompetence, discipline is also appropriate under this rule,<sup>38</sup> but it would seem to be based on an assumption that such incompetence will inevitably produce a loss of rights for future clients, even if it has not done so for the present client. Thus, in order for this rule to provide significant support for limits on claims of attorney-client privilege, it would have to be the case that frivolous assertions of attorney-client privilege due to a lack of competence would regularly turn out to be prejudicial to the clients on whose behalf the objection is raised.

Because assertions of attorney-client privilege are actions rather than omissions, even frivolous assertions rarely have the kind of direct negative impact upon client results that a failure to file a claim within the statute of limitations or to read a contract would have. Furthermore, inasmuch as frivolous assertions of privilege often effectively serve to block possibly damaging information from either disclosure or use as evidence, they will have either a beneficial effect or no harmful effect on the results achieved for the client. In cases where the frivolous nature of the privilege claim is neither contested nor revealed, it is difficult to see any prejudice to the current client or future clients.

If, however, the claim of privilege is successfully contested by the other side, the client will incur the costs of responding to motions to compel disclosure at minimum, and, if counsel digs in their heels, may incur further costs to respond to motions for sanctions and to appeal both the privilege ruling and the sanctions. While the potential benefits of preventing admission of damaging evidence might be worth incurring the litigation costs of a non-frivolous, but controversial claim of privilege, this could hardly be true when frivolous privilege claims are successfully contested. In such successful contests, the most serious prejudice to clients of frivolous claims of privilege will likely

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<sup>38</sup> ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, 3rd ed., at 3 (1996)(citing In re Gastineau, 857 P.2d 136 (Or. 1993)(goods results do not excuse poor job of lawyer)).

arise out of sanctions the courts may impose.

Sanctions for frivolous privilege claims can be imposed under a number of different procedural rules and substantive laws, as well as under the inherent power of the court. The purposes of such sanctions include: (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management.<sup>39</sup> Monetary damages are the most typical form of sanctions. Federal Rule of Civil Procedure 37(a)(4)(A) requires a court to award the moving party the expenses, including attorney fees, incurred by the moving in making a successful motion<sup>40</sup> to compel discovery. The rule permits the court to compel such payment either from the client on whose behalf the frivolous claim was made,<sup>41</sup> or from the attorney advising this course of action.<sup>42</sup> Federal Rule of Civil Procedure 37(b)(2) allows a court to award such attorney's fees in addition to other sanctions upon a party's failure to comply with an order to provide or permit discovery, so long as "the failure was [not] substantially justified."<sup>43</sup> Rule 37(b)(2) also provides the court the power to require the resisting party to compensate the court for the added expense of frivolous claims of privilege.<sup>44</sup> Monetary sanctions in the form of a per diem fine are additionally available under both court's civil and criminal contempt powers<sup>45</sup> against non-party witnesses who fail to obey court orders, including orders resisted on frivolous claims of privilege.

Should the client be required to pay these expenses as well as their legal expenses

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<sup>39</sup> RTC v. Williams, 162 F.R.D. 654, 660 (D.Kan.1995).

<sup>40</sup> Success under this rule includes both the 'voluntary' provision of discovery after the filing of the motion as well as a grant of the motion by the court.

<sup>41</sup> See e.g. Prousi v. Cruisers Division of KCS International, Inc., 1997 WL 135692 (E.D.Pa.) (ordering plaintiff to pay reasonable counsel fees and cost in bringing the motion to compel production of a redacted fee agreement between plaintiff and its counsel).

<sup>42</sup> See e.g. Jones v. Boeing Co., 1995 WL 827992 (D.Kan.) (ordering resisting counsel to pay opposing counsel \$500 for the costs of a successful motion to compel, where resisting counsel failed to even begin to meet their burden of showing privilege).

<sup>43</sup> FRCP 37(b)(2).

<sup>44</sup> Government Guarantee Fund of the Republic of Finland v. Hyatt Corp., 182 F.R.D. 182, 186 (D.V.I. 1998) (also relying on the court's inherent powers to impose a fine designed to compensate the court for discovery abuse).

<sup>45</sup> 18 U.S.C.A. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority"). See e.g., Better Government Bureau v. McGraw, 924 F.Supp. 729, 735 (D. W.Virg. 1996) (imposing a \$250 per day fine on an attorney witness who continued to resist disclosure on grounds of attorney-client privilege after the court ordered disclosure), reversed, In re Barbara Allen, 106 F.3rd 582 (4th Cir. 1997)(finding resisted discovery was privileged).

in resisting discovery, the client will certainly suffer monetary prejudice as a result of their attorney's frivolous claim. However, if the court requires the attorney to pay these expenses, the only negative monetary consequence to the client will be their own expenses for resisting discovery,<sup>46</sup> unless the attorney later passes to the client expenses the court has assessed to counsel.<sup>47</sup>

Non-monetary sanctions for failure to obey a motion to compel may be imposed by the courts in civil cases under F.R.Civ.P. 37(b)(2). These sanctions can reduce the potential strategic value of asserting frivolous claims of privilege by providing strategic advantages to the party properly seeking disclosure. These punitive advantages include: establishing facts relevant to the non-disclosed information against the resisting party;<sup>48</sup> estopping the resisting party from claiming privilege as to specified categories of documents;<sup>49</sup> denying the resisting party's discovery related motions;<sup>50</sup> precluding the resisting party from supporting or opposing specified claims or defenses or introducing specific facts into evidence;<sup>51</sup> striking out portions of the pleadings of the resisting party; staying the proceeding; dismissing all or part of the action; entering a default judgment

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<sup>46</sup> F.R.Civ. P 11(c), F.R.Civ.P. 26(g), 28 U.S.C.A. §1927 (allowing courts to make attorneys personally liable for the costs, expenses, and attorney's fees incurred as a result of unreasonable and vexatious multiplication of proceedings) and the inherent power of the court to impose sanction for bad faith behavior also allow for monetary sanctions in the form of costs, expenses and attorney's fees under circumstances that could include frivolous claims of attorney-client privilege. See e.g., Securities and Exchange Commission v. Kimmes, (S.D. N.Y. 1996)(holding that F.R.Civ. P. 11, 28 U.S.C. §1927, and the inherent power of the court to punish bad faith conduct could permit a court to impose attorney's fees on a non-party deponent who had failed to produce non-privileged documents sought under a F.R.Civ.P. 45 subpoena *duces tecum* and subsequently ordered to be produced, but finding such sanctions inappropriate in this case); McCormick-Morgan, Inc. v. Teledyne Industries, Inc., 134 F.R.D. 275, 286(N.D. Cal. 1991)(sanctioning attorney under F.R.C.P. 26(g) & 37 for claiming privilege at a deposition after waiving such privilege, sanctions to consist of re-convening depositions at opposing party's counsel's office and requiring a \$500 payment by the attorney to opposing party).

<sup>47</sup> Courts can and do sometimes forbid counsel to seek reimbursement from their client for monetary sanctions imposed against counsel personally. See Chilcutt v. United States, 4 F.3rd 1313, 1325-27, (5th Cir. 1993)(forbidding a U.S. government attorney from seeking reimbursement from the government for sanctions imposed against the attorney for groundlessly asserting attorney-client privilege to block deposition answers and also stating that private attorneys may be treated similarly).

<sup>48</sup> F.R.Civ.P. 37(b)(2)(A). See e.g., Amway Corp. v. The Procter & Gamble Co., 201 WL 1818698 (W.D. Mich. 2001) (magistrate recommendation of an order designating as established facts sought to be proven by documents wrongfully withheld as privileged)

<sup>49</sup> See Minnesota v. Philip Morris, Inc., 1998 WL 257214 (D. Minn. 1998)(when a random review of categorized documents claimed to be privileged revealed some documents "clearly and inarguably not entitled to protections of privilege," such abuse of privilege warranted loss of privilege for all documents within that category).

<sup>50</sup> Securities and Exchange Commission v. Levy, 706 F.Supp. 61, 67(D. D.C. 1989) (denying resisting party's motion to produce certain documents and motion to extend the time permitted for discovery).

<sup>51</sup> F.R.Civ.P. 37(b)(2) B)

against the resisting party;<sup>52</sup> and treating the failure to obey the motion to compel as a contempt.<sup>53</sup>

While some of the lesser non-monetary sanctions do not necessarily lead to a loss for the sanctioned client,<sup>54</sup> such non-monetary sanctions will ordinarily be prejudicial to the client. Similarly, when monetary sanctions are awarded, the extra expense will ordinarily be borne by the client with no offsetting benefit. Even where no sanctions occur, the client bears the extra expense of their own attorney's fees and costs to resist the disclosure. Therefore, in those cases in which frivolous claims of attorney-client privilege are unsuccessful, there will almost always be sufficient prejudice to the client to find a breach of the ethical duty of competence.

However, it may well be the case that frivolous assertions of privilege are a successful tactic on the whole, helping more clients than are hurt. If this is the case, it is difficult to place the ethical failing in question as one of competence. Only if the tactic tends to be unsuccessful, and is more harmful than helpful to clients, might it make sense to view frivolous assertions of attorney-client privilege as incompetence. Therefore, the ethical duty of competence may not provide clear support for the proposition that frivolous claims of privilege involve a breach of legal ethics.

#### B. ABUSE OF PRIVILEGE AS A VIOLATION OF THE ETHICAL DUTIES NOT TO MAKE FRIVOLOUS CLAIMS OR DEFENSES AND OF FAIRNESS TO THE OPPOSING PARTY

Unlike the duty to provide competent representation, the duties not to make frivolous claims and to be fair to the opposing parties are designed to limit the advancement of client's interests. While the comment to Model Rule 3.1 states that an

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<sup>52</sup> F.R.Civ.P. 37(b)(2)(C). See generally, National Hockey League v. Metropolitan Hockey Club, Inc., 429 U.S. 639, 643(1976) (upholding a dismissal of the action due to failure to timely answer interrogatories both as a penalty to the sanctioned party and as a deterrent to others who might be tempted not to comply with discovery orders in the future).

<sup>53</sup> F.R.Civ.P. 37(b)(2)(D). Civil contempt provides the court with a broad range of discretionary remedies, including imprisonment and punitive monetary fines. See Better Government Bureau, Inc. v. McGraw, 924 F.Supp. 729, 734-35 (S.D. W.Virg. 1996), reversed, In re Barbara Allen, 106 F.3rd 582 (4th Cir. 1997) (choosing a per diem fine rather than imprisonment as a contempt sanction for a non-parties failure to obey a court order finding no attorney-client privilege).

“advocate has the duty to use legal procedure for the fullest benefit of the client’s cause,”<sup>55</sup> the rule itself places the emphasis on the limits of such representation:

[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . .  
<sup>56</sup>

Model Rule 3.4 explains that the adversary system’s focus on evidentiary competition presumes that both sides have appropriate and fair access to evidence.<sup>57</sup>

One clear goal of the limit on frivolous claims imposed by MR 3.1 is the protection of non-clients from the negative legal, financial or emotional consequences that such conduct can produce. Taking legal actions for the primary purpose of creating these negative consequences is viewed as an abuse of legal procedure.<sup>58</sup> Furthermore, since “what goes around, comes around,” clients who might be benefited by frivolous claims made by their own attorney, can at other times suffer the negative consequences of having such frivolous claims made against them.

It is also possible to understand the MR 3.1 limit on representation as meant to protect the judicial system itself, although this goal is not clearly referenced in either Rule 3.1 or its comments.<sup>59</sup> This goal tends to be most clearly articulated by the courts themselves as one of the important justifications for imposing sanctions on both parties and lawyers who have abused the process in this way.<sup>60</sup> The use of scarce judicial resources by frivolous claims and defenses slows the judicial process. This, in turn, hurts the quality of justice for both civil and criminal litigants, as justice merely delayed for some is justice lost for others.

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<sup>54</sup> For example, defendant, Procter & Gamble, sanctioned by establishing certain facts claimed by plaintiff as proved in Amway Corp v. Procter & Gamble, supra note 49, later prevailed in the case. Amway Corp. v. Procter & Gamble Co., 346 F.3d 180, 181 (6th Cir. 2003).

<sup>55</sup> M.R. 3.1, Comment 1.

<sup>56</sup> M.R. 3.1.

<sup>57</sup> M.R. 3.4 Comment 1 and 2 (2004).

<sup>58</sup> See M.R. 3.1, Comment 1 (stating that advocates have a “duty not to abuse legal procedure”).

<sup>59</sup> If M.R. 3.1 can not be found to have the protection of the judicial system as a goal, it might be possible to find this goal in M.R. 8.4(d): “It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice.” Although the comment to the rule only specifically targets the distorting effects of prejudice or bias on the results of legal proceedings, the negative effects of frivolous claims and defenses on the system itself would seem to be another kind of prejudice to the system that lawyers should avoid.

<sup>60</sup> See RTC v. Williams, 162 F.R.D. 654, 660 (D.Kan. 1995) (noting that one purpose to be kept in mind in determining the appropriate sanction is “streamlining court dockets and facilitating case management”).

Delay, congestion and grid-lock in the judicial system also tarnish the reputation of this system as capable of producing just results both in the view of the public and in the view of those who work within the system. This can lead the public to avoid utilizing the system to assert their rights and lead attorneys to avoid utilizing the system to vindicate the rights of their clients.<sup>61</sup> The negative effects of frivolous claims and defenses can even discourage qualified candidates for seeking judicial office, as both the frustration of wasting time on frivolous matters and the resulting increased backlog of cases simply makes the job less attractive. Finally, frivolous claims can lead to legislative hostility to lawyers, legal rights and the courts, as legislatures seek to reduce the waste of taxpayer money by immunizing various sectors of society from suit,<sup>62</sup> placing caps on damages,<sup>63</sup> and under-funding the courts.

The primary target of this ethical duty is the initiation of a lawsuit that has no legal and/or factual basis. Clearly, this is the most harmful kind of frivolous action a lawyer can take, as it requires the defendant to undergo the entirely unnecessary expense, effort and stress of defense, and produces the most impact on the operation, finances and reputation of the judicial system. Frivolous defenses to legitimate claims have a lesser, although quite significant effect on both litigants and the court. At best, frivolous defenses can simply slow down and make more expensive the vindication of rights by plaintiffs. At worst, the increased cost of litigating may require the suit to be dropped, may produce a less favorable ruling due to lack of resources for vigorously litigation of legitimately controversial aspects of the case, or may simply cause a lesser settlement to be accepted. Such increases in expense and diminishment of results for the plaintiff is paralleled in the judicial system by increased use of scarce judicial and administrative resources and a sense that the results of the process are less “just” than they could have been.

What is of concern in this article, however, is not frivolous claims and defenses, but rather frivolous objections to or resistances to compulsory evidentiary processes such

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<sup>61</sup> Lawyers may choose mediation or arbitration to resolve client disputes.

<sup>62</sup> E.g., a bill passed the House of Representative in 2004 banning lawsuits by obese customers against fast food restaurants. <http://www.cnn.com/2004/03/10/fat.lawsuits>.

<sup>63</sup> Twenty-five states now have medical malpractice non-economic damage caps, and similar federal legislation has passed the House several times. <http://www.iii.org/media/hottopics/insurance/medicalmal>.



as civil or criminal (?)discovery, grand jury subpoenas, and trial testimony and evidence. These are covered both by MR 3.1, as discussed above, and MR 3.4, which states that

A lawyer shall not: (a) unlawfully obstruct another party's access to evidence . . . . A lawyer shall not counsel or assist another person to . . . (d) in pretrial procedure, . . . fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

As is the case with many frivolous claims and defenses, some frivolous evidentiary objections are revealed as frivolous and, therefore, have no legal impact. I would suggest, however, that frivolous attorney-client privilege objections are, on the whole, much more likely to prevail than are frivolous claims and defenses.

The possibility of a default judgment if one fails to defend against even a frivolous action is sufficient to galvanize most defendants into enough of a response to reveal the frivolous nature of the claim. Furthermore, even in the absence of such a defense, a claim that is legally, rather than factually, frivolous may be so obvious to the court that it will dismiss the action on its own motion rather than enter a default. In the case of a frivolous defense, the plaintiff is already geared up to litigate, having initiated the action in the first place. Since the direct consequence of failing to attack the frivolous defense would be the loss of potential positive results, and the plaintiff already has retained counsel and invested in these potential results, plaintiffs will, except in extreme circumstances, both have sufficient resources to reveal the frivolous nature of the defense and choose to use their resources to accomplish this end.

In contrast, when a frivolous objection of attorney-client privilege is made to a compulsory legal process seeking evidence, it is not clear to the party seeking the evidence how important or useful the evidence not disclosed would be to their case. Even assuming that the party making the frivolous objection files a fully detailed privilege log<sup>64</sup> with affidavits<sup>65</sup> or otherwise provides the required level of detail about the withheld

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<sup>64</sup> To satisfy the requirements of F.R.C.P. 26(b)(5), specified information is required to be included in the log. *Community Psychiatric Centers*, 1993 WL 497253 at \*4 (C.D.Cal.) (“a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated”).

<sup>65</sup> See e.g., *AT&T Corp. v. Microsoft*, 2003 WL 21212614, p.2 (N.D. Ca 2003)(“In addition to a privilege log, the party claiming privilege should produce affidavits describing the confidential nature of the documents.”).

evidence,<sup>66</sup> only the party making the objection knows the actual content of the non-disclosed material. A privilege log will not reveal whether the evidence withheld is the missing smoking gun, duplicative of other useful evidence already obtained, or entirely unhelpful. As a result, the value of vigorously contesting the objection cannot be predicted. Thus, even an objection that strikes counsel as obviously frivolous may not seem worth the effort to have stricken.

Second, even though a privilege log with affidavits, or an equivalent, is meant to provide the requesting party with enough information to allow a challenge to be made to the objection, practically speaking, it is often not so easy to clearly determine, based on the information provided, that a particular claim of privilege is or might be frivolous.<sup>67</sup> This is why courts prefer in most cases to undertake *in camera* evaluation of withheld evidence prior to ruling against a claim of attorney-client privilege.<sup>68</sup> In the absence of an ability to judge either the likelihood of success when challenging a claim of privilege or the value of the information that might be obtained, counsel may simply choose not to make such a challenge.

Finally, another disincentive to challenging claims of attorney-client privilege is the fact that, in many cases, there is not just one challenge to make. Depending on the volume of information requested and available, objections on the basis of privilege could cover tens, hundreds or thousands of documents, each of which must be separately challenged as not privileged. Even where a detailed privilege log makes it facially

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<sup>66</sup> A regular feature of many, although not all, frivolous attorney-client privilege objections is a failure to produce any privilege log, or a sufficiently detailed privilege log. See *infra*, Part III (B)(--)

<sup>67</sup> Mark Stein has described a similar phenomenon under Rule 11, which he calls a “hidden fact-violation.” Mark Stein, *Of Impure Hearts and Empty Heads: a Hierarchy of Rule 11 Violations*, 31 *Sant. Cl. L. R.* 393, 395 (1991). This is where a claim violates Rule 11, under language since changed by the 1993 amendments, because it not well-grounded in fact and the contrary facts are either hidden from or not accessible to the other party. *Id.* Those claims of attorney-client privilege that require access to the privileged material to reveal the lack of actual privilege would seem to be a kind of hidden fact-violation. Stein has argued that such hidden fact-violations “pose[] a far greater threat to the non-violator - and to justice - than the obvious fact-violation,” for which the opposing party has access to the contradictory facts and therefore has the ability to challenge. *Id.* at 397.

<sup>68</sup> See e.g., *Lane v. Sharp Packaging Systems, Inc.*, 640 N.W.2d 788, (S. Ct Wis. 2002) (holding erroneous a release of documents claimed to be privileged without *in camera* review, but based only upon a prima facie showing of the the crime/fraud exception); *Martin Marietta Corp. v. Fuller Co.*, 1986 WL 12424 (E.D.Pa.) (“Where, however, the parties have been unable to solve their dispute over claims of privilege, and especially where public policy requires protection of documents or portions of documents, Court inspection is unavoidable.”); *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1, 2 (D. D.C. 1999) (conducting an *in camera* review despite the lack of a privilege log, but noting that failure to produce such a log can be treated as a waiver of privilege).

apparent that no privilege can legitimately be asserted, the time and expense of evaluating and responding to each of many individual privilege claims, any and all of which may be of little ultimate value, can and does lead requesting parties to leave claims of attorney-client privilege unchallenged. Thus, when we consider the consequences to non-client parties and the judicial system of frivolous objections of privilege, we must include the consequences that occur both when such frivolous objection are successfully stricken and when no challenge at all is made.

The obvious consequence of successful challenges on both non-clients and the judicial system is the waste of legal and judicial resources required judged the objection frivolous. The proliferation of magistrates as essential adjudicators of discovery disputes, some portion of which revolve around objections based on attorney-client privilege, and the sometimes staggering quantity of objections which must be reviewed item by item both by the requesting litigators and by the court *in camera*, along with the immediate appealability of orders compelling disclosure,<sup>69</sup> suggest that the financial cost to non-client parties and the judicial system may well be considerable. While it is impossible to quantify the extent to which the early diversion of legal resources affects the results ultimately obtained by diminishing the legal resources later available to devote to winning the case or maximizing the award, it seems likely that, for some requesting parties, even successfully unmasked frivolous claims of privilege will negatively impact the quality of justice received. For courts, the amount of judicial time that may be expended in disputes about frivolous privilege claims, including conferences, hearings, *in camera* review, and written orders, might be almost as much as that used by frivolous suits or defenses. Even if less time is involved, resolving frivolous claims of privilege must be seen as adding to those delays and backlogs that diminish the quality of justice produced and tarnish the system's reputation for producing just results.

So far, we have considered the possible negative consequences that occur even when frivolous claims of privilege are successfully challenged. What are the consequences to non-client parties and the judicial system of the considerable number of frivolous claims of privilege that are never challenged or are never successfully

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<sup>69</sup> See *id.* at 4, n. 5 (“Courts have been reluctant . . . to conduct *in camera* inspection,” especially “where the examination of the requested documents requires herculean labors because of their volume”).

challenged?<sup>70</sup> Certainly no time, money or scarce judicial resources are wasted by such claims because the issue never receives legal or judicial attention. In these cases, the frivolous claim of privilege has successfully prevented relevant evidence from being discovered and offered into evidence, thus the negative impact is entirely on the results achieved. The law itself is clear about the importance of admission of relevant evidence to the truth-seeking goal of the judicial process: “because of the privilege's adverse effect on the full disclosure of the truth, it must be narrowly construed.”<sup>71</sup> If a liberal interpretation of attorney-client privilege cannot be permitted because it has too great an impact on full disclosure of the truth, frivolous assertions of privilege that successfully prevent disclosure must have an intolerable impact on the truth that emerges from the judicial process. This in turn produces injustice for the individuals involved and diminishes the social value of the judicial system in general.

It appears, therefore, that frivolous assertions of attorney-client privilege, whether successfully unmasked or never challenged, unacceptably harm opposing parties, the judicial system itself, and all those who will seek or need to seek vindication of their rights in the future. Since the goal of these ethical duties are to prevent such negative impacts on non-clients and the judicial system in the name of client service, MR 3.1 and MR 3.4 must include a duty to avoid frivolous assertions of attorney-client privilege. Should it be possible to describe some claims of attorney-client privilege as frivolous, it now seems clear that such claims would be prohibited by MR 3.1 and 3.4. However, it remains to be seen whether there are claims of attorney-client privilege that can be reasonably recognized as frivolous without the benefit of the adversary process. The possibility of early recognition is essential if the ethical rule is to be understood as prohibiting the unlimited interposition of attorney-client privilege as an objection to an otherwise legally compelled disclosure obligation.

### III. ETHICALLY IMPERMISSIBLE CLAIMS OF ATTORNEY-CLIENT PRIVILEGE

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<sup>70</sup> The reluctance of courts to do *in camera* review, particularly when the number of items to be reviewed is large may lead courts to discourage full bore litigation of privilege objections, even when the parties involved may be willing to expend the time and resources. Thus, even frivolous claims of privilege may survive attempts to challenge by the requesting party.

<sup>71</sup> In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672,675 (D.C. Cir. 1979) (citation omitted).

As a general matter, it is possible to identify three kinds of conduct that we might be willing to view as producing ethically impermissible claims of attorney-client privilege, each of which may be viewed as frivolous in a different way. First, we should consider whether claims of attorney-client privilege made for improper purposes should be viewed as ethically impermissible. Such claims may be described as frivolously motivated because they are motivated by interests other than the assertion or defense of legal rights.

A second kind of impermissible conduct might be best described as ‘lazy’ claims of privilege. This would include claims of privilege made without ‘reasonable’ factual investigation, such as failure to actually review a document before claiming it as privileged. It would also include claims of privilege made without ‘reasonable’ legal research or analysis as well as claims of privilege made without complying with the procedural requirements of Federal Rule of Civil Procedure 26(b)(5), such as a general objection of privilege without submission of a privilege log. We might describe claims made in these three ways as made in a frivolous manner, without regard for the need for substantive support.

The final kind of impermissible conduct could involve substantively frivolous claims of privilege. Claims that are simply factually insufficient under settled law and claims that are inconsistent with existing law when no good faith argument is made to change the law would be included here, even if such claims were not made in a frivolous manner.

In considering whether any of these kinds of privilege claims should be ethically impermissible, we have available a few sources of guidance. First, Model Rule 3.1 and its Comments provide some definitional assistance. Second, we can examine the disciplinary cases applying Model Rule 3.1 and its predecessors.

An additional resource would be the considerable body of case law applying those statutes that authorize the imposition of legal sanctions for litigation conduct that could include frivolous claims of attorney-client privilege. However, it is important to recognize that although the language of the law may sometimes be identical or nearly identical to the language of the ethical rules, it is not necessarily the case that the legal meaning of frivolous and the ethical meaning of frivolous should be the same in the context of privilege. The law may require attorney-client privilege to be narrowly

construed to minimize its distorting effect on the truth seeking function of the judicial process,<sup>72</sup> however, our willingness to view a claim of attorney-client privilege as ethically impermissible is likely to be tempered by the countervailing ethical value of confidentiality. Therefore, we may choose to define sanctionable conduct more narrowly in the context of ethical limits on claims of attorney-client privilege than we might in other contexts.

#### A. CLAIMS OF PRIVILEGE MADE FOR FRIVOLOUS PURPOSES

Most claims made for frivolous purposes are at the same time substantively frivolous as well.<sup>73</sup> However, it is possible that some substantively non-frivolous claims could be made for improper or frivolous purposes. Thus, there would seem little purpose in making a non-frivolous claim of privilege that was unlikely to prevail or, even if successful, would produce only a small direct benefit to the filer. Yet, if such a claim could also produce a collateral benefit or detriment, such as beneficial delay in another matter<sup>74</sup> or reputational or financial injury to the opponent, these improper purposes could be the real purpose for making the claim. Would we be willing to view as ethically impermissible claims of privilege that are not entirely groundless from a legal perspective, but which are made for such improper purposes?

From at least 1908 through 2002, American Bar Association ethical canons, codes or rules have stated that claims or defenses made for improper purposes are ethically impermissible. The A.B.A. Canons of Professional Ethics, propounded by the ABA from 1908 through 1969, required a lawyer to “decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.”<sup>75</sup> In 1969, the A.B.A. Model Code of Professional Responsibility replaced the Canons and stated that “a lawyer shall not: (1) File a suit, assert a position . . . on behalf of his client when he knows or when it is obvious that such

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<sup>72</sup> See supra note 5.

<sup>73</sup> Stein, supra note 68, at 402.

<sup>74</sup> E.g., *In re Perez*, 43 B.R. 530 (Bankr. S.D. Tex. 1984) (attorney three times filed and dismissed Chapter 13 bankruptcy proceedings to obtain multiple automatic stays of foreclosure proceedings, despite the fact that the debtors had no income and no ability to make payments as required by Chapter 13).

<sup>75</sup> ABA Canons of Professional Ethics, Canon 30 (as amended through 1969)

action would serve merely to harass or maliciously injure another.”<sup>76</sup> In 1983, the A.B.A. replaced the Model Code with the Model Rules of Professional Conduct. Up until the 2002 amendment to the Model Rules, comment 2 to MR 3.1 stated that an action would be frivolous (and, therefore, prohibited under 3.1) “if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.”<sup>77</sup> As variously drafted, these ethical rules seem to suggest that improper purpose alone could be sufficient to make a litigation position ethically impermissible.

Not surprisingly, the issue of improper purpose as an independent ground has hardly ever arisen in most jurisdictions that have adopted the language of either DR 7-102(A)(1) or MR 3.1 because improper purpose and lack of merit are usually both present.<sup>78</sup> However, at least one jurisdiction has expressly interpreted this language as making improper purpose an independent ground for discipline.<sup>79</sup> In a few other jurisdictions, no express position has been taken on the independence of improper purpose as a ground for ethical sanction, but disciplinary sanctions have been imposed even in the absence of findings of lack of merit.<sup>80</sup>

However, some jurisdictions have modified their Code or Rules to make it clear that lack of merit is also necessary before an improper purpose would make an action ethically impermissible. The 2002 amendments to the A.B.A. Model Rules of Professional Conduct follow this trend and have eliminated the improper purpose

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<sup>76</sup> ABA Model Code of Professional Responsibility DR 7-102(A) (as amended through 1983)

<sup>77</sup> MR 3.1, comment 2 (2001)

<sup>78</sup> See e.g., In The Matter Of Luther Cornelius Edmonds, 2002 WL 32396986 (Va.St.Disp.)(suspending the license of a former judge who filed a federal case seeking \$50 million in damages from former judicial colleagues and court staff who had participated in a judicial ethics inquiry on that ground that the suit was legally baseless and intended to harass). See generally, ABA ANNOTATED MODEL RULES, at 317 (listing cases from many jurisdictions in which both improper motives and substantively frivolous claims could be found).

<sup>79</sup> See e.g. Matter of Levine, 847 P.2d 1093, 1100 (1993)(interpreting the language of MR 3.1 to mean that “if an improper motive or a bad faith argument exists, respondent will not escape ethical responsibility for bringing a legal claim that may otherwise meet the objective test of a nonfrivolous claim”).

<sup>80</sup> See e.g. In Re William Spallina, 1999 WL 33721626, at 13 (Ma.St.Bar.Disp.Bd 1999)(imposing discipline based on, among other unethical conduct, filing a suit to attach and collect legitimate attorney’s fees for representation of husband in a divorce case from a CD, thereby knowingly trying to frustrate the award of the CD to wife in the divorce action); Columbus Bar Ass'n v. Finneran, 687 N.E.2d 405 (1997) (sanctioning lawyer for, in a number of separate matters, filing cases, failing to provide discovery, dismissing the cases, and then re-filing the cases, up to as many as five times, in order to get a favorable settlement offer in the case, and describing this as a violation of OH DR 7-102(A)(1), but not citing OH DR 7-102(A)(2)(lack of merit) or describing the cases as groundless or unsubstantiated).

language altogether from the Comments following Rule 3.1.<sup>81</sup> This reflects yet another step in the “objectification” of Rule 3.1 by elimination of subjective elements such as motive or knowledge.<sup>82</sup> This Model Rules deletion must be understood to limit the ethical prohibition solely to claims lacking any merit from an objective perspective, with no regard to proper or improper purposes. Under the kind of ethical regime proposed by this latest version of Model Rule 3.1, therefore, a non-frivolous assertion of attorney-client privilege made for an improper purpose would clearly be ethically permissible.<sup>83</sup> Thus, there is disagreement among ethical authorities and jurisdictions concerning the general issue of whether improper purposes are sufficient to make a claim ethically impermissible, even where the claim could not be said to be legally frivolous.

A similar disagreement can be found in the interpretation of Federal Rules of Civil Procedure 11 and 26, which are the federal procedural counterparts to DR 7-102(A)(1) and Model Rule 3.1. These federal rules and the case law generated by them have had an important influence on the ABA Model Rules,<sup>84</sup> state procedural law,<sup>85</sup> and state ethical standards regarding frivolous litigation conduct.<sup>86</sup> As the issue of attorney-client privilege mostly arises in the context of discovery, the most relevant rule to the issue of claims of attorney-client privilege would be Rule 26(g), however, most of the case

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<sup>81</sup> M.R. 3.1, Comment 2 (as amended November 2002)

<sup>82</sup> See ABA Report to the House of Delegates, No. 401 (Aug. 2001), Model Rule 3.1, Reporter's Explanation of Changes (explaining the deletion as justified because “the client's purpose is not relevant to the objective merits of the client's claim”); Annotated Model Rules of Professional Conduct, 5th ed., Annotation to Rule 3.1 (2003)(explaining the change from Model Code 7-102(A)(2) to Model Rule 3.1 as a move from a subjective standard which prohibited only “knowingly advanc[ing]” unwarranted claims or defenses to an “objective ‘reasonable lawyer’ standard”).

<sup>83</sup> See e.g., District of Columbia Rule of Professional Conduct 3.1 (deleting the purpose language found in comment 2 to the Model Rule altogether), [http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/dc-narr/query=\[jump!3A!273!2E1!3A100!27\]/doc/{@1860}?](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/dc-narr/query=[jump!3A!273!2E1!3A100!27]/doc/{@1860}?.). California has not eliminated improper purpose as ethically impermissible, but has required a lack of merit as well. See CRPC 3-200 (precluding California lawyers from accepting or continuing employment if he “knows or should know” that the object of employment is either (1) to bring an action, conduct a defense, assert a position, or take an appeal “without probable cause and for the purpose of harassing or maliciously injuring any person,” [http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/ca-narr/query=\[jump!3A!273!2E1!3A100!27\]/doc/{@2258}?](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/ca-narr/query=[jump!3A!273!2E1!3A100!27]/doc/{@2258}?.)).

<sup>84</sup> American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998* 164 (1999) (noting that the objective standard of Rule 3.1 “was adopted rather than one based on the concepts ‘harass’ or ‘maliciously injure’ to track the standard generally used and defined in the law of procedure”).

<sup>85</sup> Georgene M. Vairo, *RULE ELEVEN SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES*, 3rd ed., 40 (2004)(“Most states have adopted a sanctions tool like Rule 11.”).



law on the independence of improper purpose as a ground for sanctions has arisen in the context of Rule 11. Since most courts treat Rule 11 and Rule 26(g) as parallel provisions,<sup>87</sup> the Rule 11 case law should be instructive as to Rule 26(g) sanctions as well.<sup>88</sup>

Rule 26 states that the required signature of attorneys to discovery requests, responses and objections

constitutes a certification that . . .the request, response, or objection is :

- (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
- (B) not interposed for any improper purpose . . . ; and
- (C) not unreasonable or unduly burdensome or expensive [emphasis added].<sup>89</sup>

FRCP 26(g)(3) allows sanctions when such certifying signatures are made “without substantial justification . . . in violation of the rule.”<sup>90</sup> As drafted, it would seem that an improper certification as to either FRCP 26(g)(2)(A), (B), or (C) would be sufficient to violate FRCP 26(g)(2).

Similarly, Rule 11 states that presentation to the court<sup>91</sup> of “a pleading, written motion or other paper”<sup>92</sup> is at the same time certification that, among other things,

- to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ---
- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]<sup>93</sup>

Improper purposes under Rule 11(1) are found when a party takes an action “not in order to prevail on the paper filed, but in order to obtain some other, unjustified benefit.”<sup>94</sup>

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<sup>86</sup> See e.g., Levine, 847 P.2d at 1100 (analyzing the treatment of motive in the context of civil sanctions as relevant to the interpretation of ethical frivolous standards and concluding that there was “a common theme in both our procedural and ethical rules”).

<sup>87</sup> E.g., In Re Byrd, Inc., 927 F.2d 1135 (10th Cir. 1991)(noting the intentionally parallel structures of Rule 11 and 26(g)).

<sup>88</sup> See generally, Vairo, RULE 11 SANCTIONS 744-45 (suggesting that much of Rule 11 analysis is relevant to Rule 26(g), with certain exception not relevant to this analysis, such a mandatory or discretionary sanctions, who may be sanctioned and the nature of sanctions).

<sup>89</sup> F.R.C.P. 26(g)(2)

<sup>90</sup> F.R.C.P. 26(g)(3)

<sup>91</sup> Presenting includes “signing, filing, submitting, or later advocating.” F.R.C.P. 11(b).

<sup>92</sup> Id.

<sup>93</sup> F.R.C.P. 11(b)

<sup>94</sup> Stein, *Impure Hearts*, supra note 68, at 404.

Usually it is clear the party does not seek to prevail because the claim is also obviously frivolous and the party knows that it will not benefit directly from this legal action.<sup>95</sup>

Despite clear language in both rules that an improper purpose makes even substantively non-frivolous claims impermissible, the issue of whether courts may in fact impose sanctions for improper purpose alone has been particularly difficult for courts to accept in the context of Rule 11. Many circuits have refused to find sanctions appropriate under Rule 11 for colorable complaints in which both proper purposes of vindicating legal rights and improper purposes may be combined.<sup>96</sup> At the same time, most circuits have approved sanctions for even well-grounded motions or other non-complaint filings that are abusive or seen as serving an improper purpose.<sup>97</sup> Since almost all claims of attorney-client privilege are defensive, it would be rare that such claims would be part of a complaint. As a result, claims of attorney-client privilege would seem to fall within the scope of those litigation actions that many courts would view as sanctionable under Rules 11 or 26(g). There is, however, a dearth of case law considering the actual application of sanctions under either of these rules to colorable claims of attorney-client privilege made for improper purposes.

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<sup>95</sup> Id. at 402.

<sup>96</sup> See e.g., Nat'l Ass'n of Gov't Employees, Inc. v. Nat'l Fed'n of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988) (“the Rule 11 injunction against harassment does not exact of those who file pleadings an undiluted desire for just deserts”); Sussman v. Bank of Israel, 56 F.3d 450(2nd Cir. 1995)(sanctions could not be imposed under Rule 11 for the filing of a complaint that was not substantively frivolous but was dismissed on forum non conveniens ground and won for the plaintiff an assurance of safe passage in Israel to testify in a parallel action filed against him there), cert. denied sub nom, Bank of Isr. v. Lewin, 516 U.S. 916; Zaldivar v. City of Los Angeles, 780 F.2d 823, 832(9th Cir. 1986) (holding that the vindication of rights at issue in a complaint that is well grounded in fact and law cannot be tainted by any additional improper purposes). But see Senese v. Chicago Area I.B. of T. Pension Fund, 237 F.3d 819, 826 (7th Cir. 2001)(stating that “Rule 11 may be violated when, even if the claims are well based in fact and law, parties or their attorneys bring the action for an improper purpose” but deferring to the trial court’s finding that an improper purpose was not present in this case); In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990)(noting that a complaint filed to vindicate rights in court, and also for some improper purpose, should not be sanctioned so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose), cert. denied, Kunstler v. Britt, 499 U.S. 969, (S.Ct 1991);

<sup>97</sup> See Aetna Life Ins. Co. v. Alla Medical, 855 F.2d 1470 (9th Cir. 1988)(holding that non-frivolous motions filed to harass or delay as a part of abusive litigation tactics could be sanctioned under the improper purpose clause of Rule 11 alone, even though a non-frivolous complaint filed for an improper purpose could not be sanctioned under Rule 11); In re Kunstler, 914 F.2d at 518 (stating that filing well grounded motions can be sanctioned as harassment if excessive or filed without a sincere intent to pursue); Whitehead v. Food Max of Mississippi, Inc., 332 F.3d 796, 805 (5th Cir. 2003)(holding an objectively ascertainable improper purpose sufficient to justify Rule 11 sanctions even when an action is “well grounded in fact and law”); Pathe Computer Control Systems Corp. v. Kinmont industries, Inc., 955 F.2d 94, 97 (1st. Cir. 1992)(affirming sanctions for removal motion that could not be said to be legally unwarranted, but which was filed for the improper purpose of delay).

Although there is legal support, and 94 years of ethical support, for generally imposing disciplinary sanctions on even non-frivolous motions, filings, and discovery actions, we must now consider whether it would make ethical sense to specifically impose disciplinary sanctions on non-frivolous claims of attorney-client privilege for improper purposes. Once the issue is limited to claims of attorney-client privilege, it quickly becomes apparent that colorable claims of privilege cannot be sufficiently tainted by improper purposes to justify the chilling effect disciplinary sanctions would provide.

To begin with, attorney-client privilege claims are purely defensive in nature, unlike maliciously made, but legally grounded, offensive acts such as filing a lawsuit or making a discovery request. As a result, the possible improper purposes that might be associated with a claim of privilege are likely to be considerably more tame than those that might be associated with the initiation of a lawsuit or even a request for discovery. Imagine an attorney served with a request for documents that clearly target some that are unquestionably privileged, but that contain nothing that would help the requesting party. It is difficult to see how an objection of attorney-client privilege alone could serve the usual malicious improper purposes such as ruining a personal or financial reputation,<sup>98</sup> tying up the sale of property,<sup>99</sup> or causing deep emotional distress.<sup>100</sup> At most, we might have a situation where blocking the discovery of the documents might be made with the purpose of intent of annoying and frustrating the other side and/or perhaps triggering an expensive fight about the documents that will drain their opponent's resources and resolve. These purposes clearly fall short of the more malicious purposes that have been seen as sufficient to overcome the non-frivolous nature of the claims.

In addition to the fact that the improper purposes that might motivate non-frivolous claims of privilege are more strategic than malicious, it is also important to realize that in many cases, there is a very important legal reason why non-frivolous

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<sup>98</sup> E.g., Whitehead, 332 F.3d at 801 (sanctioning an attorney's staged for television execution of a writ of judgment at a local Kmart for a \$3.4 million judgment as undertaken both to embarrass Kmart and create free publicity for the lawyer); In the Matter of Luther Cornelius Edmonds, 2002 WL 32396986 (Va.St.Disp.)(Virginia State Bar Disciplinary Board Docket No. 00-022-1227, May 15, 2002) (finding an improper purpose where a former judge instituted a federal racial discrimination suit against a sitting judge who had ruled against his wife in a commercial matter).

<sup>99</sup> In re Perez, 43 B.R. 530 (Bank. S.D. Tex. 1984)(filing repeated Chapter 13 bankruptcy petitions to obtain repeated stays of foreclosure).

<sup>100</sup> E.g., Argentieri v. Fisher Landscapes, Inc., 15 F.Supp.2d 55, at 62 n.9 (D. Ma. 1998)(claiming a motion for attachment was filed solely to give defendant's wife "apoplexy").

claims of privilege should be asserted regardless of the lack of harm to the client if the requested communication was provided. Failure to assert privilege can create a waiver of privilege for other communications on the same subject that could be disadvantageous to the client.<sup>101</sup> In cases where such a waiver would harm the client, the proper purpose makes any improper purpose collateral at most.

Perhaps there are cases where a waiver is either not possible or not harmful to a client. Is there still a proper purpose sufficient to outweigh the concerns we have about these strategic but improper purposes? Legally successful claims of privilege defend the attorney-client relationship and the adversarial system of justice that depends on this relationship. It seems obvious that the ethical duty of confidentiality requires protection of the attorney-client relationship by non-disclosure whenever and wherever the relationship is actually targeted. This defense is so important from an ethical perspective that it is unimaginable that an improper purpose for making this defense would change our valuation of the defense. When it comes to legally supportable assertions of attorney-client privilege asserted for improper purposes, it may be fair to say that they do resemble not-guilty pleas in criminal defense cases. Just as we cannot imagine a collateral reason for pleading not guilty that would undermine the defense of liberty embodied in all such pleas, we cannot also imagine a collateral reason for denying access to possibly attorney-client privileged materials that would undermine the defense of the adversary system provided by protecting attorney-client privilege. Consequently, any ethical limitation on assertions of attorney-client privilege should not extend to legitimate assertions made for improper purposes. Therefore, in the context of claims of attorney-client privilege, the move made in the 2002 amendments to Model Rule 3.1 to eliminate improper purpose as a species of frivolousness can be seen as consistent with the underlying principles of legal ethics. Therefore, the Model Rule of Attorney-client Privilege proposed here would not define a frivolous claim of attorney-client privilege as including a claim made for an improper purpose.

## B. CLAIMS OF PRIVILEGE MADE IN A FRIVOLOUS MANNER

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<sup>101</sup> Epstein, *THE ATTORNEY-CLIENT PRIVILEGE* 299, 378.

Earlier we described three kinds of ‘lazy’ claims of privilege: claims made without ‘reasonable’ factual investigation, claims made without ‘reasonable’ legal research or analysis, and claims made without complying with the procedural requirements of Federal Rule of Civil Procedure 26(b)(5). When such laziness produces substantively frivolous claims of privilege, the lack of merit alone may well suffice to make such claims ethically impermissible.<sup>102</sup> At issue in this section is whether making claims of privilege in a frivolous manner should be an ethical violation even when the claim turns out to be either colorable or meritorious.

### 1. LACK OF FACTUAL INQUIRY

The most extreme example of claim made in a factually frivolous manner would arise if a lawyer claimed attorney-client privilege for documents that the lawyer had not personally sent or received without ever reviewing the documents for the presence or absence of facts that would support a claim of privilege.<sup>103</sup>

The ethical duty of competence under Model Rule 1.1 requires that “[a] lawyer . . . provide . . . [the] preparation reasonably necessary for the representation.”<sup>104</sup> Such preparation includes “inquiry into and analysis of the factual . . . elements of the problem.”<sup>105</sup> Thus, lawyers have been disciplined for failing to obtain and review bank records that would have prevented a conservatorship being unnecessarily imposed on an elderly client,<sup>106</sup> for failing to obtain and review medical reports in a murder case,<sup>107</sup> for

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<sup>102</sup> See *infra*, section III, C.

<sup>103</sup> See e.g., American Medical Systems, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA., 1999 WL 816300, at 6, 9 (E.D.La.) (awarding attorney’s fees for “completely inappropriate” claim of privilege, including for copies of folder labels, blank pieces of paper, and copies of reported cases). See also Eureka Financial Corp., 136 F.R.D. at 183, n.9 (suggesting that improper “blanket” claims of privilege are most often made by counsel “who have not properly reviewed the documents for privilege”).

<sup>104</sup> M.R. 1.1. This language is quite similar to DR 6-101(A)(2) of the Model Code of Professional Responsibility, which requires a lawyer not to “[h]andle a legal matter without preparation adequate under the circumstances”).

<sup>105</sup> M.R. 1.1., comment 5. It is worth noting that the Model Code fails to mention factual inquiry in either the DR itself or the Ethical Considerations that precede the rule. An increasing emphasis on factual investigation can be most clearly seen in the movement from DR 7-102(A) to Model Rule 3.1 and in the most recent amendments to MR 3.1. See *infra*. Further support for a general duty to undertake a factual review of documents prior to claiming privilege may also be found in MR 3.4, which prohibits a lawyer from “fail[ing] to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”<sup>105</sup> Clearly, the first step in a reasonably diligent effort to comply would be factual review of documents that might be within the scope of the request.

<sup>106</sup> In the Matter of Brantley, 920 P.2d 433, 441-2 (S.Ct. Ka. 1996)(before filing for conservatorship for elderly client, lawyer failed to verify that client did not know of bank transfers to son reported by bank official by checking bank records and showing client these records).

failing to read client statement or contact potential witnesses,<sup>108</sup> and for failing to read grand jury transcripts or examine physical evidence.<sup>109</sup> Understandably, these disciplinary cases under MR 1.1 have tended to involve failures to investigate facts central to the success and failure of the claims and defenses of clients. Indeed, Rule 1.1 would seem to be aimed at failures to factually investigate that are likely to directly lead to loss of client rights. Thus, in such cases, courts are willing to say that good results, should they occur, do not excuse the lack of preparation on the part of the lawyer because the good results are not really produced by the representation itself, but by some independent factor.<sup>110</sup>

On the other hand, it is difficult to say that incompetence is present when the acts or omissions may and do directly produce good results and can therefore be seen as strategic acts or omissions.<sup>111</sup> Clearly, if a lawyer fails to examine documents to be produced, produces them all without claiming privilege for any of them, and thereby produces some privileged documents, we would have a Rule 1.1 failure to factually investigate that directly led to a loss of client rights. Indeed, we would probably see a greater degree of competence at work if the same lawyer were to blindly claim privilege for all the documents in this situation, rather than failing to make any effort at all to protect the client's privilege. In this situation, if privileged documents are thereby protected, the lawyer has directly produced this result. If detrimental information has been withheld from the opposing party, the lawyer has directly produced this result as well. There is a level of legal and strategic competence operating in such a practice that makes it difficult to bring it cleanly with the scope of cases decided under Model Rule 1.1.

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<sup>107</sup> In Re Chambers, 642 P.2d 286, 291 (S.Ct. Or. 1982)(lawyer suspended for, among other things, not reviewing state held medical records in a murder case); Attorney Grievance Commission of Maryland v Mooney, 753 A.2d 17, 37 (Ct.Ap. Maryland 1999)(lawyer suspended for, among other things, failing to obtain medical records or subpoena witnesses in an assault case).

<sup>108</sup> Attorney Grievance Commission of Maryland v. Ficker, 706 A.2d 1045, 1057-8 (Ct.Ap. Maryland 1998)(lawyer appeared not to have read statement given by client to assistant and did not contact any witnesses named in statement).

<sup>109</sup> In the Matter of Wolfram, 847 P.2d 94, 100 (S.Ct. Az. 1993) (lawyer suspended for failing to read grand jury transcript, examine physical evidence, or interview witnesses in felony child abuse case).

<sup>110</sup> See e.g., Wofram, 847 P.2d at 104 (noting that, although lawyer's incompetent representation ultimately resulted in an improved plea bargain after issue of ineffective assistance of counsel was raised and a lesser sentence, and that this may actually have been intended by counsel, it was still unethical) (concurring judge); In re Conduct of Gastineau, 857 P.2d at 142("If a lawyer does a poor job, but the client fortuitously or through the efforts of others obtains a good result, that does not excuse the lawyer from providing competent representation or justify neglecting the case").

<sup>111</sup> *Id.* (no incompetence when "the accused identified the most desirable disposition for his client and deliberately was using the tactic of not getting in the way of a good result").

Of course, a failure to actually review documents would make it impossible to comply with the procedural obligations of providing specific factual information about each document objected to.<sup>112</sup> At most, a general privilege objection could be made as to all documents. Thus, the lack of factual investigation would necessarily lead to procedural violations and a violation of M.R. 3.4, which is discussed in more detail below.<sup>113</sup>

Additional support for the proposition that failing to review documents prior to claiming privilege is ethically impermissible may be found in the 2004 version of Model Rule 3.1. MR 3.1 specifies that “[a] lawyer not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact . . . that is not frivolous.”<sup>114</sup> The comments add that while an action is not frivolous “merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery [, w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases.”<sup>115</sup>

It should be noted that both the reference to a basis ‘in fact’ in the body of MR 3.1, and the requirement in the comment that lawyers inform themselves about the facts were 2002 additions to MR 3.1.<sup>116</sup> Neither the previous version of MR 3.1,<sup>117</sup> nor its predecessor Model Code provisions 7-102(A)(1)&(2),<sup>118</sup> made any specific reference to factual investigation or grounding for litigation actions. Indeed, the overwhelmingly subjective focus of the predecessor sections of the Model Code – prohibiting only the knowing or obvious making of a claim unwarranted by law<sup>119</sup> -- may have actually protected lawyers whose lack of factual investigation made it impossible for them to know the claim was unwarranted.

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<sup>112</sup> See e.g., FRCP 26(b)(5)(requiring specific information about privileged documents be provided “in a manner that . . . will enable other parties to assess the applicability of the privilege or protection”).

<sup>113</sup> See *infra.*, Part III(B)(3).

<sup>114</sup> M.R. 3.1 (2004).

<sup>115</sup> *Id.* at Comment 2.

<sup>116</sup> Compare MR 3.1(as amended 2002) with MR 3.1(2001).

<sup>117</sup> MR 3.1(2001).

<sup>118</sup> ABA Model Code of Professional Responsibility DR 7-102(A)(1)&(2)(1969)

<sup>119</sup> *Id.* at DR 7-102(A)(2)

The shift to an objective test in the 1983 Model Rule 3.1,<sup>120</sup> on the other hand, was intended to bring the ethical standard in line with the procedural law of frivolous litigation actions.<sup>121</sup> Since the 1983 version of Rule 11 expressly required a certification that the action “is well grounded in fact,”<sup>122</sup> it seems likely that the previous wording of MR 3.1 requiring a “basis . . . that is not frivolous”<sup>123</sup> implicitly included a reasonable attempt to discern the facts.<sup>124</sup> The Reporter’s Explanation to the 2002 amendments to MR 3.1 confirms this by stating both that the 2002 changes were not intended to make a change in substance,<sup>125</sup> and that the new language was added simply “to remind lawyers that they must act reasonably to inform themselves about the facts and law.”<sup>126</sup> At the same time, Rule 3.1 is generally understood to allow little or no factual investigation if there is no time to do so before an action protecting the client must be taken, such as filing to avoid a statute of limitations deadline.<sup>127</sup> It does seem, however, that this excuse is not likely to apply to privilege objections to document requests.<sup>128</sup>

The crucial question under MR 3.1 is whether a lawyer’s pre-objection failure to even read documents claimed to be privileged would be an ethical violation if, by chance, the documents were subsequently determined to be privileged. Does MR 3.1 target the frivolous manner in which the objection was made independent of the end result? Prior to the objective turn in MR 3.1, this issue was described in terms of ‘objective’ and

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<sup>120</sup> See Center for Professional Responsibility, American Bar Association, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, 5th ed., at 316 (hereinafter “ANNOTATED MODEL RULES”).

<sup>121</sup> Accord, American Bar Association, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-1998 164 (1999)(the objective test of MR 3.1 was developed to track procedural law).

<sup>122</sup> Fed. R. Civ. P. 11(1983)

<sup>123</sup> MR 3.1(2001)

<sup>124</sup> E.g., *In re: George K. Kurker*, 2002 WL 32254626 at 2 (Ma.St.Bar.Disp.Bd.)(under the original version of MR 3.1, suspending from practice an attorney who filed a suit on behalf of himself alleging a conspiracy between the judges and opposing counsel in a prior case involving his own interest in a family business without interviewing any potential witnesses, investigating, or having any evidence or reasonable personal knowledge to support the allegations).

<sup>125</sup> Model Rule 3.1 Reporter’s Explanation of Changes at “Text 1,” <http://www.abanet.org/cpr/e2k-rule31rem.html>.

<sup>126</sup> *Id.* at Comment 2.

<sup>127</sup> See ANNOTATED MODEL RULES 319.

<sup>128</sup> A lawyer finding themselves with insufficient time to review documents for privilege and other objections before a deadline to produce has passed should either have gotten to work earlier or can apply for an extension of time in which to respond, rather than take a pile of unexamined papers and declare them all privileged simply to protect possible client rights in a time crunch. Even missing a deadline without an



‘subjective’ basis. A lawyer who believed there was no factual support for a claim has no subjective basis for claiming privilege. If facts necessary to support a claim of privilege were not in fact present, there was also no objective basis for the claim. If such facts were present, there was an objective basis for the claim. The predecessor to MR 3.1, DR 7-102(A)(2), required that there be both no objective basis for the claim and no subjective basis.<sup>129</sup> Thus, a lawyer that could show that they did believe facts to be present, even though they had done no investigation and the facts were not present, would not violate the ethical rule.

The turn to an objective standard in 3.1 was clearly meant to remove the additional requirement that only a lawyer with no subjective belief in a claim would violate the rule.<sup>130</sup> If the claim is objectively frivolous, it is now no defense that the lawyer did not realize it.<sup>131</sup> However, it is possible to eliminate the requirement of subjective knowledge, yet still require that an attorney engage in the kind of investigatory conduct normally required to produce a subjective belief that there is a basis for the claim. This is precisely what the 2003 amendments accomplished. Language added to the comments emphasizes the conduct requirement that lawyers “inform themselves about the facts” as an essential aspect of avoiding making a frivolous claim.<sup>132</sup> Further, the ABA itself has described MR 3.1 as including a “duty to investigate.”<sup>133</sup> Whether this should be understood to impose an independent duty to investigate, such that lack of factual investigation of objectively factually grounded claims would be an ethical violation, remains unclarified.

As the same issue has arisen under Rule 11, it may be instructive to the case law dealing with this very issue.<sup>134</sup> The 1983 amendments to Rule 11 were adopted one day before the Model Rules were first approved to replace the Model Code.<sup>135</sup> These

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extension is not going to have the dire consequences of passing a statute of limitations deadline without filing a complaint.

<sup>129</sup> Model Code of Professional Responsibility DR 7-102(A)(2)(1969)(prohibiting the lawyer from “[k]nowingly advancing a claim or defense that is unwarranted”).

<sup>130</sup> Lancelloti v. Fay, 909 F.2d 15, 18 (1st Cir. 1990).

<sup>131</sup> Id.

<sup>132</sup> M.R. 3.1(2004) at Comment 2.

<sup>133</sup> ANNOTATED MODEL RULES at 319.

<sup>134</sup> See *supra*.

<sup>135</sup> See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, 3rd ed. at 300 (1996).

amendments for the first time imposed a “reasonable inquiry”<sup>136</sup> requirement on litigants. This was designed to move the standard away from judgments about a lawyer’s good faith in bringing a claim,<sup>137</sup> which necessitated a focus on the subjective state of mind of the attorney. However, two possible objective targets emerged to take the place of the lawyer’s good faith. The reasonable inquiry standard could be read to require particular pre-filing conduct by lawyers which would then immunize the result, or it could be read to require a final product which could have resulted from reasonable pre-filing conduct.<sup>138</sup>

Initially, courts applying the 1983 version of Rule 11 tended to focus on the product or filing itself and the issue of whether it was substantively frivolous.<sup>139</sup> If the product were seen as either not “well grounded in fact [or] warranted by existing law,”<sup>140</sup> courts presumed that a reasonable inquiry could not have occurred.<sup>141</sup> However, using this approach, courts have had great difficulty articulating a “workable test for frivolousness.”<sup>142</sup> Since it is easier to agree on what a reasonable inquiry should have been than it is to agree on what result a reasonable inquiry should have produced, it has been argued that courts should shift their focus to the actual pre-filing conduct.<sup>143</sup> Indeed, at least one commentator has suggested that the design of the 1993 amendments to Rule 11 was meant “to focus judicial inquiry primarily on the reasonable inquiry-conduct aspect of Rule 11, rather than the content of paper *per se*.”<sup>144</sup>

Additional focus by the courts on the reasonable inquiry element of Rule 11 produced two differing approaches. Most circuits have adopted a two-part test, in which sanctions may not be imposed unless there has been both a finding that a filing is baseless and a finding that this would have been revealed by a reasonable inquiry.<sup>145</sup> Thus, an

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<sup>136</sup> See Vairo, *supra* at 9 (quoting Rule 11 under the 1983 amendments).

<sup>137</sup> *Id.* at 9, n.57.

<sup>138</sup> *Id.* at 244.

<sup>139</sup> *Id.* (noting that although the 1983 version of Rule 11 did not use the word frivolous, courts often used this term as a paraphrase of the “reasonable inquiry” language of Rule 11).

<sup>140</sup> *Id.* (1983 version of Rule 11)

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 244-5.

<sup>143</sup> *Id.* at 247.

<sup>144</sup> Georgene M. Vairo, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES*, Richard C. Johnson, ed., 3rd Ed., at 247 (citing William W. Schwarzer, *Rule 11: Entering a New Era*, 28 *Loy. L.A. L. Rev.* 7( 1994)).

<sup>145</sup> *Moore v. Keegan*, 78 F.3d 431, 434 (9th Cir. 1996)(explicitly determining that a pre-filing lack of reasonable inquiry into facts was irrelevant when prior to trial facts emerged which prevented the complaint from being frivolous); *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 695 (11th Cir. 1995)

actual reasonable inquiry will immunize what turns out to be an objectively frivolous filing and vice versa.<sup>146</sup> A few circuits have taken the position that a pre-filing failure to investigate the facts is sufficient to justify Rule 11 sanctions,<sup>147</sup> even if “the attorney . . . gets lucky in discovery.”<sup>148</sup> Thus it remains an open question under Rule 11 whether subsequent discovery of supporting facts should excuse the earlier failure to investigate.<sup>149</sup>

A major commentator on Rule 11, Georgene Vairo, has argued that Rule 11 should not be read to impose an independent requirement of an actual reasonable inquiry where facts emerge to make the claim not substantively frivolous because the resulting non-frivolous filing does not create an improper burden to the system.<sup>150</sup> Further, the fact that sanctions loom if the filing is substantively frivolous should provide sufficient motivation for attorneys to investigate the facts.<sup>151</sup> Vairo also points out that this approach “limits satellite litigation,”<sup>152</sup> i.e., litigation about the litigation, which creates its own burden on the courts. However, she does suggest that such failures to engage in factual investigation are unethical, even if they should not be a ground for sanctions in

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(stating the Rule 11 test as looking first to see if claims are objectively substantively frivolous, then considering whether a reasonable inquiry would have revealed this at the time the claims were made); Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988.) (stating Rule 11 test as requiring no showing of an adequate pre-filing inquiry if an objectively reasonable evidentiary basis for a claim emerged pre-trial or at trial) reversed in part, Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (S.Ct. 1989) (reversing only sanctions against the law firm after holding that signatory lawyer but not law firm of signatory lawyer could be sanctioned under Rule 11). But see Lichtenstein v. Consolidated Services Group, Inc., 173 F.3d 17, 23 (1st Cir. 1999) (stating in dictum that “a party who brings a suit without conducting a reasonable inquiry and based on nothing more than a prayer that helpful facts will somehow emerge, and who through sheer fortuity is rewarded for his carelessness, is nevertheless vulnerable to sanctions.”).

<sup>146</sup> Brunt v. Service Employees Intern. Union, 284 F.3d 715, 721 (7th Cir. ,2002) (“[e]ven ‘objectively frivolous filings support but do not compel an inference of unreasonable investigation’”) (quoting Mars Steel Corp v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989)).

<sup>147</sup> Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1279 (3rd Cir. 1994) (“a signer making an inadequate inquiry into the sufficiency of the facts and law underlying a document will not be saved from a Rule 11 sanction by the stroke of luck that the document happened to be justified”); Lichtenstein v. Consolidated Services Group, Inc., 173 F.3d 17, 23 (1st Cir. 1999) (stating in dictum, “a party who brings a suit without conducting a reasonable inquiry and based on nothing more than a prayer that helpful facts will somehow emerge, and who through sheer fortuity is rewarded for his carelessness, is nevertheless vulnerable to sanctions.”). But see Kale v. Combined Ins. Co. of America, 861 F.2d 746, 759 (1st Cir. 1988) (holding that when a reasonably competent attorney would have found non-frivolous legal grounds for a complaint, the fact the filing attorney was not aware of these grounds at the time of filing would not justify Rule 11 sanctions, and suggesting that the same would apply to a pre-filing lack of factual grounds that was remedied later).

<sup>148</sup> Vairo, RULE 11 SANCTIONS at 251.

<sup>149</sup> Vairo, 251.

<sup>150</sup> Id.

<sup>151</sup> Id.

themselves.<sup>153</sup> Thus, we may take the Rule 11 case law as recognizing the impropriety of making a claim without reasonable inquiry into the fact, even as there is disagreement as to the issue of whether Rule 11 sanctions are an appropriate way to express this judgment.

If we may conclude that the ethical duty to avoid frivolous claims includes an independent duty not to make claims in a frivolous manner, by which we mean here without reasonable inquiry into the facts, it remains only to consider whether such a independent duty is in any way problematic in the specific context of claims of attorney-client privilege. Does our duty to preserve the attorney-client privilege require that we allow attorneys to make unnecessarily fact-blind claims of privilege because some of these communication will legitimately require the protection of the privilege?

In fact, the danger of chilling the assertion of objectively non-frivolous claims of privilege by independently prohibiting fact-blind claims of privilege is minimal. First, the probability of a negative impact on legitimate privilege is quite small. Unlike improper purpose, which may as easily accompany non-frivolous privilege claims as frivolous privilege claims, it would be extremely rare for a truly fact-blind claim of privilege to hit the mark.<sup>154</sup> Furthermore, while an improper purpose probably cannot be ‘deleted’ from the lawyer’s or client’s psyche to clear the way to make a substantively non-frivolous claim, it is simple to remedy the lack of factual investigation and remove any negative impact on privilege. All the lawyer need do is evaluate the communications before making the privilege objection. Thus viewing MR 3.1 as containing an independent duty, as is reasonable under the circumstances, to examine the facts surrounding the communication sought to be disclosed seems consistent with both its emphasis on a primarily objective standard and the recent elimination of improper purpose as a relevant factor.

In addition, it is highly unlikely that making a reasonable pre-filing factual investigation of documents an ethical requirement will result in lawyers choosing to disclose communications rather than take the time to conduct a factual evaluation.

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<sup>152</sup> Id.

<sup>153</sup> Id. (“it would be perverse to reward the losing party with his attorney’s fees solely to make sure that the winning attorney complies with his or her ethical obligations”).

<sup>154</sup> See e.g., American Medical Systems, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA., 1999 WL 816300, at 10 (E.D.La.)(imposing sanctions when counsel obviously failed to review documents such

Lawyers are already quite clear that allowing a waiver of privilege to occur in this way would be an violation of their ethical duty of confidentiality as well as malpractice. The only result of such a duty to investigate would be to further motivate reasonable pre-filing factual investigation prior to the making of privilege claims. Furthermore, this motivation will not be provided at the expense of further burdening the courts with satellite litigation. Perhaps, as Vairo suggests, it might be inappropriate to award attorneys fees to the side losing the motion to compel, but it does seem necessary to recognize in some arena that the “winning” attorney acted in a manner that is unacceptable when inadequate factual inquiry was made.

Thus, a comment to Model Rule 3.1 designed to focus the attention of attorneys on the particular ethical concerns raised by claims of attorney-client privilege should address the frivolous practice of making claims of privilege without reasonable factual investigation of the communications in question sufficient to ensure that facts supporting the basic legal elements of privilege are present.

## 2. LACK OF LEGAL RESEARCH OR ANALYSIS

As is the case with a lack of factual investigation, a lawyer’s failure to do legal research or analysis will usually lead to the filing of legally frivolous claims. Holding off consideration of those cases in which the claim is also substantively frivolous for the moment, our focus here is on claims which are either meritorious or for which “avant garde”<sup>155</sup> legal arguments can be made, but are not made or dreamed up until well after the filing, usually only in the context of a motion for sanctions.

The ethical duty of competence as defined by Model Rule 1.1 requires that “[a] lawyer . . . provide . . . [the] preparation reasonably necessary for the representation.”<sup>156</sup> Such preparation includes “inquiry into . . . [the] legal elements of the problem.”<sup>157</sup> Thus, lawyers have been disciplined for incompetence under MR 1.1 or its predecessor, DR 6-

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as “blank documents, letters to and from opposing counsel, [and] published cases” before objecting to their production as either attorney-client privileged or work-product privileged).

<sup>155</sup> *Pathe*, 955 F.2d at 97 (describing novel theories of jurisdiction argued for the first time to support a motion to transfer at the sanctions hearing as ‘avant garde’ and sufficient to avoid being sanctioned for failure to make a reasonable inquiry that the filing was warranted by law, but suggesting that the timing of the legal research and analysis supported the districts court imposition of sanctions for improper purpose).

<sup>156</sup> M.R. 1.1.

<sup>157</sup> *Id.* at comment 5.

101(A)(2),<sup>158</sup> for filing a complaint without researching whether there was a legal cause of action for the facts alleged,<sup>159</sup> for failing to do sufficient research to discover possible causes of action,<sup>160</sup> for undertaking a probate matter without any research into the basic law,<sup>161</sup> and for failing to read a governing statute.<sup>162</sup>

In addition to undertaking appropriate preparation, MR 1.1 also requires that lawyers have the “legal knowledge necessary for representation.”<sup>163</sup> The interaction between the requirements of knowledge and preparation reflects both the different paths lawyers may take to achieve competence in a particular matter as well as the differing levels of knowledge required for matters that are complex and unique compared to matters that are simple and routine. A lawyer with highly specialized and up-to-date knowledge of the law and a great deal of experience with similar cases may already have the legal knowledge necessary and need little or no additional preparation in the form of legal research.<sup>164</sup> A novice lawyer may need remedial study and research merely to master the basics of the law in an area, with additional focused research as required by the particular legal issues raised by the client’s case.<sup>165</sup> Alternatively, a novice lawyer or an experienced lawyer unfamiliar with an area of the law can consult with a more knowledgeable lawyer.<sup>166</sup>

In cases of alleged incompetence involving relatively basic matters, courts may

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<sup>158</sup> “A lawyer shall not: . . . (2) handle a legal matter with preparation adequate in the circumstances.”

<sup>159</sup> Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62, 63 (S.Ct. Tenn.,1983)(suspending under DR 6-101(A)(2) an attorney who filed civil rights and libel complaint based on the receipt of obscene material in the mail).

<sup>160</sup> Matter of Disciplinary Proceedings against Zautcke, 508 N.W.2d 387, 388-9 (S.Ct. Wis. 1993)(attorney “conducted no substantive legal research into any of the potential causes of action”).

<sup>161</sup> State ex rel. Oklahoma Bar Ass'n v. Hensley, 661 P.2d 527, 530 (S.Ct. Okl. 1983)(finding a lack of competence not merely in attorney’s undertaking a probate matter without any initial competence in the area, but in her “failure to ascertain what she knew to be basic and statutorily defined points of law readily ascertainable by any member of the bar”).

<sup>162</sup> State ex rel. Nebraska State Bar Ass'n v. Holscher, 230 N.W.2d 75, 79 (S.Ct. Neb 19975)(lawyer failed to check amendments to statute, but disciplined on grounds of making a false statement of law); Zautcke, 508 N.W.2d at 588-9 (lawyer failed to “review the statute governing shareholder derivative suits”); Attorney Grievance Commission of Maryland v. Zdravkovitch, 760 A.2d 950, 962 (Md. 2000) (lawyer failed to read removal statute).

<sup>163</sup> MR 1.1(2004)

<sup>164</sup> MR 1.1, comment 1 (noting that requisite knowledge can be present from a lawyer’s general experience and specialized experience and training).

<sup>165</sup> MR 1.1, comment 2 (noting that “a newly admitted lawyer can be as competent as a practitioner with long experience” and that “[a] lawyer can provide adequate representation in a wholly novel field through necessary study”).

<sup>166</sup> *Id.* at comments 1 & 2.

therefore focus on a practitioner's lack of requisite knowledge rather than on their lack of research. In such cases, courts require lawyers "to be familiar with fundamental principles essential to the practice of law."<sup>167</sup> In other cases, the lawyer may be viewed as failing to "discover those additional rules of law which, although not commonly known, may be readily found by standard research techniques."<sup>168</sup>

Yet a third aspect of competence is legal analysis: "[c]ompetent handling of a particular matter includes inquiry into **and analysis of** the factual and legal elements of the problem."<sup>169</sup> Thus, an attorney may know the relevant facts and law, yet simply assume the result rather than undertake an analysis of the facts under the law. Alternatively, the attorney may in fact undertake an analysis, but fail to adequately apply the law to the facts.<sup>170</sup> In practice, it may be difficult to distinguish these two failures.

The expected competence of lawyers with regard to the law of attorney-client privilege has not been a matter regularly or deeply explored by courts in the context of ethical discipline. Is the law of attorney-client privilege a "fundamental principle[ ] essential to the practice of law"<sup>171</sup> such that lawyers would be expected to simply know it without doing any research? Certainly, a case could be made that competence in a lawyer must include knowledge of the basic legal elements of attorney-client privilege,<sup>172</sup> including how privilege may be lost.<sup>173</sup> In the absence of this knowledge, an attorney will be incapable of fulfilling their ethical duty to protect attorney-client privileged communications,<sup>174</sup> as that requires the ability to identify what is and is not privileged. Furthermore, assessments of privilege may have to be made quickly when monitoring the

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<sup>167</sup> People v. Gordon, 607 P.2d 995,997 (Colo.1980)(lack of knowledge demonstrated by lawyer's attempted use of probate proceedings to transfer property owned as joint tenants with a right of survivorship). See generally, ABA ANNOTATED MODEL RULES, at 19 (citing to many cases indicating that a lawyer must be "familiar with well-settled principles of law applicable to a client's needs").

<sup>168</sup> Id. (quoting Baird v. Pace, 752 P.2d 507, 509 (Ariz. 1987)).

<sup>169</sup> MR 1.1, comment 5.

<sup>170</sup> See generally, ABA ANNOTATED MODEL RULES, at 21 (collecting disciplinary cases involving misapplication of laws such as the Internal Revenue Code, child support guidelines, and federal sentencing guidelines).

<sup>171</sup> People ex rel Goldberg, 607 P.2d 995, 997 (Colo. 1980) (lawyer treated corporation as tenancy-in-common).

<sup>172</sup> See *infra* note 186.

<sup>173</sup> Such as by waiver or under the crime-fraud exception.

<sup>174</sup> See ABA Comm. on Ethics and Professional Responsibility, Op.94-385 (1994) ("the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligations under Rule 1.6 apply").

testimony of one's client in a deposition or in the witness stand. The basic elements should not be something that a competent lawyer needs to look up.

However, the privilege objections of most concern here, objections to written civil discovery requests, are of a type that does not require 'seat-of-the-pants' knowledge of attorney-client privilege. Thus, we need not be concerned about precisely where we would draw the line between an essential basic knowledge of privilege and law that can be learned or relearned by some study or research. It is sufficient to say that prior to filing objections based on attorney-client privilege, attorneys need to have this basic knowledge. It is the lack of such knowledge, combined with the recognition of an ethical duty to protect attorney-client privilege, that will lead lawyers to make substantively frivolous claims of privilege.

In re Ryder,<sup>175</sup> one of the few ethical<sup>176</sup> cases to involve an improper claim of privilege, is a case that illustrates the consequences of a lack of basic knowledge about attorney-client privilege. Ryder, an experienced private practice attorney and former Assistant United States Attorney, transferred a bag of money he knew had been stolen from a bank and a sawed-off shotgun he knew had been used to commit the crime from a client's safety deposit box to his own safety deposit box.<sup>177</sup> Ryder kept the existence and location of these items secret.<sup>178</sup> Within a few weeks, his client had been arrested and a search warrant for Ryder's safety deposit box issued.<sup>179</sup> When Ryder revealed to the court that he intended to move to suppress the items found in his safety deposit box, the court removed him as counsel, suspended him from practice before the court, and ordered that charges be brought against him.<sup>180</sup>

At the time he took possession of the money and shotgun, Ryder thought that the transfer would cloak these items with attorney-client privilege and that the transfer would work to prevent the client from being connected to these instruments and fruits of the

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<sup>175</sup> 263 F.Supp. 360 (E.D. Va. 1967), aff'd, In re Ryder, 381 F.2d.713, 714(4th Cir. 1967).

<sup>176</sup> Ryder was a proceeding to strike an attorney from the roll of attorneys qualified to practice before a federal district court. It is not a typical disciplinary case involving state bar supervision and enforcement of ethical violations, but the federal court did refer to and rely on the ethical rules of the state in which it sat, the Virginia Canons of Professional Ethics.

<sup>177</sup> Ryder, 263 F.Supp. at 363.

<sup>178</sup> Id. at 363-4.

<sup>179</sup> Id.

<sup>180</sup> Id. at 364.



crime. Ryder is not described as having done any legal research prior to taking this action, however, he did consult with a former Bar Association officer prior to taking this action, and subsequently with a former judge/law professor, a current state judge, and a state attorney.<sup>181</sup> So rather than doing research to supplement his initial knowledge of attorney-client privilege, Ryder consulted with other attorneys.

If the advice Ryder had received had been good, his consultations with other attorneys would have been an adequate replacement for initial knowledge or a duty to research.<sup>182</sup> It is difficult to tell from the opinion to what extent, if at all, he asked or was advised regarding the application of attorney-client privilege to these objects. Much of the advice he received was simply that he should not retain the money if he did receive it.<sup>183</sup> The advisors may have been more focused on Ryder's possible criminal liability as an accessory rather than on the attorney-client privilege rationale. Based on his own misapprehension of the law of attorney-client privilege, which was not cleared up by the advice he got, either because the advice did not go directly to this point, because the attorneys advising him were similarly confused, or because Ryder ignored what they said, Ryder took and maintained possession of these items believing that they had become privileged.

Ryder's misapprehension can be traced to his failure to either know or understand one or more of the basic elements of attorney-client privilege.<sup>184</sup> Only communications may be privileged.<sup>185</sup> Mere physical objects are not communications in the absence of some kind of oral or written communication from the client to the lawyer encoded upon them.<sup>186</sup> No non-frivolous argument could have been made in this case to suggest that either the money or the shotgun were "communications." Furthermore, the transfer of the objects to Ryder was not for the purpose of legal advice, but for the purpose of

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<sup>181</sup> Id. at 363-4.

<sup>182</sup> MR 1.1 Comments 1&2(2004)

<sup>183</sup> Id.

<sup>184</sup> Accord, *In re Ryder*, 381 F.2d. 713, 714(4th Cir. 1967) ("Viewed in any light, the facts furnished no basis for the assertion of an attorney-client privilege.").

<sup>185</sup> See 8 Wigmore, *Evidence* § 2292 (McNaughton Rev.1961)(" (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.")(emphasis added).

<sup>186</sup> Documents with writing may qualify as communications, as may objects with messages scratched on them, if other conditions for privilege are also met.

concealment. Finally, even if the objects had been “communications” “from the client to the attorney” for the purpose of “legal advice,” the transfer of possession was for the purpose of concealing evidence from the police and assisting the client in the commission of a crime.<sup>187</sup> This would have triggered the crime-fraud exception to the privilege had the privilege ever attached in the first place.<sup>188</sup>

In the opinion, the court mentions that Ryder improperly relied on two cases involving documents held by lawyers.<sup>189</sup> It is not possible to know whether these were cases Ryder was aware of and relied on at the time he concluded that attorney-client privilege would attach, or whether these were discovered afterwards and first argued to the court by Ryder or his counsel in an attempt to avoid the threatened discipline. We do know that counsel conceded at the hearing that privilege did not attach despite these cases.<sup>190</sup>

If we assume that Ryder did not know of these cases at the time he took and maintained possession of these objects, then Ryder may be viewed as an example of a case in which the attorney failed to know or understand fundamental principles of the law that a competent attorney is expected to know. Even if Ryder consciously had these cases in mind when he determined that the transfer of the objects to him would make them privileged, his equation of the documents at issue in these cases and the non-communication bearing objects he was dealing reveals how important basic knowledge is. Without this foundation, case law cannot be properly understood and applied to new situations.

It should be pointed out that the court did not frame Ryder’s misconduct as a form of incompetence because the standard for removing a licensed attorney from the rolls of those admitted to practice before a federal court required a showing of misconduct that was “fraudulent, intentional, and the result of improper motives.”<sup>191</sup> The court found that Ryder acted outside of the bounds of the law in holding the stolen money and shotgun in violation of Canon 15 and rendered a service disloyal to the law in violation of Canon

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<sup>187</sup> Id. at 366-67.

<sup>188</sup> See id. at 367.

<sup>189</sup> Id. at 365.

<sup>190</sup> Id.

<sup>191</sup> Id. at 361.

32.<sup>192</sup> For the purposes of that proceeding, therefore, Ryder's intent to hide his client's participation in this crime and his illegal acts in support of this purpose were of far more concern than his ignorance of the law of privilege. However, it was Ryder's ignorance of privilege that blinded him to the illegality of his conduct and, thereby paved the way for his illegal conduct.<sup>193</sup>

A practical problem that arises in the context of legal knowledge and analysis that does not arise in the context of factual investigation is that it may not always be possible to establish whether a lawyer was aware of a particular legal argument before a legal claim was made, especially in an area of the law such as attorney-client privilege. Most, if not all, lawyers have been exposed to some of the law of attorney-client privilege in law school or during practice. When a question of privilege arises, a lawyer who proceeds without any deliberate research or analysis might be said to be deciding on the basis of an unconscious, intuitive application of whatever they had previously grasped about privilege law. The same cannot be said about the particular facts of a case. A lawyer who has not received this information cannot possibly have learned it before.

It seems likely that Ryder was proceeding on the basis of some knowledge of privilege rather than total ignorance, but in his case, a little knowledge was more dangerous than complete ignorance might have been. The fact that he knew something made him confident enough to avoid the minimal steps of reviewing the legal elements of privilege and analyzing the facts under those elements. It also may have prevented him from checking relevant case law. In Ryder's case, even the consultation of four other attorneys, whose advice either missed the point or was ignored, might not have been enough to prevent him from being viewed as incompetent.<sup>194</sup>

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<sup>192</sup> Id. at 368.

<sup>193</sup> Compare Ryder, 263 F.Supp. at 370 (merely suspending Ryder rather than disbaring him because he intended to return the money to the bank and had attempted to determine whether his actions were ethical by consulting reputable members of the bar) with State ex rel. Oklahoma Bar Ass'n v. Harlton, 669 P.2d 774, 777 (S.Ct. Okl. 1983) (disbaring attorney whose concealment of a shotgun used in a crime by another was not because of the "misguided zeal of an attorney in defense of his client," citing Ryder, but rather "as a personal accommodation to its perpetrator").

<sup>194</sup> He did not associate the lawyers he consulted with on the case, which MR 1.1 suggests can provide competence where there would otherwise be none. See MR 1.1 comment 2 ("Competent representation can also be provided though the association of a lawyer of established competence in the field in question"). As a result, the lawyers who provided the advice did not have their reputations and licenses on the line and might, therefore, not have given the issue the analytic effort they would have exercised had they been guiding their own conduct. Thus, it may well be that reliance on the informal legal advice of others is

Of course, it is not possible to rely on Ryder to establish that claims of privilege made in a frivolous manner are unethical even if not substantively frivolous, as the claims of privilege in Ryder were substantively frivolous. Ryder was not a case where in hindsight it was possible to see that there was a non-frivolous legal argument that might have justified advancing the claim of privilege. But Ryder does help us think about the complex nature of legal knowledge, preparation and analysis as well how serious the consequences of this kind of incompetence can be.

We can also consider the extent to which the 2003 version of Model Rule 3.1 would make merely failing to research the law of privilege and analyze the facts under the law prior to claiming privilege ethically impermissible even when non-frivolous legal arguments can be made. MR 3.1 specifies that “[a] lawyer not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact . . . that is not frivolous.”<sup>195</sup> The comments add that

[w]hat is required of lawyers, however, is that they inform themselves about . . . the applicable law and determine that they can make good faith arguments in support of their clients position. Such action is not frivolous even though a lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable to either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.”<sup>196</sup>

The Rule, together with the comments, provides two distinct targets of approbation: making a claim for which there is no non-frivolous basis in law (objective substantive legal frivolousness) and failure to engage in legal research and analysis prior to filing (frivolous conduct). However, there is little or no guidance in the text of MR 3.1 to clarify whether a lucky stab in the dark is an ethical violation.

As might be expected, the vast majority of disciplinary cases under 3.1 involve substantively frivolous cases in which no good faith argument is available to be

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insufficient. Without associating the advising lawyer, the lawyer seeking advice must rely more or less blindly on another because they do not have the competence to judge or re-evaluate the advice given.

<sup>195</sup> M.R. 3.1 (2004)

<sup>196</sup> Id. at Comment 2

discovered by legal research.<sup>197</sup> In such cases it is obvious that either the lawyer didn't do the research, did research but failed to understand what they found,<sup>198</sup> or discovered the lack of merit but proceeded anyway. When a lawyer blindly makes a winning claim or even a losing, but non-frivolous claim, it is less obvious that they have done so "blindly," particularly if they correct their failure to do pre-filing research and analysis prior to any ruling on the merits by the trial court. Thus, the disciplinary apparatus is quite unlikely to ever learn about their improper pre-filing conduct and consider whether this in itself is a violation of MR 3.1.

However, at least one court has found a violation of MR 3.1 where the lawyer eventually articulated a "unique,"<sup>199</sup> but good faith argument on the merits in defending the disciplinary action, but had failed to make that argument to the trial court in his response to a motion for summary judgment.<sup>200</sup> Of course, in this case, the lawyer simply failed to cover-up his lack of research and analysis as quickly as most lawyers would once the merits were challenged. Had the lawyer put the effort into his client's case that he put into his own disciplinary case, we would never have known about the pre-filing lack of effort. It is also not clear that the court would have been willing to find a violation of 3.1 if the good faith argument had been developed in time to respond to the motion for summary judgment, as this would have made it available in time to try to help the client.

Most courts facing this issue in the context of Rule 11 have concluded that if an objectively reasonable, i.e., non-frivolous, legal ground has eventually appeared, Rule 11 sanctions cannot be imposed, even though these legal grounds were neither known or discovered at the time the litigation action in question was taken.<sup>201</sup> This approach to the Rule 11 reasonable inquiry requirement has been justified by the need to limit satellite

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<sup>197</sup> See generally, AMERICAN BAR ASSOCIATION ANNOTATED MODEL, at 317-18 (collecting cases finding no good faith argument).

<sup>198</sup> In Re Richards, 986 P.2d 1117, 1120(N.M. 1999) (lawyer misunderstood cited case).

<sup>199</sup> In Re Boone, 7 P.3rd 270, 282(Ks 2000).

<sup>200</sup> Id. at 282 (finding a violation of MR 3.1 even as it also found the lawyer's continuing course of conduct argument for retroactive application of the ADA despite settled case law that the ADA is not retroactive a good faith argument).

<sup>201</sup> Kale, 861 F.2d at 759 (1st Cir. 1998) (holding that a non-frivolous equitable tolling argument prevented imposition of sanctions even if the attorney filing the case was unaware of the equitable tolling doctrine until well after filing the complaint); Unigard Sec. Ins. Co. v. Lakewood Engineering, 982 F.2d 363, 370 (9th Cir. 1992)(" Because the frivolousness prong of Rule 11 is measured by *objective* reasonableness, . . . whether Unigard actually relied on these cases is irrelevant"); Jones, 49 F.3d at 695 (without an initial

litigation,<sup>202</sup> as well as the fact that the possibility of sanctions for substantively frivolous claims already motivates lawyers to engage in reasonable legal inquiry and analysis.<sup>203</sup> Yet, at least two circuits<sup>204</sup> have taken the position with regard to legal as well as factual inquiry that "[a] shot in the dark is a sanctionable event, even if it somehow hits the mark."<sup>205</sup> These courts argue that this approach both provides better deterrence of baseless claims,<sup>206</sup> and "ensures that each side really *does* bear the expenses of its own case,"<sup>207</sup> without creating a chilling effect on aggressive advocacy.<sup>208</sup>

In the ethical context, we have identified as our primary concern the overall litigation impact created by claims of privilege that force opposing litigants to make fairly blind choices about what information they will pursue through a motion to compel, that divert financial resources available for the litigation, and that often deprive litigants of information they are entitled to have. These consequences are present in what I will call 'losing' cases, when the information is not in fact privileged and would have to be disclosed if the issue were actually litigated. Of these losing cases, only some portion would be viewed as frivolous from a substantive legal perspective.

One approach to the ethics of privilege would be to follow the majority approach to Rule 11 and require both substantive frivolousness and a lack of legal knowledge, inquiry and/or analysis before finding an ethical violation, thus viewing the "legally-blind" assertion of non-frivolous losing claims of privilege as ethical. Such an approach might be justified by the practical reality that we are only likely to become aware that a

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finding that the claims are objectively frivolous as to the facts or law, no need to consider whether a reasonable inquiry was made).

<sup>202</sup> Kale, 861 F.2d at 759

<sup>203</sup> See Vairo, RULE 11 SANCTIONS 252; Garr, 22 F.3d at 1283 (dissenting opinion).

<sup>204</sup> Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 932 (7th Cir.1989) (en banc)( the reasonableness of an attorney's inquiry "focuses on inputs rather than outputs, conduct rather than result"); Mays v. Principi, 2002 WL 15704, at 4 (N.Ill. 2002) (quoting Mars that focus of Rule 11 analysis is on input rather than output); Garr, 22 F.3d at 1279 (3rd Cir. 1994)(position is dictum re legal analysis as the case involved issue of lack of factual inquiry). See also Linda Ross Meyer, "When Reasonable Minds Differ," 71 N.Y.U. L.R. 1467, 1490 (1996)(arguing that the Supreme Court endorsed the Seventh Circuits emphasis on attorney conduct when, in Cooter & Gell v. Hartmarx Corp., 496 U.S. 394, 401-2 (1990), the court described determinations of frivolousness as requiring factual determinations about the pre-filing inquiry rather than pure questions of law).

<sup>205</sup> Garr, 22 F.3d at 1279 (quoting Vista Mfg., Inc. v. Trac-4 Inc., 131 F.R.D. 134, 138 (N.D. Ind. 1990)).

<sup>206</sup> Garr, 22 F.3d at 1279.

<sup>207</sup> Mars Steel Corp., 880 F.2d at 932(arguing that it is improper to force the other side to do your research for you in order to defend themselves).

<sup>208</sup> *Id.* ("Sanctuary as a result of a reasonable investigation ensures that counsel may take novel, innovative positions--that Rule 11 does not jeopardize aggressive advocacy or legal evolution.")

lawyer has failed to engage in appropriate pre-filing legal research and analysis when we realize that they have made a substantively frivolous claim. Thus, it might seem that independent sanctioning of pre-filing conduct of this kind was of no value.

However, it is a mistake to confuse the reality of enforcement with the appropriateness of a threat of enforcement with regard to behavior that is deemed problematic. The ethical rule against knowingly suborning client perjury<sup>209</sup> is similarly problematic, as it is exceedingly difficult to discover when lawyers have violated this rule, yet this has not suggested that the rule be abandoned. The most important question is whether the conduct in question is in fact unethical, and only secondarily whether the ethical rule creates the possibility of deterring the conduct.

When making “legally-blind” claims of privilege, the lazy lawyer is in no position to judge whether their claim is truly frivolous, is a non-sanctionable loser, or is a winner. In the absence of a rule that sanctions the conduct of making a privilege claim “legally blind,” the lazy lawyer may take a chance either that no one will challenge the privilege claim to discover its possible lack of merit, or that, if challenged, the claim will be viewed as substantively non-frivolous. Given the fact that the opposing lawyer is operating in the dark about the possible value of the information claimed to be privileged, and the high cost of challenging many individual claims of privilege, the lazy lawyer might reasonably see the odds tilting away from possible sanction. However, it is this same reality that makes it clear how damaging to the fairness of the adversary system such behavior is. Lawyers should at least be discouraged from strategic behavior that has such a significant negative impact on the adversary system.

The ethical legitimacy of the second calculation, that the claim may be non-frivolous, is more difficult to assess. The risk of sanction will appear less if lawyers believe that the line between substantively frivolous and legitimate claims of privilege is sufficiently unclear that good faith, even if losing, arguments are likely to be available if it becomes necessary to defend an objection. It would not be surprising if many lawyers did not in fact have this view of the law of attorney-client privilege. If this were true, then there would be little ethical value in forcing attorneys to engage in pre-filing legal research or analysis for attorney-client privilege claims. The reasonableness of this

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<sup>209</sup> M.R. 3.3 (2004)

assumption will be considered below, and I will argue that, while there are some areas of unclarity, the law of privilege is clear enough for a reasonably prepared lawyer to determine whether many claims of privilege are substantively frivolous. This makes the strategic choice to make a “legally blind” claim of privilege unethical because it fails to avoid the avoidable negative consequences on the adversary system of making a ‘losing’ claim.

Therefore, lawyers should be ethically required to follow a procedure that might ensure sufficient legal research and analysis when there is time for such a process, e.g. in the context of written interrogatories or document requests rather than objections to testimony. Such a procedure might begin with a requirement that lawyers remind themselves of the legal elements of privilege, either by forcing the detailed recall of these elements from memory or by reviewing an appropriate case law or treatise source. Second, lawyers would be required to either be aware of those factual issues that require additional reference to case law or statutes rather than the basic formula, such as pre-existing documents, organizational clients, client identity information, and information about evidentiary objects the lawyer has moved or altered, or be prepared to research beyond the basic formula in every case. Finally, lawyers would be required to consciously analyze the facts of each claim of privilege under the relevant law before making the claim.

The steps articulated above are certainly good practice. The issue, however, is whether failing to follow one or more of these steps should be viewed as an ethical violation. The issue is most clearly raised by asking whether such failures would still be ethical violations if the claims of privilege were upheld as substantively meritorious. One problem with such an approach is that it would forbid acting on a ‘hunch,’ or what some might prefer to call an ‘educated guess.’ Attorneys’ intuitive hunches about the possible legal viability of a privilege claim may be subtly guided by the thousands of cases and arguments read and digested, even though not explicitly remembered, during their legal education and career. Indeed, a competent lawyer should not be capable of being ignorant of the fundamentals of the law of privilege. However, the question remains, is it unethical to act on a hunch when there is or should be time for a real legal analysis.



My inclination is to say that acting on a hunch is an ethical violation, even when the hunch turns out to be correct and the information is privileged.<sup>210</sup> Although the result in such a case is good for the duty of confidentiality and good for the client, it need not have occurred in such a frivolous manner. By failing to condemn the conduct in this case, we simply reinforce the habit or custom of making reflexive privilege objections, which may just as often turn out to be specious rather than meritorious. Furthermore, a focus on pre-filing conduct rather than post-hoc arguments provides an essential counterweight in an area of law where post-hoc arguments may be perceived as easily available.

Finally, making such conduct an ethical violation will not chill claims of privilege or undermine the duty of confidentiality, because the ethical and legal consequences of missing such a claim are too great. It seems unlikely that lawyers would choose to simply disclose rather than undertake the necessary research and analysis, as this would be easily recognized as a potential violation of the duty of confidentiality, which requires the lawyer “to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer.”<sup>211</sup> Since it would be a concern for confidentiality that would motivate a lazy lawyer to prefer to blindly claim privilege rather than blindly disclose in the first place, it seems unlikely that even a lazy lawyer would allow privileged material to be improperly disclosed, even if it required them to do work they would prefer to avoid. All but the most ethically reprehensible lawyer would react to a specific ethical prohibition on blind claims of privilege with some level of factual and legal analysis of the privilege status of requested materials.

Thus, a new comment to the Model Rules designed to focus the attention of attorneys on the particular ethical concerns raised by claims of attorney-client privilege should address the practice of filing claims of privilege without necessary legal knowledge or analysis.

### 3. LACK OF A COMPLETE PRIVILEGE LOG

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<sup>210</sup> Accord, Tuszkiewicz v. Allen-Bradley Co., Inc., 173 F.R.D. 239, 240 (E.D. Wisc. 1997) (requiring payment of attorney fees for unsuccessful motion to compel when explanation of the factual predicates for the claim of privilege at the deposition rather than in response to the motion to compel would have obviated the need for a motion to compel).

<sup>211</sup> M.R. 1.6 comment 15 (2004)

The third and final way in which a lawyer may make a claim of privilege in a frivolous manner is by objecting to discovery requests on the grounds of privilege either without providing any privilege log as required by procedural rules such as the Federal Rule of Civil Procedure 26(b)(5)<sup>212</sup> or Federal Rules of Civil Procedure 45(d)(2),<sup>213</sup> or by providing a privilege log that fails to fully comply with such Rules.<sup>214</sup> Although the precise informational requirements of privilege logs vary from District to District,<sup>215</sup> all logs require some minimum specific factual information. Thus, the requirement of a privilege log ensures that at least some factual investigation of the claimed privileged communication has occurred prior to the claim. Some courts also require a statement as to “how each element of the privilege is met as to that document,”<sup>216</sup> thus forcing legal analysis prior to a claim of privilege.

Making a general claim that one or more documents is privileged without submission of such a log is often a manifestation of a lack pre-filing factual investigation and legal analysis.<sup>217</sup> Thus, it is at least partially possible to ground an ethical prohibition on asserting privilege without following applicable privilege log rules on the prior

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<sup>212</sup> FRCP 26(b)(5) (“When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”). See e.g., Starlight International Inc. v. Herlihy, 186 F.R.D. 626, 646 (D. Ks. 1999) (finding sanctionable misconduct for asserting attorney-client privilege in a deposition without a privilege log or other explanation for refusing to answer questions).

<sup>213</sup> F.R.C.P. 45(d)(2)(2005) (“When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim”).

<sup>214</sup> More detailed requirements for such logs are set out in local court rules and case law and typically include “(1) the type of document, (2) the general subject matter, (3) the date and (4) such other information sufficient to identify it for a subpoena *duces tecum*, including, where appropriate, the author, the addressee and, where not apparent, the relationship of the author and addressee to each other.” Michael Silverberg, “The Burden of Producing Privilege Log,” 05/09/96 N.Y.L.J. 3 (describing Southern District of New York Civil Rule 46(e)(2)(ii)(A) and case law). Courts may also require additional information such as the purpose of the document and a description of how each legal element of privilege is met. See Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 594 (W.D.N.Y. 1996).

<sup>215</sup> F.R.C.P. 26(b)(5).

<sup>216</sup> Id. See U.S. v. Davis, 636 F.2d 1028, 1044, n.20 (5th Cir. 1981) (stating that resisting party should have made an attempt to demonstrate . . . [the] specific way that . . . particular document[s] fell within the ambit of the privilege”); Willemijn Houdstermaatschaap BV v. Apollo Computer Inc., 770 F.Supp. 1429, 1439 (D.Del. 1989)(requiring “description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality”).

<sup>217</sup> See Eureka Financial Corp., 136 F.R.D. at 183, n. 9 (“All too often, the blanket privilege is asserted by counsel who have not carefully reviewed the pertinent documents for privilege.”).

discussions of the ethical status of pre-filing factual investigation, legal research, and legal analysis. However, even if these ethical prerequisites to a claim of privilege have occurred, the absence of a privilege log places an impossible burden on the requesting party to show no privilege in the absence of the information that might assist them in doing so.<sup>218</sup> Thus, it is the unfair and impossible position in which the requestor of information is placed<sup>219</sup> that specifically requires the attention of the ethical rules.

M.R. 3.4, titled “Fairness to Opposing Party and Counsel,”<sup>220</sup> provides strong support for the proposition that making a claim of privilege with an incomplete or missing privilege log is already unethical under the current Model Rules. M.R. 3.4(c) prohibits a lawyer from “knowingly disobey[ing] an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.”<sup>221</sup> Thus attorneys have been disciplined under M.R. 3.4(c) for failing to respond to interrogatories and requests for production.<sup>222</sup> Since filing a privilege log, as defined by FRCP 26(b)(5), local rules and case law, is such an obligation, a failure to do so clearly violates M.R. 3.4. In addition, M.R. 3.4(d) states that “A lawyer shall not . . . in pretrial procedure, . . . fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”<sup>223</sup> The comments to MR 3.4 state that the rule includes a prohibition of “obstructive tactics in discovery procedure.”<sup>224</sup> Since making a general privilege objection without filing the privilege log that provides the factual and legal basis for the claim may be viewed as a failure to diligently comply with a discovery request or as an obstructive tactic, then M.R. 3.4(d) provides further support for the proposition that privilege log failures are already unethical.

In the procedural context, many courts encountering violations of FRCP 26(b)(5) or 45(d)(2) have been quite willing to sanction such conduct even at the expense of

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<sup>218</sup> See Delaney, 826 F.2d at 128 (noting that an “index of the withheld material, summarizing, in factual and not conclusory terms, the nature of the material withheld and linking each specific claim of privilege to specific material” “helps overcome the . . . natural handicap” arising from “lack of access to the documents”).

<sup>219</sup> See Eureka Financial Corp., 136 F.R.D. at 183, n. 9 (describing blanket privilege objections as “defeating the full and fair information disclosure that discovery requires”).

<sup>220</sup> MR 3.4 (2004).

<sup>221</sup> MRPC 3.4(c).

<sup>222</sup> Matter of Gabriel, 837 P.2d 149 (Az. 1992); In Re Boone, 7 P.3rd at 283

<sup>223</sup> Id. at 3.4(d).

<sup>224</sup> Id. at 3.4, Comment 1.

legitimate claims of privilege by summarily denying all such claims of privilege and compelling production.<sup>225</sup> Some courts, mindful of the harsh effects of such a consequence, have tried to avoid “hair-trigger findings of waiver”<sup>226</sup> by providing resisting parties with a second chance to produce such a log,<sup>227</sup> or imposing a different kind of sanction.<sup>228</sup>

Although it seems fairly apparent that it is already an ethical violation to fail to follow court rules and file a sufficiently detailed privilege log when making a claim of privilege, it is worth pointing out this specific application of M.R. 3.4 is entirely consistent with and does not chill the duty of confidentiality. When considering the ethical prohibition of previous kinds of frivolous claims of privilege -- improper purpose, insufficient factual or legal investigation, and lack of legal analysis, there was always a concern that this might undermine the duty of confidentiality by chilling claims of privilege that ought to be made. In this situation, however, one of the procedural sanctions for not filing the privilege log -- waiver of privilege -- makes a failure to file a privilege log a potential violation of the duty to preserve privilege.<sup>229</sup> Thus, the duties to preserve privilege and not claim privilege in a procedurally frivolous manner are strategically and ethically linked together.

The proposed new comment to the Model Rules designed to focus the attention of

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<sup>225</sup> See e.g., In Re Grand Jury Subpoena, 274 F.3d 563, 575-76 (1st Cir. 2001)(describing failure to provide a privilege log as a “fatal” error resulting in waiver of the privilege); Dorf & Stanton Communications v. Molson Breweries, 100 F.3d 919, 923 (Fed. Cir. 1996)(applying Second Circuit law to affirm a waiver of privilege for failing to file a complete privilege log in violation of 45(d)(2)); Cabot v. United States, 35 Fed. Cl. 442, 446 (Fed. Cl. 1996) (ordering production of documents when justification for claims of privilege ordered under Federal Claims Court rules was not provided); Williams v. Sprint/United Management Co., 230 F.R.D. 640, 653-54 (D.Kan. 2005) (a waiver of possibly privileged metadata resulted from unilaterally scrubbing metadata from produced electronic spreadsheets without objecting and listing metadata on privilege log).

<sup>226</sup> See e.g., Hobley v. Chicago Police Commander Jon Burge, 2003 WL 22682362, at p. 5 (N.D.Ill. 2003) (quoting 8A WRIGHT & MILLER § 2213 at 428).

<sup>227</sup> See, e.g., U.S. v. Western Electric Co., 132 F.R.D. 1, 4 (D.D.C. 1990) (choosing not to impose a waiver of privilege as a sanction for failing to file a privilege log, but rather to provide a second chance for such log to be prepared and provided).

<sup>228</sup> See, e.g., Hobley, 2003 WL 22682362, at p. 5 (N.D.Ill. 2003) (refusing to find waiver of privilege for failure to file a privilege log, but granting sanctions in the form of attorney fees instead).

<sup>229</sup> See e.g. Coastal Corp. v. Duncan, 86 F.R.D. 514, 520 (D.C.Del. 1980) (requiring production of all document claimed to be privileged because “[a]n improperly asserted claim of privilege is no claim of privilege at all”); Jones v. Boeing Co., 1995 WL 827992, at 1 (D.Kan.) (refusing to conduct an *in camera* review of documents prior to compelling their production when claimant’s “blanket” claim of privilege and failure to show that elements of privilege were met would result in shifting the burden of analysis and proof to the court).

attorneys on the particular ethical concerns raised by claims of attorney-client privilege should point out that claims of privilege can be unethical when made in the absence of appropriate factual investigation, legal knowledge, research and analysis, and a full privilege log.

### C. SUBSTANTIVELY FRIVOLOUS CLAIMS OF PRIVILEGE

Having established that it is unethical to make a claim of attorney-client privilege in a frivolous manner, it is now time to turn to those claims that are substantively frivolous from an objective perspective. The vast majority of substantively frivolous claims of privilege will be those made without appropriate factual investigation, legal knowledge, research and analysis, and procedurally required disclosure. Thus, it might seem unnecessary to address the issue of substantive frivolousness in an ethical rule. However, there are several reasons why it is worth considering. First, the main, and we would hope relatively rare exception to this overlap, would be the wicked lawyer who claims information as privileged after engaging in factual investigation, legal knowledge, and legal analysis which reveals that privilege is not available. The wicked as well as the ignorant and lazy should be addressed by the ethical rules.

In addition, although substantively frivolous claims are most likely to be the result of frivolous, indeed incompetent, pre-filing practices, it might be easier to decide as a matter of law that a particular claim is substantively frivolous than to engage in a fact-intensive inquiry into the details of what the lawyer did and thought.<sup>230</sup> Thus, targeting substantively frivolous claims of attorney-client privilege could provide a simple way to both motivate and regulate the pre-filing practices of attorneys making privilege claims.

Furthermore, the determination that there has been incompetent research and analysis will not be able to avoid reference to the substantive frivolousness or merit of the resulting claim.<sup>231</sup> Particularly when there has been some research and analysis, the competence of such research will in large part be judged by the product produced. Thus,

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<sup>230</sup> But see Linda Ross Meyer, “When Reasonable Minds Differ,” 71 N.Y.U. L.R. 1467, 1485 (1996) (arguing that judges in Rule 11 cases find it easier to decide that a lawyer has made a claim in a frivolous manner than to decide that the claim is substantively frivolous).

<sup>231</sup> Accord, *id.* at 1494-95 (“the practice-based approach does not eliminate the need for courts to determine substantive issues”).

it will sometimes be impossible to decide whether competent research and analysis occurred without considering the merit of the resulting privilege claim.

An additional and particularly important reason for evaluating substantive frivolousness in the context of attorney-client privilege here is that ethical obligations of research and analysis only make sense to the extent the law of attorney-client privilege has sufficient clarity and predictability to allow lawyers to distinguish meritorious claims of privilege from frivolous claims. If the law of attorney-client privilege is “radically indeterminate,”<sup>232</sup> there will be very few substantively frivolous claims of privilege. This would make post-hoc factual investigation, legal research, and legal analysis a much more reasonable practice and undermine the conclusion reached above that failure to undertake these prior to making the claim is unethical. Indeed, many otherwise competent and ethical lawyers probably do rationalize their failures to investigate, research and analyze possible claims of privilege on grounds that the law of privilege is sufficiently indeterminate to ensure that some non-frivolous argument can be found. The truth of this rationalization must be addressed both to justify the procedural ethical obligations outlined above and to educate lawyers about the real dangers of making a frivolous claim of privilege.

Whether the law of attorney-client privilege is radically indeterminate across the board or only “modestly indeterminate”<sup>233</sup> can as practical matter be studied by looking at when and to what extent courts are willing to declare claims of privilege frivolous and award sanctions.<sup>234</sup> If the law of attorney-client privilege is only modestly indeterminate, as will be asserted here,<sup>235</sup> it should be possible to provide lawyers with some practical guidance about what does and doesn’t make a claim of privilege frivolous. This guidance can take two distinct forms. The first is general guidance about the kind of legal support required to make a claim non-frivolous. The second kind of guidance addresses the

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<sup>232</sup> Id. at 1468-70 (defining radical indeterminacy in the law as meaning that valid legal arguments can be on either side of any legal issue).

<sup>233</sup> Id. at 1470 (characterizing indeterminacy only in “small pockets” of the law as modestly indeterminate).

<sup>234</sup> Id. at 1480 (stating that deciding whether a legal claim is frivolous is equivalent to deciding whether the law relevant to that claim is indeterminate).

<sup>235</sup> Accord, Report of the ABA Task Force on Attorney-Client Privilege at 4 (May 18, 2005) (noting that “[a]t the margins, the application of privilege is not always clear, and indeed, treatises can and have been written on the privilege, its exceptions, its intricacies, and its areas of ambiguity”).

specific legal requirements of attorney-client privilege and attempts to identify specific kinds of claims of privilege or problematic elements that produce frivolous claims.

### 1. General Characteristics of Substantively Frivolous Claims

As M.R. 3.1 “parallels and is best analyzed in tandem with Rule 11 of the Federal Rules of Civil Procedure,”<sup>236</sup> we can look to both disciplinary cases under M.R. 3.1 and sanction cases under Rule 11 for more specific guidance as to when a claim is frivolous. We can also include FRCP 26(g)(2) cases imposing sanctions for frivolous discovery positions, as language identical to that found in FRCP 11, “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law”<sup>237</sup> is found there as well.<sup>238</sup>

MR 3.1 prohibits “assert[ing] or controvert[ing] an issue . . . , unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”<sup>239</sup> Similar language can be found in FRCP 11.<sup>240</sup> The Comments to MR 3.1 add that an “action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.”<sup>241</sup> Good faith requires that there be “some realistic possibility of success if the matter is litigated,”<sup>242</sup> but the lawyer need not believe that the position supported will ultimately prevail.<sup>243</sup> The Arizona Supreme Court has described the standard of objective frivolousness in both the ethical and legal context as

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<sup>236</sup> ABA ANNOTATED MODEL RULES, at 321.

<sup>237</sup> F.R.C.P. 11(b)(2) (also adding the words “or the establishment of new law”); F.R.C.P. 26(g)(2).

<sup>238</sup> Of course, FRPC 11 does not cover “disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37”). FRCP 11((d). However, the jurisprudence with regard to the basic standard of frivolousness is the same. In re Byrd, Inc., 927 F.2d 1135, 1137 (10th Cir. 1991) (applying FRCP 11 case law to FRCP 26(g)(2) determinations and citing multiple circuits that do likewise).

<sup>239</sup> MR 3.1.

<sup>240</sup> F.R.C.P. 11(b)(2) (where the claim is not “warranted by existing law,” it can still avoid being sanctioned under Rule 11 if it is “warranted . . . by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law”).

<sup>241</sup> M.R. 3.1 at Comment 2.

<sup>242</sup> ABA Formal Opinion 85-352 (July 7, 1985) (setting out the standard for advising a position on a tax return).

<sup>243</sup> MR 3.1 at Comment 2.

requiring that there be support by “any reasonable legal theory, or if a colorable legal argument is presented about which reasonable attorneys could differ.”<sup>244</sup>

It is possible to distinguish two kinds of substantive frivolousness<sup>245</sup>: pure factual frivolousness and legal/factual inadequacy. Pure factual frivolousness will only arise when insufficient factual investigation coupled with a competent grasp of the law leads the lawyer to assume facts sufficient under the law, when the facts are not actually sufficient.<sup>246</sup> This form of substantive frivolousness needs little further explication, but will be specifically fleshed out in the context of attorney-client privilege below. Legal/factual inadequacy arises when the lawyer is aware of facts inconsistent with the law, yet insists the law applies, or when the lawyer is aware of law adverse to the facts, yet insists a different legal result applies. The difference between these two descriptions of frivolousness is more a matter of perspective than substance. The first looks more like Cinderella’s sisters insisting that that their feet are small enough to fit in the glass slipper, when they are clearly too large. We might describe this as obliviousness to inconsistent or missing facts, while grasping that the law requires such facts.<sup>247</sup> Legal/factual inadequacy could be said to be present if Cinderella’s sisters had realistic ideas about the large size of their feet, but either were convinced that the slipper was going to be large enough despite never having seen it, or had somehow magnified the size of the slipper when they did see it. This happens in a legal context when a lawyer has a realistic view of the facts, but

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<sup>244</sup> In re Levine, 847 P.2d 1093, 1100 (Az. 1993).

<sup>245</sup> Visoly v. Security Pacific Credit Corp., 768 So.2d 482, 491 (Fla. App. 3 Dist. 2000) (“an appeal that lacks a factual basis or well-grounded legal support will be considered devoid of merit”).

<sup>246</sup> A possible example of this may be found in Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 263 (S.D. N.Y. 1995) where the court found no substantial justification for privilege claims both when the claimant conceded in response to the motion to compel that many documents had been improperly withheld and many questions had been improperly not answered and where plaintiff never established the factual predicate for limited waiver as to other communications). See also Heath v. F/V ZOLOTOL, 221 F.R.D. 545, 550 (W.D.Wash. 2004) (frivolous claim that witness statements created in ordinary course of business were privileged were result of failure to ask client about the circumstances of statement, which showed “not even a scintilla of evidence” of attorney involvement and justified default judgment on liability and \$25,000 personal fine to attorneys).

<sup>247</sup> See e.g. Iowa Supreme Court Bd. Of Prof’l Ethics & Conduct, 557 N.W.2d 515, 521(1996) (frivolous suit when all evidence showing no causal connection to claimed injury but lawyer included defendant as trial tactic); In re Zimmerman, 19 P.3rd 160, (Kan. 2001) (lawyer’s appeal of summary judgment granted because failure to hire an expert to show seat belt defect meant no genuine issue of material fact re defect was frivolous); In Re Selmer, 368 N.W.2d 702, 703-4(Minn. 1997)(racial discrimination defense to collection actions against lawyer were frivolous when lawyer could provide no specific evidence of discrimination other than his race).



misunderstands the law and its application,<sup>248</sup> is ignorant of the law,<sup>249</sup> or refuses to accept that the law relied upon requires different or additional facts.<sup>250</sup> This also includes situations when lawyers do not even try to address arguments and cases cited by the other side,<sup>251</sup> when they fail to distinguish controlling adverse authority,<sup>252</sup> when they assert irrelevant distinctions,<sup>253</sup> or when they take the general position that no argument is frivolous if the United States Supreme Court has not yet rejected it on the merits.<sup>254</sup>

At the same time, the prohibition on frivolous litigation is not meant to “chill the

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<sup>248</sup> See e.g., In Re Capoccia, 709 N.Y.2d 640, 643 (N.Y.A.D. 3. Dept. 2000 (“[Respondent] attempt[s] to shoehorn laws and legal concepts to a set of facts where they have no application”).

<sup>249</sup> See e.g., Attorney Grievance Commission of Maryland v. Zradkovich, 762 A.2d 950, 965 (Md. 2000) (ethically frivolous removal to federal court when plaintiff attempted to remove from Texas State Court to Federal Court in Maryland, but statute allowed only defendant to remove and then only to Federal Court in Texas and court speculated that lawyer had not bothered to read statute); Investerings Partnership v. U.S., 1998 WL 647214, at 1 (D.D.C. 1998) (party position not substantially justified under FRCP 37(a)(4) when failed to discover controlling precedent); Vinton v. Adam Aircraft Industries, Inc., 232 F.R.D. 650, 663 (D.Colo. 2005) (finding no abuse of discretion in a magistrate’s imposition of sanctions for claim of privilege found not to be substantially justified because supported by only a single conclusory sentence claiming privilege).

<sup>250</sup> See e.g., In Re Brough, 709 So.2d 210, 210 (La. 1998) (filing suit against the insured of an insolvent insurance carrier and its legal successor was ethically frivolous when statute barred suits unless uninsured motorist policy limits were exhausted);. See In Re Richards, 986 P.2d 1117, 1119, (N.M. 1999) (factually very similar cases finding the exception inapplicable make reliance on exception ethically frivolous); Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 266 (S.D. N.Y. 1995) (finding no substantial justification under FRCP 37(a)(4) for withholding documents as attorney-client privileged when factual predicate for limited waiver not established).

<sup>251</sup> See e.g., Atheridge v. Aetna Casualty and Surety Co., 184 F.R.D. 200, 207 (D.D.C. 1998) (“running from the fight by ignoring what one’s opponent has said is not a substantially justified position for a litigant to take”); Bowne, 161 F.R.D. at 265 (no substantial justification when memorandum “fail[ed] to acknowledge the existence of” [controlling authority] prominently discussed by moving party).

<sup>252</sup> See Bowne, 161 F.R.D. at 266 (finding no substantial justification under FRCP 37(a)(4) for withholding documents as attorney-client privileged when sanctioned party used “ [t]he ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist’ ”); Athridge v. Aetna Casualty and Surety Co., 184 F.R.D. 200, 206 (D.D.C. 1998) (awarding expenses for the motion to compel because “running from the fight by ignoring what one’s opponent has said is not a substantially justified position for a litigant to take”); Prousi v. Cruisers Division of KCS International, Inc., et al., 1997 WL 135692, at 1 (E.D.Pa.) (ordering payment of the other side’s fees and expenses for a motion to compel disclosure of the date of a fee agreement when the lack of privilege was easily researched and clearly addressed by Third Circuit precedent).

<sup>253</sup> In re Caranchini, 956 S.W.2d 910, 915 (1997) (lawyer “disregarded well-established Kansas law” and “presented a distinction without a difference” “to distinguish the court’s previous decision on this issue”).

<sup>253</sup> Flaherty v. Gas Research Institute, 31 F.3d 451, 459 (7th Cir. 1994) (frivolous under Rule 11 to argue case holding that courts had no jurisdiction to hear age discrimination claims until a final administrative order did not apply to a retaliation for opposing age discrimination claim when both claims encompassed by same statute).

<sup>254</sup> See People v. Hartman, 744 P.2d 482, 483-5 (Co. 1987) (frivolous to argue that U.S. Supreme Court might accept argument that wages are not income when U.S. Tax court has rejected this argument for many decades and recently stated that raising such an argument would be viewed as frivolous); In re Solerwitz, 848 F.2d 1573, 1577-78 (C.A.Fed. 1988) (rejecting the expert testimony of law professor that it is not

creativity that is the very lifeblood of the law [when v]ital changes have been wrought by those members of the bar who have dared to challenge the received wisdom.”<sup>255</sup> If “there is no controlling precedent on the issue, and counsel marshals what authority there is in support of her position, the position she articulates will be found to be substantially justified even if it does not prevail.”<sup>256</sup> However, when potentially dispositive adverse authority exists, it must both be acknowledged<sup>257</sup> and “cogent argument . . . made.”<sup>258</sup> Thus it is not sufficient to acknowledge the lack of legal support but assert *simpliciter* that the law should be different<sup>259</sup> to avoid being viewed as frivolous. Support and/or arguments for a demand for change must first be sought through legal research, and support must be found, even if only “in minority opinions, in law review articles, or through consultation with other attorneys.”<sup>260</sup> In cases where other jurisdictions have developed law more supportive than the controlling adverse authority, failure to point to

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frivolous to remake same arguments to appellate court despite that court’s precedent rejecting such arguments as long as the Supreme Court has not decided these issues on the merits).

<sup>255</sup> Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

<sup>256</sup> Boca., 1998 WL 647214, at 1. See also, 107 F.3d 846, 853 (11th Cir. 1997) (no sanctions because “substantially justified in relying on Supreme Court dictum regarding the attorney’s fees issue, and relying on out-of-circuit district court caselaw, where there was no in-circuit caselaw”).

<sup>257</sup> See Bowne, 161 F.R.D. at 266 (sanctions justified when litigant used “[t]he ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist,” even though valid argument for changing law could have been made); Omni Packaging, Inc. v. U.S. INS, 930 F.Supp. 28, 34 (D.P.R. 1996) (reminding counsel of ethical duty under MR 3.1 to cite unfavorable binding precedent); RESTATEMENT 3RD OF LAW GOVERNING LAWYERS (“Restatement Lawyers”) § 110, comment d (stating that a good faith argument requires disclosing adverse precedent).

<sup>258</sup> Richards, 986 P.2d at 1120.

<sup>259</sup> FRCP 11, Advisory Committee notes to the 1993 Amendments (stating that the new objective standard was intended to eliminate any “‘empty-head pure-heart’ justification for patently frivolous arguments”). Accord, Eastway Const. Corp. v. City of New York, 637 F.Supp. 558, 575 (E.D. N.Y. 1986) (noting that the first challenge to Plessy v. Ferguson was certainly frivolous while later challenges became non-frivolous and ultimately prevailed). Although not expressly stated by the Eastway court, we may understand its position on the frivolousness of early challenges as founded on a lack of new arguments or reason to believe old arguments would be better received, while half-a-century later social change, the use of empirical evidence, and the development of the law provided both new arguments and new weight to old arguments. See also RESTATEMENT OF LAW GOVERNING LAWYERS § 110, comment d (noting that the presence of new authority, new arguments and a new court can be sufficient to ground a good faith argument for change).

<sup>260</sup> Advisory Committee Notes to 1993 Amendments to Rule 11. See also RESTATEMENT OF LAW GOVERNING LAWYERS § 110, comment d (describing considerations relevant to the presence of a good faith argument for change as including “whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer’s position, or whether for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success”).

this inconsistency will make the claim frivolous.<sup>261</sup>

A new comment to the Model Rules designed to focus the attention of attorneys on the particular ethical concerns raised by claims of attorney-client privilege could usefully point out that claims of privilege are frivolous if they are missing essential facts, are based on ignorance or misreading of the law of privilege, fail to acknowledge and appropriately distinguish controlling adverse authority, or are based on a change or reversal of existing law without providing argument and support for such a change.

## 2. Specific Claims of Privilege that are Substantively Frivolous

We now turn to considering the extent to which the law of attorney-client privilege may be described as determinate, thereby allowing for claims of privilege to be considered frivolous. The analysis of this issue will be limited to a review of some of the specific factual situations in which claims of attorney-client privilege have regularly been deemed either frivolous or non-frivolous by the courts. Such findings arise in a variety of contexts, including motions for sanction under FRCP 37(a)(4) (discovery abuse) and 28 U.S.C. §1927 (liability for excessive costs due to unreasonable and vexatious multiplication of proceeding) as well as contempt hearings under FRCP 45(e) (failure to obey a subpoena) and the inherent power of the courts.<sup>262</sup>

The discussion of these cases will be generally organized according to the basic elements of privilege at stake. Although many courts cite to the highly articulated Judge Wyzanski definition of attorney-client privilege<sup>263</sup> from United States v. United Shoe Mach. Corp.,<sup>264</sup> the somewhat simpler Wigmore definition will mostly suffice here:

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<sup>261</sup> See Bowne, 161 F.R.D. at 266 (noting that had the party argued when first challenged that “the law was unsettled,” substantial justification for withholding documents would have been found).

<sup>262</sup> See e.g., NASCO, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696, 702 (5<sup>th</sup> Cir. 1990) (“federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs and the shifting of fees”), *aff’d sub nom.* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

<sup>263</sup> Epstein, THE ATTORNEY-CLIENT PRIVILEGE 46 (describing the Wyzanski formulation as “much quoted”).

<sup>264</sup> 89 F.Supp. 357, 358-9 (D. Mass. 1950) (“The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed by the client and (b) not waived by the client.”).

- (1) Where legal advice of any kind is sought
- (2) from a professional legal advisor in his capacity as such,
- (3) the communications relating to that purpose
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal advisor,
- (8) except the protection be waived.<sup>265</sup>

a. Frivolous Because No Legal Advice

The requirement that legal advice be sought will undermine privilege claims when no advice whatsoever is sought from an attorney or when the type of advice sought is business, scientific, literary, public relations, or any other non-legal advice. In general, deciding whether **legal** advice is being sought is first a highly fact-dependent evaluation. In addition, there are particular factual settings about which courts do not always agree whether the nature of the service is legal or predominantly legal.<sup>266</sup> Thus, whether a claim that legal advice is involved can be viewed as frivolous may well depend on the particular factual setting and the settled or unsettled nature of the legal analysis governing this setting in this jurisdiction.<sup>267</sup> Nonetheless, courts have been willing to describe some attempts to cloak communications to lawyers that do not seek legal advice or that involve non-legal concerns as frivolous and deserving of sanctions.

In F.D.I.C. v. Hurwitz,<sup>268</sup> sanctions were awarded for, among other egregious misconduct by the FDIC, claiming privilege for purely investigative work by attorneys.<sup>269</sup> In Cobell v. Norton,<sup>270</sup> sanctions were granted for attorney-client privilege objections to questions that would have revealed at most the content of lawyer-client conversations

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<sup>265</sup> 8 J. Wigmore, EVIDENCE §2292, at 554 (McNaughton rev. ed. 1961).

<sup>266</sup> E.g., preparation of tax returns by an attorney. See Rice, ATTORNEY-CLIENT PRIVILEGE, §7:9, text at 65 & n. 94 (describing three different positions taken by the 8th Circuit, the 2nd Circuit, and N.D. Ill.). See also, id. at §7:17, at 79-80 (describing the en banc reversal of a decision that legal advice was not sought from attorneys retained by corporations to investigate allegations of illegal practices, Diversified Industries, Inc. v. Meridith, 572 F.2d 596 (8th Cir. 1977)).

<sup>267</sup> See generally, Rice, ATTORNEY-CLIENT PRIVILEGE §7:10-26, at 69-110 (summarizing legal advice case law in a variety of factual settings).

<sup>268</sup> 384 F.Supp.2d 1039 (S.D.Tex. 2005) (awarding over \$72 million in attorneys fees and costs arising out a baseless lawsuit that was abusively pursued over many years)

<sup>269</sup> Id. at 1097 (no privilege when lawyers are acting as executives, investigators or regulators).

<sup>270</sup> 213 F.R.D. 16 (D.D.C. 2003) (granting motion to compel and sanctions where privilege claimed for conversation about client's schedule and availability for a deposition)

about the client's schedule and availability for a deposition.<sup>271</sup> As the client's communications about her schedule were not provided for the purpose of seeking advice at all, they failed to meet this basic element of privilege.<sup>272</sup> Sanctions were justified in this case because, despite a nineteen-page memorandum citing four "supportive" cases, the position taken by the Justice Department was deemed not supported by case law and legally frivolous.<sup>273</sup> The court imposed the more extreme sanction of requiring the attorneys to personally pay the costs of the motion to compel because this attempt to "obstruct[ ] a legitimate inquiry into whether her co-counsel had lied to the Court . . . [was] made more repugnant by the fact that defense counsel is not only an officer of the court, but a representative of the Department of Justice."<sup>274</sup>

Advice was sought from an attorney in Amway Corp. v. The Procter & Gamble Corp.<sup>275</sup> however, since it concerned the negative public relations consequences of suing nuns, priests and ministers who had repeated allegations of a Satanism/Procter & Gamble connection, it was not legal advice.<sup>276</sup> This conclusion was further bolstered by the fact that copies of the documents seeking this advice were simultaneously circulated to numerous non-legal personnel.<sup>277</sup> The opinion states that, as a general rule,

[w]here . . . in-house counsel appears as one of many recipients of an otherwise business-related memo, the federal courts place a heavy burden on the proponent to make a clear showing that counsel is acting in a professional legal capacity and that the document reflects legal, as opposed to business, advice.<sup>278</sup>

As a result of these and other frivolous claims of privilege, as well as Procter & Gamble's failure to provide adequate affidavit support for its claims of privilege, the magistrate judge recommended a sanction in the form of an order establishing a fact suggested by the non-privileged, but improperly withheld documents.

Similarly, in American Medical Systems, Inc. v. National Union Fire Insurance

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<sup>271</sup> Id. at 31.

<sup>272</sup> Id. at 24.

<sup>273</sup> Id. at 29-31.

<sup>274</sup> Id. at 31

<sup>275</sup> 2001 WL 1818698 (W.D.Mich.).

<sup>276</sup> Id. at 7-8

<sup>277</sup> Id. at 5.

<sup>278</sup> Id. at 5.

Co. of Pittsburgh, PA,<sup>279</sup> attorneys fees were awarded as a sanction for frivolous claims of attorney-client privilege<sup>280</sup> for transmittal letters<sup>281</sup> and documents sent to both legal and non-legal personnel.<sup>282</sup> Transmittal letters are not viewed as involving legal advice because they “merely transmit documents to or from an attorney.”<sup>283</sup> When documents sent to both legal and non-legal personnel, they are not viewed as “made primarily for the purpose of seeking legal advice.”<sup>284</sup>

As these cases illustrate, lawyers who assume that the “legal advice” element of attorney-client privilege is met simply because a lawyer has sent or received a communication run the risk of making a frivolous claim. This element of privilege is particularly problematic when the attorney receiving the communication is in-house counsel because these positions involve non-legal as well as legal duties. Indeed, courts place the burden on the in-house counsel claimant of privilege to show that legal rather than non-legal advice was sought.<sup>285</sup> The difficulty of proving attorney-client privilege becomes even greater if the lawyer is merely one of many recipients of a copy of a document.<sup>286</sup>

Another problematic context for privilege arises when lawyers are present at corporate meetings engaged in non-legal corporate business, often as a voting member of

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<sup>279</sup> 1999 WL 816300 (E.D.La.).

<sup>280</sup> *Id.* at 3 (no “good faith effort to produce relevant, non-privileged documents when 236/336 documents found non-privileged).

<sup>281</sup> *Id.* at 3. See also Amway, 2001 WL 1818698, at 4 (holding that transmittal letters that “contain no facts tending to reveal the client’s confidences” are not privileged).

<sup>282</sup> 1999 WL 816300, at 1

<sup>283</sup> *Id.* at 2.

<sup>284</sup> *Id.*

<sup>285</sup> Rice, ATTORNEY-CLIENT PRIVILEGE, §7:1, at 21-22 and §7:2, 24-(citing numerous cases holding that an affirmative showing that the communication was for legal rather than non-legal advice is necessary when the attorney is in-house counsel).

<sup>286</sup> Courts are sensitive to the practice of “funneling” sensitive, but non-legal, documents to or through corporate attorneys, with copies to the non-legal personnel who really need the information and then claiming that all the copies of the document are privileged. See generally Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 324 (7th Cir. 1963) (stating in dictum that a corporation cannot “funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure”); Rice, ATTORNEY-CLIENT PRIVILEGE, §7:2, at 24. However, if one copy of a document is sent to an attorney for legal advice and other copies are sent to non-lawyers for business purposes, or one item in a document requests legal advice while others request business advice, courts may protect the copy that went to the attorney or redact the parts of the document that seek legal advice. *Id.*, §7:2, at 34.

the committee.<sup>287</sup> A careful factual evaluation of the context in which the communication was made must take seriously the possibility that non-legal advice may have been sought and recognize the extra burden created by multiple non-lawyer recipients of the communication.

Given the highly fact-dependent nature of such legal advice analyses, especially in the corporate context,<sup>288</sup> it is unlikely that the assertion of privilege in such situations will be viewed as substantively frivolous as long as affirmative factual support is provided and an argument is made regarding the legal nature of the advice. Thus, in Burton v. R.J. Reynolds,<sup>289</sup> while nearly all communications concerning scientific evidence on the health effects of smoking cigarettes were found to involve public relations or general business advice,<sup>290</sup> the court refused to sanction the claims of attorney-client privilege.<sup>291</sup> In part, this refusal was due to a few successful privilege claims. However, the court also seemed to view the novel factual context of this case, in which tobacco corporation attorneys had extensive control over scientific and public relations matters at the same time litigation over the health risks of tobacco was on-going, as making the application of the legal principles more complicated.<sup>292</sup> Nonetheless, the court did describe as “avoidable”<sup>293</sup> some of the effort both the plaintiff and court were forced to expend to resolve the privilege questions and further described tobacco counsel as not using the best professional practice<sup>294</sup> when they failed to acknowledge and argue the adverse law of the case on these privilege issues.<sup>295</sup>

More recently, the Seventh Circuit has described claims of privilege involving

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<sup>287</sup> Marten v. Yellow Freight Systems, 1998 WL 13244, at 8-9 (D. Kan. 1998) (finding that a committee that met to decide whether to terminate an employee had a predominantly business rather than legal purpose).

<sup>288</sup> Rice, ATTORNEY-CLIENT PRIVILEGE, §7:2, at 32

<sup>289</sup> 200 F.R.D. 661, 680 (D. Kan. 2001) (denying sanctions where “some (though not many)” privilege claims were upheld and where “the legal principles governing the privilege disputes in this case are somewhat unsettled in this particular context).

<sup>290</sup> Id. at 669-79 (mostly rejecting attorney-client privilege claims on the grounds that only public relations or business advice was at issue)

<sup>291</sup> Id. at 679.

<sup>292</sup> Id. at 680.

<sup>293</sup> Id. at 680.

<sup>294</sup> Id. (“it would have been a better exercise in professionalism for defendants' counsel to have acknowledged the court's prior rulings concerning the scope of the attorney-client privilege . . ., asserted their position that the court's prior rulings were wrong . . ., and then attempted to explain why the court's prior rulings would not apply”).

<sup>295</sup> Id.

“distinguishing in-house counsels' legal advice from their business advice”<sup>296</sup> as “an area of privilege law that is generally recognized to be ‘especially difficult.’ ”<sup>297</sup> As a result, the court found that such claim of privilege were made in good faith where an appropriate privilege log had been filed, and counsel exhibited good faith by reducing the number of documents on the log from 750 to 465 in response to objections.<sup>298</sup> However, making “blanket” privilege claims,<sup>299</sup> or failing to provide a privilege log or other support<sup>300</sup> in these contexts is particularly likely to trigger sanctions. Thus, in an earlier tobacco case in Minnesota,<sup>301</sup> sanctions were awarded for claims of privilege<sup>302</sup> involving the same or similar documents,<sup>303</sup> despite the fact that a majority of all the withheld documents were found privileged.<sup>304</sup> Although this case additionally involved application of the crime-fraud exception to defeat the privilege, many documents were found not to be privileged “in the first instance”<sup>305</sup> because they “contained nothing of a privileged nature.”<sup>306</sup> It can be surmised from the general description of documents at issue here,<sup>307</sup> that many of the documents were not privileged because they involved non-legal advice. Sanctions

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<sup>296</sup> American Nat. Bank and Trust Co. of Chicago v. Equitable Life Assurance Society of the United States, 406 F.3d 867, 878 (7<sup>th</sup> Cir. 2005) (quoting Rice, ATTORNEY-CLIENT PRIVILEGE § 5:7).

<sup>297</sup> *Id.* (holding that claims of privilege made in privilege logs that had been voluntarily amended twice in response to objections were not made in bad faith and finding an abuse of discretion in magistrate’s refusal to review a large number of documents *in camera* and ordering as a sanction release of all documents upon finding a few unprivileged documents in a very limited and arbitrary *in camera* review).

<sup>298</sup> *Id.* (holding that claims of privilege made in privilege logs that had been voluntarily amended twice in response to objections were not made in bad faith and finding an abuse of discretion in magistrate’s refusal to review a large number of documents *in camera* and ordering as a sanction release of all documents upon finding a few unprivileged documents in a very limited and arbitrary *in camera* review).

<sup>299</sup> Rice, ATTORNEY-CLIENT PRIVILEGE, §7:1., at 21 and §7:5, at 47.

<sup>300</sup> See Amway, 2001 WL 1818698, at 10.

<sup>301</sup> Minnesota v. Philip Morris Inc., 1998 WL 257214 (Minn. Dist. Ct 1998) (magistrate opinion affirming order of Special Master appointed to resolve discovery disputes in suit by the State of Minnesota against a number of tobacco companies)

<sup>302</sup> *Id.* at 7 (ordering the disclosure of more than 30,000 documents in certain categories without document by document evaluation when a spot check revealed abuse of the categorization process by the inclusion of obviously unprivileged material).

<sup>303</sup> Three categories of documents ordered disclosed in the Minnesota case were described as relating to or referencing scientific research, “special Projects,” and public statements about smoking and health). *Id.* at 5 -6 (requiring disclosure of Category 3, 4(b) and 5 documents). The documents found not privileged in Burton included position papers, prepared Congressional testimony, and position resources for public statements (*Id.* at 669 (documents 58, 86, 88, 93, 94 and 98), purely scientific documents, (*Id.* at 670 -71 (documents 52 , 51, 62, 68, 70,75, 85)), and “Special Products” documents (*Id.* at 674 (document 107)).

<sup>304</sup> *Id.* at 5-6 (upholding privilege claims for as many as 200,000 of the remaining documents).

<sup>305</sup> *Id.* at 6.

<sup>306</sup> *Id.* at 7.

<sup>307</sup> *Id.* at 5-6 (spot checks of documents in the categories of “Science,” “Special Projects.” and “Public Statements” revealed unprivileged documents).



were awarded<sup>308</sup> because these frivolous claims of privilege revealed “a pattern of abuse”<sup>309</sup> arising from either an attempt to deceive the court or a failure to engage in the required level of legal and factual analysis of each document claimed to be privileged.<sup>310</sup>

#### b. Frivolous Because No Lawyer Qua Lawyer

The next element of attorney-client privilege requires that the legal advice be sought from a lawyer in their capacity as a lawyer. A claim of privilege for a communication to a person who is clearly not an attorney or an agent to an attorney will be viewed as frivolous. Thus, in Amway Corp. v. The Procter & Gamble Corp.,<sup>311</sup> the court described as frivolous a claim of privilege for a document in which neither the author nor any of the recipients was an attorney.<sup>312</sup> In Chinnici v. Central Dupage Hospital Assoc.,<sup>313</sup> the court described counsel as having “ignored the law of privilege”<sup>314</sup> requiring both an attorney and a client when the lawyer redacted a section of a memo from a non-lawyer condominium association president to other association members.<sup>315</sup> In Heath v. F/V ZOLOTOL,<sup>316</sup> sanctions in the form of a \$25,000 personal fine against the lawyers and a finding of liability against the client were imposed when the lawyers failed to reveal the existence of routine witness statements made without any attorney involvement and then subsequently made frivolous arguments that they were privileged.<sup>317</sup>

Claims of privileges involving communications to both a lawyer and non-lawyer are less likely to be viewed as frivolous when the possibility exists that the non-lawyer the communication was made to was an agent of the attorney. The so-called agent must

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<sup>308</sup> Id. at 7.

<sup>309</sup> Id.

<sup>310</sup> See id. at 7 (noting that despite the fact that the Court had put counsel on notice that documents listed on the privilege log had to have been personally reviewed by counsel or those under counsel’s supervision, a spot check of listed documents revealed many documents “clearly and unarguably not entitled to protections of privilege”).

<sup>311</sup> 2001 WL 1818698 (W.D.Mich 2001) (granting sanctions for many different kinds of frivolous claims of privilege and failure to provide proper affidavit support for its privilege claims in general).

<sup>312</sup> Id. at 8.

<sup>313</sup> 136 F.R.D. 464 (1991).

<sup>314</sup> Id. at 466.

<sup>315</sup> Id. (sanctions were not granted because the moving party failed to request a discovery conference to resolve this very simple matter).

<sup>316</sup> 221 F.R.D. 545 (W.D. Wash. 2004).

be needed by the attorney in order to render legal advice<sup>318</sup> and must in fact be under the direction and supervision of the attorney at the time of the communications.<sup>319</sup> These are primarily factual matters, and will require lawyers to engage in the necessary level of factual investigation to ensure that the appropriate foundation facts are present and asserted in a privilege log or support affidavits.

However, the issue of whether particular kinds of assistance are really required to obtain legal advice can become a matter of law. One issue that frequently arises in this context is whether communications with an accountant employed by the client's lawyer are privileged when they were made for the purpose of having the accountant prepare the client's tax return. As most courts do not view the preparation of a tax return by an attorney as involving legal advice, the same work performed by the accountant is viewed as lacking a relationship to legal advice.<sup>320</sup> The status of psychiatric experts hired by the defense in criminal cases is also an issue that will be resolved as a matter of controlling law, which varies from jurisdiction to jurisdiction.<sup>321</sup> Another vexing issue concerns whether communications to patent agents are privileged either as communications to attorneys<sup>322</sup> or as communications to agents of attorneys.<sup>323</sup>

While the lack of national consensus in these matters might suggest the law is indeterminate on this issue, there is settled law within jurisdictions. Lawyers wishing to avoid substantively frivolous claims of privilege for communications to agents of attorneys must do the legal research required to determine whether their jurisdiction has

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<sup>317</sup> Id. at 550-51, 553 (statement given to persons not represented by attorney, no attorney was present and no attorney requested the statements).

<sup>318</sup> Rice, ATTORNEY-CLIENT PRIVILEGE, §3:4, at 26-27.

<sup>319</sup> Id. at §3:5, 30-32.

<sup>320</sup> Id. at §3:6, at 36.

<sup>321</sup> See e.g., Granviel v. Estelle, 655 F.2d 673, 682-3 (finding that Texas law, along with New York law, would not find communications to the psychiatrist privileged, while Michigan, California, New Jersey, and the Third Circuit would extend the privilege to these communications). See also, Rice, ATTORNEY-CLIENT PRIVILEGE, §3:3, at 19-20, n. 33 (collecting cases applying and denying attorney-client privilege to communications to psychiatrists assisting defense counsel).

<sup>322</sup> See generally Note, "Attorney-Client Privilege and the Patent Prosecution Process in the Post-Spalding World," 81 Wash. U. L. Q. 175, 190 (2003) (discussing the continuing "lack of uniformity" in the treatment of patent prosecution documents among the federal circuits)

<sup>323</sup> Compare Gorman v. Polar Electro, Inc., 137 F.Supp. 2d 223, 227 (E.D. N.Y. 2001)(holding that the 2nd Cir. courts generally allow privilege to cover communications with patent agents when the agents are "acting under the authority and control of counsel", but noting that federal courts are not in agreement on this issue)(quoting Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D. N.Y. 1988) with Agfa Corp. v. Creo Products, 2002 WL 1787534, at 2 (D.Mass).

addressed the privilege issue with regard to the kind of agent at issue in their case and, if they want to challenge settled law, must both acknowledge negative controlling precedents and make a colorable argument as to why a different approach should be adopted.

c. Frivolous Because Not Communications Relating to the Purpose of Seeking Legal Advice

There are two distinctly different types of privilege claims that are substantively frivolous due to failure to meet this element. The first involves exchanges that are not viewed as communications at all, such as objects, observations, underlying information and pre-existing documents. The second group concerns specified kinds of information that are not viewed to be for the purpose of seeking legal advice as a matter of law even though communicated to lawyers from whom legal advice has otherwise been sought.

i. Non-Communications

As we have already seen in the discussion of In Re Ryder above,<sup>324</sup> physical objects that do not contain a message to the attorney inscribed upon them are not communications.<sup>325</sup> The consequences to lawyers who risk their licenses and freedom on frivolous claims of privilege for such items can be dire.<sup>326</sup> A claim of privilege regarding an object is most likely to be deemed frivolous when the object is evidence of a crime and is made to defend a lawyer's possession and failure to turn over the object to police, as was the case in In Re Ryder.<sup>327</sup> Attorneys who take and keep possession of such objects believing that they are acting within the law are in fact courting criminal

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<sup>324</sup> Supra n.175.

<sup>325</sup> See supra, text at n. 186. See also In re January 1976 Grand Jury, 534 F.2d 719, 728 (7th Cir. 1976) (stating that money itself is not privileged); State v. Dillon, 471 P.2d 553, 565 (Idaho 1970), cert. denied, 401 U.S. 942 (1971) (attorney-client privilege applies only to communicative and not 'real' evidence"); People v. Investigation Into a Certain Weapon, 448 N.Y.S. 2d 950, 954 (ordering attorney to produce ammunition and ammunition clip, but distinguishing the tangible objects from attorney testimony about how possession of objects was obtained); Commonwealth v. Stenhach, 514 A.2d 114, 119 ("[w]e join the overwhelming majority of states which hold that physical evidence of crime in the possession of a criminal defense attorney is not subject to a privilege but must be delivered to the prosecution").

<sup>326</sup> See generally, In re January 1976 Grand Jury (Genson), 534 F.2d 719, 730 (affirming the confinement for contempt of an attorney who refused on grounds of privilege to turn over stolen money paid to the lawyer by a client hours after robbing a bank).

<sup>327</sup> See id. at 727-29 (7<sup>th</sup> Cir. 1976).

prosecution.<sup>328</sup>

A more complicated legal issue arises when an attorney is served with a subpoena duces tecum requiring them to produce an object, often identified as relating to or received from a specified client. While the object itself cannot be claimed to be privileged, the production of the object by the attorney in response to the detailed subpoena request might or might not be viewed as implicitly disclosing an intentional communication to the lawyer, i.e., the fact that the client had possession of the object prior to transferring it to the lawyer.<sup>329</sup> If production is viewed as testimonial, one solution is to require the attorney to simply produce the item to the district attorney, thereby avoiding the more testimonial production to the grand jury.<sup>330</sup> If not, the lawyer may suffer contempt sanctions.<sup>331</sup> The best way to avoid this risk is to understand both that the object is not privileged and cannot be kept for any length of time by the lawyer.<sup>332</sup>

These complications, while worth being aware of because they threaten lawyers who fail to understand them with criminal prosecution or contempt, are not particularly

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<sup>328</sup> Accord, U.S. v. Cintolo, 818 F.2d 980, 1001(1st Cir. 1987)(affirming attorney’s conviction for obstruction of justice based in part on attorney’s suggestion that incriminatory documents be placed in his briefcase to protect them from a search warrant); Quinones v. State, 766 So.2d 1165, 1171 (Fla. App. 2d 2000) (suggesting but not deciding that a defense attorney who kept a knife possibly used in client’s stabbing attach for 18 months violated the evidence tampering statute). But see, Stenhach, 514 A.2d at 125-26 (vacating criminal sentences for attorneys who failed to turn over rifle stock on grounds that statutes prohibiting hindering prosecution and tampering with evidence were constitutionally overbroad as applied to lawyers because they fail to distinguish between privileged evidence such as written communications to lawyers and non-privileged evidence and because there was no settled law clarifying what defense conduct was legal and what was not).

<sup>329</sup> Compare State of Washington re Sowers v. Olwell, 394 P.2d 681, 831-34(Wash. 1964) (preserving any privilege relating to knife by requiring it to be turned over to the District Attorney rather than produced to the Grand Jury in response to the subpoena and precluding any attempt to reveal the source of the knife to the jury) and People v. Investigation into a Certain Weapon, 448 N.Y.S. 2d 950, 953 (S.Ct. N.Y. 1982) (ordering lawyer to deliver ammunition clip and ammunition to District Attorney rather than produce items in response to Grand Jury subpoena because delivery of items by client to attorney involves a privileged communication) with In re January 1976 Grand Jury, 534 F.2d at 731 (Tone, concurring but actually writing the majority opinion, see 534 F.2d at 721) (affirming order of confinement for contempt for lawyer’s failure to produce items as required by Grand Jury subpoena because neither object nor act of transferring money to lawyer is a communication).

<sup>330</sup> See supra.

<sup>331</sup> Id.

<sup>332</sup> Keeping the items can be a violation of criminal law prohibiting concealment of evidence and the ethical rule also prohibiting unlawful concealment of “material having potential evidentiary value,” M.R. 3.4(a). See also ABA Standards Relating to the Administration of Criminal Justice 4-4.6 (setting out the circumstances under which defense counsel should and should not deliver an object received from a client to law enforcement authorities).

relevant to the issue of frivolous claims of privilege in the civil litigation context. To begin with, an entirely different standard of frivolousness is applied to criminal defense.<sup>333</sup> More importantly, information about a client's original possession of an object is less likely to have the kind of evidentiary value it often has when the object is a gun or stolen money in a criminal case. This means that possession information is less likely to be viewed as an intentional communication arising out of the transfer. Finally, such information can be easily discovered from clients, due to the lack of a fifth amendment privilege against incrimination leading merely to civil liability and the availability of liberal civil discovery, thus usually making it quite unnecessary to seek this kind of information from attorneys.

Two other kinds of non-communications are attorney observations of clients and the underlying information conveyed in the communication. Attorney observations of client appearance, coherence, etc., are not viewed as communications<sup>334</sup> unless the observation was made as the result of a communicative act by the client.<sup>335</sup> Similarly, while the fact that certain information or facts were communicated to an attorney is protected from disclosure by the attorney or client, the underlying information minus the fact of communication to the attorney, can be compelled from the client.<sup>336</sup>

Finally, documents created independent of the attorney-client relationship for purposes other than communicating information to the attorney are not themselves communications from the client to the attorney and are not attorney-client privileged.<sup>337</sup> Even though such "pre-existing documents" can subsequently be used by clients to communicate the information contained therein to lawyers, it is the showing of the

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<sup>333</sup> See M.R. 3.1 ("A lawyer for the defendant in a criminal proceeding which could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established").

<sup>334</sup> See e.g., People v. Williams, 454 N.E. 2d 220, 240 (Ill. 1983) (finding lawyer observation of client's appearance and demeanor during courtroom conference unprivileged).

<sup>335</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES, §2:11, at 81. See also, Rubin v. State of Maryland, 602 A.2d 677, 685, n. 4 (Ct. App. Mary. 1992) (equating demonstrative communication with verbal communication for purposes of attorney-client privilege).

<sup>336</sup> See Rice, ATTORNEY-CLIENT PRIVILEGE, §5:1, 9-11; In Re Grand Jury Proceedings v. U.S., 896 F.2d 1267, 1270 (11<sup>th</sup> Cir. 1990) (distinguishing non-privileged underlying facts from the privileged communication of those facts).

<sup>337</sup> Fisher v. United States, 425 U.S. 391, 404 (1976) (pre-existing documents obtainable from client are obtainable from attorney); In Re Original Grand Jury Investigation, 733 N.E.2d 1135, 139-40 (Ohio 2000) (holding that a client's letter to his brother was not attorney-client privileged, but vacating contempt and monetary sanctions for the attorney who refused to turn it over to a grand jury on the ground that there was a good faith argument that ethical obligations prohibited the disclosure).

document to the lawyer that is the communication rather than the document itself.<sup>338</sup> Especially in business contexts, careful attention to the facts surrounding the creation of a document is essential to determine whether the client can meet the burden of proof by showing that it was initially created for the purpose of later transmitting to the lawyer rather than for another business purpose.<sup>339</sup>

There is one exception to this rule; pre-existing documents protected by the Fifth Amendment while in the possession of the client but unprotected by the Fifth amendment in the possession of the client's lawyer are considered privileged.<sup>340</sup> However, this is precisely the kind of narrow exception that requires careful attention to both the facts of the case and the legal doctrine in order for a good faith argument to be made regarding the privileged status of pre-existing documents.<sup>341</sup>

#### ii. Communications not for the Purpose of Legal Advice

The fact that there is an attorney-client relationship formed for the purpose of seeking legal advice does not mean that all communications made in the context of this relationship are privileged. Each individual communication must be shown to be for the purpose of seeking legal advice. There are three kinds of information routinely communicated to attorneys by clients that are frequently not viewed as communicated for the purpose of seeking legal advice: identity of client, location of client, and fee or billing information.

#### w. Identity of Client

The identity of the client, while certainly communicated by the client to the attorney in the course of seeking legal advice, is in most cases not viewed as protected by attorney-client privilege.<sup>342</sup> This result has been justified on many different grounds: no

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<sup>338</sup> In re Search Warrant B-21778 (Gartley), 521 A.2d 422, 428 (Pa. 1987).

<sup>339</sup> See Robertson v. Commonwealth of Virginia, 25 S.E.2d 352, 360 (Va. 1943) (affirming contempt against an attorney, including a fine and striking the defenses of the client, where the attorney had refused to produce an accident report which the court found had not been shown to have been made for the exclusive purpose of showing the lawyer).

<sup>340</sup> Fisher, 425 U.S. at 404-405.

<sup>341</sup> Securities and Exchange Commission v. Kimmes, 1996 WL 734892, at 12 (S.D. N.Y.) (refusing to award sanctions for possibly frivolous claims of privilege regarding pre-existing documents that had no 5<sup>th</sup> amendment protection in the client's hands because the requesting party had also engaged in frivolous and meritless arguments).

<sup>342</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES, §2:11, at 87.

legal advice is sought concerning the client's identity;<sup>343</sup> the identity of the client is usually not intended to remain confidential and is often intended to be revealed in the course of providing representation of the client in dealings with non-clients,<sup>344</sup> or the lawyer was hired by the client for the purpose of furthering criminal activity.<sup>345</sup>

Yet these analysis of these situations is complicated by the fact that client identity will be viewed as privileged if "disclosure would reveal a privileged confidential attorney-client communication, or where disclosure would incriminate the client, but perhaps only if it provides the last link in a chain of evidence against him, and perhaps only if it does so in the very criminal activity for which legal advice was sought."<sup>346</sup> In addition, there is considerable variation from jurisdiction to jurisdiction as to the validity or applicability of this 'last link' or 'legal advice' exception.<sup>347</sup> Finally, the actual application of the exception is highly fact-dependent and cogent arguments can often be made on both sides.<sup>348</sup> As a result, it is difficult to provide much general guidance as to when a claim of privilege for client identity might be viewed as frivolous.

However, as the exception continues to be the subject of considerable litigation,<sup>349</sup> it seems likely that the application of the exception within any single jurisdiction will become regularized. This then creates the possibility of determining that a particular

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<sup>343</sup> See, e.g. People ex rel. Vogelstein v. Warden of County, 270 N.Y.S. 362, 367-68 (S. Ct. 1934) (" 'The client does not consult the solicitor with a view to obtaining his professional advice as to whether he shall be his solicitor or not.' ") (quoting Bursill v. Tanner, L. R. 16 Q. B. D. 1, 4.).

<sup>344</sup> See e.g., U.S. v. Flores, 628 F.2d 521, 526 (9th Cir. 1980) (attorney hired to file administrative claim by named client to recover guns seized in search cannot claim privilege for name of source of information for claim)

<sup>345</sup> Grand Jury Proceedings in the Matter of Pavlick, 680 F.2d 1026, 1028-29 (5th Cir. 1982) (refusing to find the identity of a client privileged when client paid fees for persons involved in drug smuggling who had been induced to smuggle in part by a promise that they would be "taken care of" if arrested).

<sup>346</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES, §2:11, at 90-94 (footnotes removed) (collecting a large number of cases showing the different ways this exception has been formulated, and the considerable differences in results reached from case to case and circuit to circuit). See also Tillotson v. Boughner, 350 F.2d 663, 666 (7<sup>th</sup> Cir. 1965) (reversing contempt for an attorney refusing to disclose the identity of a client who had independently determined that he had a tax liability and retained the attorney in question to deliver a cashier's check for the amount to the IRS).

<sup>347</sup> See Rice, ATTORNEY-CLIENT PRIVILEGE §6:15, text at notes 24 –26 (describing the 10<sup>th</sup> circuit as questioning this exception and the 2<sup>nd</sup> Cir as first reformulating the exception and then consistently refusing to find it applicable).

<sup>348</sup> See e.g., Pavlick, 680 F.2d at 1026 (district court and court of appeals found identity of fee-payer privileged, reversed en banc with three out of seven judges dissenting).

<sup>349</sup> See Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES, §2:11, 87-99 (summarizing cases on client identity).

claim to come within the exception fails to make even a colorable case.<sup>350</sup> The legal consequence of making such a frivolous claim is likely to be contempt for the attorney raising this objection, as attempts to get testimony from attorneys about undisclosed clients are most often made in the context of grand jury investigations<sup>351</sup> and criminal trials of third parties.<sup>352</sup>

#### x. Location or Address of Client

In ordinary cases, clients' communication of their address is clearly neither made for the purpose of obtaining legal advice nor meant to be confidential.<sup>353</sup> However, in cases where clients do not want to be found, address information communicated to an attorney is meant to be confidential. In these cases, the factual context of the communication becomes paramount in determining whether privilege will attach to the location information. Attempts to compel lawyers to disclose the confidentially communicated location or address of clients most often arise in the context of custody cases in which one parent has disappeared with minor children,<sup>354</sup> criminal cases in which the defendant cannot be found or has skipped bail,<sup>355</sup> and civil cases in which the location of a client is needed to enforce a monetary judgment.<sup>356</sup>

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<sup>350</sup> Liew v. Breen, 640 F.2d 1046, 1050 (9<sup>th</sup> Cir. 1981) (finding attorney's fee sanction arising from privilege claim for client identity was not abuse of discretion because legal issue was not sufficiently doubtful to show good faith dispute).

<sup>351</sup> E.g., Ex Parte Enzor, 117 So. 2d 361, 362 & 365-66 (Ala. 1960) (reversing an order of confinement for an attorney who refused to disclose a client's identity to a grand jury because disclosure would reveal the client's guilt on the very matter for which the lawyer had been employed to advise).

<sup>352</sup> E.g. Flores, 628 F.3d at 527 (affirming order of confinement for civil contempt until attorney testified, matter expired, or 18 months had been served); Hughes v. Meade, 453 S.W. 2d 538, (Ky. Ct. Ap. 1970) (civil contempt order for refusing to reveal name of client justified because attorney hired to help return stolen property to police was not providing legal advice at all).

<sup>353</sup> Accord, Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES 84 –87 (describing client address information as non-privileged because related to general features of attorney-client relationship rather than communications for specific advice); Viveros v. Nationwide Janitorial Ass'n, Inc., 200 F.R.D. 681, 684 (N.D.Ga.2000) (imposing sanctions of \$50 and attorney fees where addresses and phone numbers were withheld on ground of privilege and there was no attempt to show confidential legal advice was sought regarding the address).

<sup>354</sup> See e.g., Bersani v. Bersani, 565 A.2d 1368 (Ct. Super. Ct. 1989) (wife disappeared with children); Dike v. Dike, 448 P.2d 490 (Wash. 1968) (wife disappeared with child).

<sup>355</sup> See e.g., Commonwealth v. Maguigan, 511 A.2d 1327 (Pa. 1986) (attorney refused to reveal location of client who skipped bail in a rape case).

<sup>356</sup> See Sullivan v. Carrigan, 10 F.R.D. Serv. 431 (E.D Pa. 1988) (attorney in contempt for refusing to reveal the telephone number of client with an outstanding default judgment).



In the custody cases, the location of the client who has disappeared with minor children has often been found to fall outside of attorney-client privilege, with some important exceptions. When the failure to disclose location assists the client in contemptuous violation of a court order not to leave the jurisdiction and frustrates court rulings based on the best interests of the child, any legal purpose for the communication is trumped by the use of the attorney to assist in the criminal/fraudulent conduct of the conduct, thus bringing the crime-fraud exception to attorney-client privilege into effect.<sup>357</sup> At the same time, however, courts have upheld claims that client location information was privileged where harm to the parent or child was feared if the location was revealed,<sup>358</sup> or when it was not clear that the disappearing parent had actually violated a valid court order.<sup>359</sup>

Several decades ago, when this was a novel issue of law, judgments of contempt against lawyers refusing to disclose such information were vacated even as courts clearly held that the information had to be disclosed.<sup>360</sup> In jurisdictions where these issues have been settled for some time, courts may now be willing to find lawyers in contempt for refusing to disclose the location of disappearing parents in custody cases involving clear violation of court orders and not involving fear of harm because such claims will be viewed as substantively frivolous.

#### y. Fee or Billing Information

Attorney-client privilege protects only communications made for the purpose of getting legal advice; it does not protect “all occurrences and conversations which have

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<sup>357</sup> See Bersani, 565 A.2d at 1371-2 (wife in contempt of order not to leave country); Jacqueline F. v. Segal, 391 N.E. 2d 967, 972 (N.Y. Ct. App. 1979) (guardian moved to Puerto Rico during appeal of custody order); JaFarain-Kerman v. JaFarain-Kerman, 424 S.W.2d 333, 340 (Mo. App. 1967) (finding no privilege when husband left country with child in violation of temporary custody order because this obstruction of justice triggered the crime-fraud exception).

<sup>358</sup> See e.g., Taylor v. Taylor, 359 N.E. 2d 820, 821 (Ill. App. 1977) (wife requested confidentiality of address due to her fear for her safety and that of her child); Waldman v. Waldman, 358 N.E.2d 521, 522 (Ohio 1976) (suggesting that confidentiality of client addresses may be generally necessary in domestic relations matters to protect client safety).

<sup>359</sup> See e.g., Brennan v. Brennan, 422 A.2d 510, 517 (Pa. Super. Ct. 1980) (finding no crime or fraud because father had not been served with notice of custody hearing or custody order).

<sup>360</sup> See e.g., Dike, 448 P.2d at 499 (relieving the attorney of the contempt citation because the “application of the privilege [wa]s rather obscure”).

any bearing, direct or indirect, upon the relationship of the attorney with his client.”<sup>361</sup> Such occurrences and conversations either do not involve communications from clients, or if they do, are not viewed as confidential communications for the purpose of seeking legal advice.<sup>362</sup> Thus, information ordinarily found in bills, such as time expended,<sup>363</sup> the fact of meetings or calls,<sup>364</sup> the general nature of work done,<sup>365</sup> fee arrangements,<sup>366</sup> including the fact of payment and who paid<sup>367</sup>, and expenses,<sup>368</sup> is not viewed as privileged. However, if revealing this information has the effect of revealing a privileged attorney-client communication, such fee or billing information will be viewed as privileged as well.<sup>369</sup> Thus, where the client’s motive for seeking legal services, the litigation strategy or the specifics of the legal services sought could be deduced from particularly detailed bills, they have been treated as privileged.<sup>370</sup> Some courts have viewed billing information as privileged where the information would incriminate the client,<sup>371</sup> but, more recently, this has been limited to cases where disclosure of an actual confidential communication would result.<sup>372</sup>

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<sup>361</sup> United States v. Goldfarb, 328 F.2d 280, 281-82 (6th Cir.), cert. denied, 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

<sup>362</sup> In Re Walsh, 623 F.2d 489, 494 (7<sup>th</sup> Cir. 1980).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES 85 (2003).

<sup>366</sup> Osterhoudt v. U.S., 722 F.2d 591, 592 (9<sup>th</sup> Cir. 1983) (“generally ‘fee arrangements with . . . clients are not confidential communications protected by attorney-client privilege’”).

<sup>367</sup> In Re Walsh, 623 F.2d at 494.

<sup>368</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES 89.

<sup>369</sup> *Id.* at 92.

<sup>370</sup> See Clarke v. American Commerce Nat. Bank, 974 F.2d 127, 129 (9<sup>th</sup> Cir. 1992) (noting exception, but finding no privilege in this case where “statements contain information on the identity of the client, the case name for which payment was made, the amount of the fee, and the general nature of the services performed”).

<sup>371</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES at 92-94 (although this has been limited by some courts to situations where the information “provides the last link in a chain of evidence” against the client).

<sup>372</sup> *Id.* at 97-99. See e.g., Seventh Elect Church in Israel v. Rogers, 688 P.2d 506, 533 (Wa. 1984) (holding that a potentially incriminating disclosure re fees was not privileged if it did not “convey the substance of confidential communications”); Osterhoudt, 722 F.2d at 592-4 (noting that the idea that mere incrimination would make the fee information privileged, rather than the privileged nature of the information revealed, was based on a misreading of case law); In Re Grand Jury Proceedings v. U.S., 896 F.2d at 1274-5 (explaining that the implicit communication of the fact of having sufficient money to pay the fee which accompanies payment or a promise to pay a fee is not confidential and need not be protected to encourage effective legal representation).

These special circumstances are not likely to be present in cases not involving either unusually detailed bills,<sup>373</sup> criminal wrongdoing,<sup>374</sup> or the payment of a fee by the client or a third party in a circumstance suggestive of wrongdoing by the client.<sup>375</sup> Furthermore, the presence of these special circumstances only suggests the possibility that a confidential communication may be revealed with fee information, it does not guarantee it.<sup>376</sup> Careful attention to the presence of special circumstances, legal research and an analysis of the basic elements of privilege sufficient to provide a good faith argument that fee or billing records fall within these possible exceptions will be necessary to prevent claims of attorney-client privilege for such information from being found sanctionable.<sup>377</sup>

#### d. Frivolous Because Not Made in Confidence

A communication from client to attorney must be both intended to be confidential and made in a manner that reasonably could achieve confidentiality in order to satisfy the confidentiality element.<sup>378</sup> Information is not intended to be confidential if it is intended

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<sup>373</sup> See e.g., Real v. Continental Group, Inc., 116 F.R.D. 211, 214 (N.D. Cal. 1986) (noting the unusually detailed nature of the billing statements sought to be discovered); Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4<sup>th</sup> Cir. 1999) (finding privilege where the bills showed the federal statutes researched); Lane v. Sharp Packaging Systems, Inc., 640 N.W.2d 788, 804-5 (Wis. 2002) (finding billing records that contained detailed descriptions of the legal service privileged).

<sup>374</sup> See generally, *id.* at 90-97, notes 22-24 (collecting and discussing the mostly criminal cases in which claims of privilege were upheld for information of this kind); In Re Grand Jury Subpoena (Zerendow), 925 F.Supp. 849, 857 (D.Ma 1995) (noting that the payment information, determined to be non-privileged, was sought regarding the the wrongdoing of others rather than the client).

<sup>375</sup> See generally, *id.* at 92-97 & note 24 (discussing numerous cases and circumstances in which client incrimination did or did not make fee information privileged).

<sup>376</sup> In Re Grand Jury Subpoena (Zerendow), 925 F.Supp. at 855 (noting that fee information is privileged only in “rare situations”).

<sup>377</sup> See e.g., R.A. Hanson Co., Inc. v. Magnuson, 903 P.2d 496, 502 & 505 (Wash.App. Div. 3 1995) (affirming a contempt order against an attorney who refused on grounds of privilege to disclose information about the attorney’s payment on behalf of the client of legal fees for a third party in another case); Moudy v. Superior Court, 964 P.2d 469, 472 (Alaska App.1998) (affirming a finding of contempt for an attorney who refused on grounds of attorney-client privilege to reveal whether a client had been told of a trial date and whether the client had had contact with other Public Defender staff); State v. Keenan, 771 P.2d 244, 248 (Or. 1989) (upholding a contempt finding for refusal to disclose dates of attorney-client contacts where the substance of the communications would not thereby be revealed). But see Seventh Elect Church, 688 P.2d at 536 (vacating a finding of contempt against lawyers who refused “in good faith” to disclose unprivileged legal fee information in a case that appeared to make new law in Washington as no Washington precedents were cited in the court’s attorney-client privilege analysis).

<sup>378</sup> Rice, ATTORNEY-CLIENT PRIVILEGE § 6:1, 7-9 (confidentiality requires both subjective and objective intent).

to be transmitted by the attorney to a third party.<sup>379</sup> Thus information provided to an attorney for the purpose of preparing a tax return, for incorporation in a letter to a third party, a prospectus, or a filing, or for any other form of disclosure will not be viewed as a confidential communication.<sup>380</sup> Communications made in public places with no attempt to avoid being overheard<sup>381</sup> or deliberately made in the presence of third parties who cannot be shown to be a client spouse,<sup>382</sup> the agent of the client or the attorney,<sup>383</sup> or otherwise necessary to provision of legal services<sup>384</sup> will not be viewed made in confidence. Of course, determinations of what the client intended re transmittal to others, who is an agent of a client or attorney, who is necessary to provision of legal services, or what constitutes reasonable attempts to ensure or maintain confidentiality of communications will be highly fact-dependent. As long as sufficient facts are present to allow a good faith argument on these points, a claim of privilege will not be frivolous or unethical.

Although clients with a common interest, such as joint clients, who communicate with their attorney in each other's presence technically do so in the presence of a third party, such communications are nonetheless viewed as made in confidence as to real third parties.<sup>385</sup> The presence of a common interest is crucial to the finding of privilege in these cases, and can arise in a number of factual situations, including patent cases, joint ventures, and common criminal or civil defense.<sup>386</sup> A claim of privilege under the common interest doctrine will not be frivolous as long as a good faith basis in fact and law exists for claiming a common interest. However, such communications are not viewed as

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<sup>379</sup> Epstein, THE ATTORNEY-CLIENT PRIVILEGE 178.

<sup>380</sup> Id. at 172-76 & 178-82 (summarizing cases where no intention of confidentiality was found due to expectation of transmittal to third parties). But see Rice, ATTORNEY-CLIENT PRIVILEGE §6:8, 54 (suggesting that the conclusion of no intent for confidentiality should not be inferred from intent to have the lawyer transmit the information subsequently, as legal services may counsel against the transmission).

<sup>381</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES §2:16, 107-8 (reasonable attempts to avoid ordinary eavesdropping or observation must be made).

<sup>382</sup> Epstein, THE ATTORNEY-CLIENT PRIVILEGE 168 (noting that the presence of other relatives or non-marital partners will destroy confidentiality). But see Schreiber v. Kellogg, 1992 WL 309632 at 1 (E.D. Pa. 1992) (presence of father of client at meeting with client and his attorney does not defeat attorney-client privilege).

<sup>383</sup> Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES at §2:16, 111.

<sup>384</sup> Id. at 115-16. See also Tausz c. Clarion-Goldfield Community School District, 596 N.W.2d 125, (Ia. 1997) (holding that the presence of an accountant was essential to rendering a legal opinion).

<sup>385</sup> Epstein, THE ATTORNEY-CLIENT PRIVILEGE 196.

<sup>386</sup> Id. at 196-213. See also Rothstein & Crump, FEDERAL TESTIMONIAL PRIVILEGES §2:17, 117-21.

made in confidence vis a vis the joint clients themselves.<sup>387</sup> As a result, attorney-client privilege cannot be asserted by one joint client to prevent disclosure of communications to the joint attorney.<sup>388</sup>

#### e. Frivolous Because Not Made By the Client

Attorney-client privilege will only attach to communications made by the client or an agent of the client.<sup>389</sup> It is the claimant's burden to show that there is an attorney-client relationship.<sup>390</sup> Various legal tests are used to assess whether an agent communication is involved, depending on whether the client is an individual or an entity with many internal corporate agents,<sup>391</sup> and whether the agent is an independent contractor, assistant or consultant.<sup>392</sup> These tests are highly-fact dependent, thus it may be that many claims of agency are at least colorable and therefore non-frivolous. However, the absence of facts making the agency relationship colorable will make a claim of privilege arising from a third party communication frivolous and unethical.<sup>393</sup>

#### f. Frivolous Because Privilege Has Been Waived

The party claiming privilege also bears the burden of showing that the privilege has not been waived.<sup>394</sup> Thus, a claim of privilege may be substantively frivolous if made for communications that would be privileged but for a clearly present subsequent waiver. However, while some waivers involve fairly simple legal rules and factual

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<sup>387</sup> Epstein, THE ATTORNEY-CLIENT PRIVILEGE 213.

<sup>388</sup> See Athridge, 184 F.R.D. at 204 (finding communication from insurance company to insured's lawyer not privileged against insured where lawyer is viewed as representing common interest of insured and insurance company).

<sup>389</sup> Rice, ATTORNEY-CLIENT PRIVILEGE at §4:1, 9-10.

<sup>390</sup> Rice, ATTORNEY-CLIENT PRIVILEGE at §4:1, 8-9 (noting that prospective clients are clients for this purpose and that the burden is on the claimant to show the relationship).

<sup>391</sup> E.g., Upjohn v. U.S., 449 U.S. 383, 384 (1981) (setting out the federal test of privilege for communications from corporate employees to corporate attorneys).

<sup>392</sup> Rice, ATTORNEY-CLIENT PRIVILEGE at §4:2, 12-21 (discussing the "necessity" test used to determine the agent status of non-employees).

<sup>393</sup> Waldman, 358 N.E.2d at 523 (contempt upheld for attorney claiming privilege for address of son of client because attorney failed to provide any evidence showing that he learned this address from his client); Ost-West-Handel Bruno Bischoff GmbH, v. M/V Pride of Donegal, 1997 WL 231126, at 2 (S.D.N.Y.) (granting sanctions where numerous documents "not communications with any client" were withheld and no privilege log was provided).

<sup>394</sup> See Resolution Trust Corp. v. Dean, 813 F. Supp. 1426, 1429 (D. Ariz. 1993) (testimony concerning the precautions taken to maintain the confidentiality of a memo quoted in a newspaper article was sufficient to meet the burden of showing non-waiver); Coastal States Gas Corp. v. Dept. of Energy, 617 F. 2d 854, 863

determinations<sup>395</sup> other waivers are either controversial,<sup>396</sup> rest on unsettled law,<sup>397</sup> or are highly fact dependent.<sup>398</sup> Indeed, even where a waiver as to a specific communication is unarguable, the extent of the implied waiver as to other privileged communications on the same subject is a determination subject to both varying legal tests and the specific facts of the case.<sup>399</sup> In these more problematic areas of waiver, assertions of non-waiver are likely to be viewed as colorable and non-frivolous. However, the existence of a waiver has been viewed as sufficiently non-controversial to justify sanctions in cases where

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(D.C. Cir. 1980) (claimant of privilege bears the burden of showing that confidentiality after communication, a “fundamental prerequisite to assertion of the privilege,” was maintained).

<sup>395</sup>See Rothstein & Crump, *FEDERAL TESTIMONIAL PRIVILEGES* at 159 (describing “express waiver, failure to assert the privilege, or voluntary disclosure” as “relatively unproblematic concepts”). See also, *In re Omeprazole Patent Litigation*, 227 F.R.D. 227, 231-232 (S.D.N.Y. 2005) (information disclosed to expert witness constitutes voluntary waiver of privilege and “specious and frivolous” motion to protect information justified award of attorneys fees from counsel and client jointly and severally); *E.E.O.C. v. Exel, Inc.*, 190 F.Supp.2d 1179, 1180 (E.D.Mo. 2002) (granting fee and cost sanctions where client voluntarily answered early deposition questions about communications with his attorney, then claimed privilege as to later questions).

<sup>396</sup>The issue of whether voluntary disclosure of privileged information to a government agency results in waiver of privilege in all future settings, sometimes described as selective waiver, has produced three different approaches in the federal courts, see Epstein, *FOURTH EDITION SUPPLEMENT TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* at 76-85 (collecting cases in which courts in the Federal, First, Second, Third, Fourth, Sixth, and Eighth circuits held that selective waiver is a total waiver; in which courts in the Second, Fifth, Seventh, Eighth, and Tenth Circuits held that selective waiver was not a waiver in other settings; and in which courts in the First, Second and Seventh Circuits held or suggested that selective waiver would not waive privilege if an agreement or protective order to that effect was put in place at the time of the selective waiver). The encroachment on attorney-client privilege created by the combination of the no-selective-waiver approach and the expanding coercive practice of government agencies to demand privileged information in exchange for “cooperation credit” in criminal and regulatory investigations recently triggered the formation of an American Bar Association Task Force on Attorney-Client Privilege. See *REPORT OF ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE 1*, 12–21.

<sup>397</sup>Epstein, *THE ATTORNEY-CLIENT PRIVILEGE* 309-16 (collecting cases illustrating the three different approaches to inadvertent disclosure waiver: usually waived, usually not waived, waiver dependant on five-factor analysis of the circumstances of the disclosure). It should be noted that within particular jurisdictions, the approach taken to inadvertent disclosures may well have reached the status of settled law, however, a frivolous claim would only appear possible in jurisdictions following the most harsh approach, as the possibility of maintaining privilege despite an inadvertent disclosure is either quite likely in the “usually-not-waived” jurisdictions or is arguable on the facts in the “five-factor-analysis” jurisdictions).

<sup>398</sup>Waivers made by corporate officers and employees and client representatives such as attorneys are dependent on a determination that the waiving actor had authority to make the waiver, which is a very fact-dependent determination. See Rothstein & Crump, *FEDERAL TESTIMONIAL PRIVILEGES* 147 –50 & n. 2, 4-8 (collecting cases finding authorization of non-officer corporate employee waivers even though this authority “is normally exercised by its officers and directors,” as well as cases finding lack of authorization of corporate officer waivers; cases finding attorney waivers both authorized and unauthorized by clients; and cases finding trustee waivers for individual bankrupts always authorized, never authorized, and sometimes authorized).

counsel expressly stated that privilege was waived as to particular subject<sup>400</sup> or where advice of counsel was made an issue in this<sup>401</sup> or previous litigation.<sup>402</sup>

The preceding consideration of the case law involving unsuccessful claims of privilege reveals that specific guidance can be provided concerning the danger of substantively frivolous claims in certain areas of attorney-client privilege in which the law is relatively straightforward and settled. Other kinds of claims, discussed above, remain either controversial or too fact-dependent to allow for useful generalizations. We also saw that while courts have imposed sanctions upon attorneys who made such substantively frivolous claims, they have also been sympathetic to lawyers whom they saw as genuinely struggling with the intersection between ethical duties of confidentiality and legal duties of disclosure, and have vacated sanctions imposed by lower courts.<sup>403</sup> However, as these issues are increasingly brought to and clearly resolved by state supreme courts and federal appellate courts, it will become more difficult for attorneys to be seen as making these claims in good faith unless they both acknowledge the existence of the contrary controlling case law and make non-frivolous arguments for distinction or reversal. Thus, a comment to the Model Rules which seeks to heighten lawyers' sensitivity to the possibility of making frivolous claims of attorney-client privilege should include concrete examples of claims of privilege that are generally agreed to be legally unsupportable.

## CONCLUSION AND PROPOSED COMMENT

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<sup>399</sup>See *id.* at 159, 183-85 (noting that the extent of an implied waiver as to the same subject matter as the communication expressly, voluntarily or involuntarily waived is interpreted more broadly by some courts and less broadly by others).

<sup>400</sup>McCormick-Morgan, Inc. v. Teledyne Industries, Inc., 134 F.R.D. 275, 284-5 (N.D. Ca. 1991) (imposing monetary sanctions upon attorneys who instructed witnesses not to answer deposition questions on matters squarely within an express waiver provided by them).

<sup>401</sup>E.g., Government Guarantee Fund of the Republic of Finland v. Hyatt Corporation, 177 F.R.D. 336, 343 (D.V. I. 1997) (imposing sanctions where attorney in litigation waived privilege previously established by providing information regarding his advice in opposition to motion for summary judgment).

<sup>402</sup>E.g., Amway Corp. v. The Proctor & Gamble Co., 2001 WL 1818698 at 3 & 12 (W.D. Mich.) (magistrate recommended establishment of a negative fact as a sanction for meritless claims of privilege that included, among other claims, documents for which privilege had previously been found waived because "at issue" in a prior case).

In a society with a complex legal system and laws unintelligible to non-experts, attorney-client privilege is essential to the possibility of vindicating rights and maintaining liberties. It is not the intention of this Article to suggest either that the law of attorney-client privilege is too expansive or that the ethical duty to assert attorney-client privilege should be reined-in. Rather, this Article seeks to strengthen the privilege against attacks by the executive, the legislature or even the judiciary by ensuring that claims of privilege are seen as a legitimate part of legal representation and not a mere tool for abuse of the system. This requires lawyers to exercise the judgment and minimal self-restraint required in other areas of the law to avoid making frivolous claims. With privilege comes responsibility. The following proposed comment to Model Rule 3.1 attempts to articulate this responsibility, but it is insufficient on its own. Legal education must also take seriously the importance of developing competence and judgment in the law of attorney-client privilege.

#### PROPOSED COMMENT TO MODEL RULE 3.1.

The ethical duty of confidentiality requires lawyers to assert all non-frivolous claims of attorney-client privilege. At the same time, frivolous claims of attorney-client privilege undermine the proper function of the adversary system. Lawyers must be aware that it is also unethical to make a frivolous claim of attorney-client privilege. The evidentiary burden is on the claiming party to show the evidence sought falls within the attorney-client privilege. Ethics requires that lawyers avoid claims of attorney-client privilege that are substantively frivolous and/or are made in a frivolous manner.

A claim is made in a frivolous manner if made:

- (1) without factual investigation, as appropriate under the circumstances, sufficient to show that facts supporting the basic legal elements of privilege are present;
- (2) made without taking all necessary steps, including legal research, to ensure that the lawyer has the foundational and specialized legal knowledge of the law of attorney-client privilege relevant to this specific claim of privilege;
- (3) without engaging in a competent legal analysis applying the law of privilege relevant to this claim to the facts discovered by the required factual investigation: and
- (4) made in violation of a court rule or order requiring the provision of specific

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<sup>403</sup> See e.g., *In Re Original Grand Jury Investigation*, 733 N.E.2d at 1139-40 (vacating contempt and monetary sanctions for the attorney who refused to turn it over to a grand jury on the ground that there was a good faith argument that ethical obligations prohibited the disclosure).



facts relevant to privilege and/or a demonstration that the legal elements privilege are met by these facts.

A claim of privilege will be substantively frivolous if made :

- (1) with essential facts missing;
- (2) based on ignorance or misreading of the law of privilege;
- (3) while failing to acknowledge and appropriately distinguish controlling adverse authority;
- (4) based on a change or reversal of existing law without providing argument and support for such a change; and
- (5) for typical documents or communications that are routinely viewed as non-privileged, such as
  - (a) communications that seek non-legal advice or seek no legal advice, as is the case with scheduling communications, transmittal letters, and documents sent both to lawyers and non-lawyers not agents of the lawyer;
  - (b) communications not made to lawyers qua lawyers, such as regarding tax preparation;
  - (c) non-communications, such as objects, ordinary observations, and underlying information;
  - (d) specific communications viewed as not ordinarily made for the purpose of getting legal advice, such as ordinary client identity, location and billing information,
  - (e) communications not made in confidence, such as made in presence of third parties or intended to be disclosed;
  - (f) communications not made by the client; or
  - (g) where privilege as to these communications has been expressly waived by counsel or where advice of counsel has been put at issue.