STATE OF MINNESOTA

IN SUPREME COURT

A20-0427

Court of Appeals — McKeig, J.
Dissenting, Anderson, J., Gildea, C.J.

In re Polaris, Inc.,
Petitioner,

Colby Thompson,
Respondent,

Filed: December 15, 2021

Office of Appellate Courts

vs.

Polaris, Inc.,
Appellant.

Aaron D. Van Oort, Jeffrey P. Justman, Faegre Drinker Biddle & Reath, LLP, Minneapolis, Minnesota; and

Richard C. Godfrey, Catherine L. Fitzpatrick, Kirkland & Ellis LLP, Chicago, Illinois, for appellant.

Mahesha P. Subbaraman, Subbaraman PLLC, Minneapolis, Minnesota;

Brian E. Wojtalewicz, Wojtalewicz Law Office, Ltd., Appleton, Minnesota; and

Jeffrey D. Eisenberg, Eric S. Olson, Christopher P. Higley, Eisenberg Cutt Kendell & Olson, Salt Lake City, Utah, for respondent.

Benjamin W. Hulse, Emily A. Ambrose, Blackwell Burke, P.A., Minneapolis, Minnesota, for amicus curiae Coalition of Minnesota Companies.

Sharon L. Van Dyck, Van Dyck Law Firm, PLLC, Minneapolis, Minnesota; and

Taylor B. Cunningham, Conlin Law Firm, LLC, Minneapolis, Minnesota, for amicus curiae Minnesota Association for Justice.

Patrick Hedren, Manufacturers' Center for Legal Action, Washington, D.C., for amicus curiae National Association of Manufacturers.

Michael R. Carey, Dykema Gossett PLLC, Minneapolis, Minnesota, for amicus curiae The Product Liability Advisory Council, Inc.

Adam W. Hansen, Apollo Law LLC, Minneapolis, Minnesota; and

Ellen Noble, Washington, D.C., for amicus curiae Public Justice.

S Y L L A B U S

1. Minnesota appellate courts have jurisdiction to consider a petition for a writ of prohibition that challenges the district court's denial of a claw-back request made under Minn. R. Civ. P. 26.02(f)(2).

2. When deciding whether a document that contains both legal advice and business advice is protected by the attorney-client privilege, the district court must apply the predominant purpose test. Under the predominant purpose test, for the attorney-client privilege to apply to the document in its entirety, the predominant purpose of the communication must be legal advice.

3. The district court did not clearly err by finding that the predominant purpose of the document at issue here is business advice. Therefore, the attorney-client privilege protects only the portions of the document that contain legal advice.

Affirmed; motion to dismiss denied.

O P I N I O N

MCKEIG, Justice.

The underlying litigation in this case involves a product-liability lawsuit brought by respondent Colby Thompson against appellant Polaris Inc. Before this litigation began, Polaris was subject to a government safety investigation and potential enforcement action under federal consumer product safety laws. Polaris retained outside counsel to conduct an audit into its safety processes and policies. After completing the audit, the lawyers provided a 32-page report, which included recommendations to improve compliance performance. Polaris inadvertently disclosed the audit report during discovery in the product-liability litigation with Thompson. Polaris then sought to claw the document back, asserting that the report is protected by the attorney-client privilege. Finding that the predominant purpose of the report was business advice, not legal advice, the district court denied the claw-back request while permitting redactions of the legal advice in the report. Polaris then sought a writ of prohibition to prevent disclosure of the report. The court of appeals denied the writ of prohibition, and Polaris sought further review.

At issue here is whether the report in its entirety is protected by the attorney-client privilege. Because we conclude that the district court did not clearly err by finding that the predominant purpose of the report is business advice, we affirm the denial of the writ of prohibition. We also deny Thompson's motion to dismiss the appeal for lack of jurisdiction.

FACTS

Appellant Polaris Inc. is a Minnesota company that produces on-road and off-road vehicles. One model of Polaris's off-road recreational vehicles is a four-wheel all-terrain vehicle known as the RZR. In April 2016, Polaris announced a recall of 133,000 RZR 900 and RZR 1000 vehicles due to a fire hazard. The next month, the federal Consumer Product Safety Commission notified Polaris that it was investigating whether Polaris had "complied with the reporting requirements" of the Consumer Product Safety Act, 15 U.S.C. § 2064(b). The Commission also advised Polaris that, "[u]ntil this matter is resolved, there will remain the possibility of enforcement action, including reasonably anticipated litigation."

In May 2016, Polaris retained the law firm of Crowell & Moring, LLP—specifically attorney Cheryl Falvey, a former general counsel of the Commission and a partner at Crowell—to conduct an audit into the safety processes and policies of Polaris. In August 2016, Crowell communicated the information gathered from the audit to Polaris in a 32-page report. Each page of the audit report is marked "PRIVILEGED AND CONFIDENTIAL: Protected by Attorney Client Privilege and Attorney Work Product." At issue here is whether the report in its entirety is protected by the attorney-client privilege.

The audit report, titled "Embracing Safety as a Business Priority," states that Crowell was "asked to interview key witnesses and review company records and emails to determine what lessons can be learned from the process leading up" to the recall. The report clarified, however, that Crowell did "not represent the company" regarding the recall or responding to questions from the Commission regarding Polaris's execution of the

recall. Rather, the report explains that Crowell was "hired for an entirely different purpose": "to make the company better when it comes to dealing with safety concerns." According to the report, Crowell agreed to provide a "privileged and confidential assessment of the current state of the safety processes and procedures and provide recommendations for process improvements." The report includes recommendations in the areas of safety, engineering, design, and corporate practices. Additionally, portions of the report address regulatory requirements as well as the interpretation of certain Commission regulations. The report was distributed to senior management and the board of directors.

In August 2017, respondent Colby Thompson filed a lawsuit against Polaris after he suffered serious burns when the Polaris RZR vehicle he was driving started on fire. The complaint included claims for negligence, strict liability, manufacturing flaw, failure to warn, and breach of warranties. The district court assigned a special master to handle pretrial discovery issues. During discovery, Polaris inadvertently produced a copy of the audit report. Polaris did not learn of this disclosure until Thompson's attorney attempted to use the report during a deposition. Polaris objected to the use of the report and demanded its return, asserting a privilege claim. Thompson challenged the privileged status of the report.

The next day, Polaris, made a motion to "claw back" the audit report under Minn. R. Civ. P. 26.02(f)(2). Polaris argued that the report is protected by the attorney-client privilege and work-product doctrine. Polaris filed the report and other claimed confidential

materials under seal in the district court. Thompson opposed the claw-back request, asserting that the report contains business advice as opposed to legal advice.

The special master denied Polaris's claw-back request. The special master described the "threshold inquiry" in the privilege analysis as whether the audit report "embodies a communication in which legal advice is sought or rendered," *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 444 (Minn. 1998). The special master acknowledged that portions of the report "address the regulatory requirements related to recall reporting," but found that was "not the predominant purpose of the report." Rather, the special master found that the "majority" of the report was "giving business advice to management and the Board of Directors about promoting safety and making company changes so Polaris can in fact provide a safe product." In essence, the special master found that the report was an "operational audit," which made recommendations for "operational changes" relating to "safety, engineering, design, and corporate practices." While denying the request to claw back the report, the special master stated that "it is appropriate to redact those limited sections" of the report that "contain legal opinions" regarding the interpretation of Commission regulations.

Polaris appealed the special master's decision to the district court. The district court adopted the special master's findings of fact and conclusions of law in total and affirmed the special master's order regarding the partially privileged nature of the audit report.

Polaris then sought a writ of prohibition in the court of appeals, asserting "irreparable harm" from "having its attorney-client privileged communications and attorney work product disclosed in litigation." Polaris asserted that the audit report is

"privileged in its *entirety*" and asked the court of appeals "to direct that the report not be disclosed." Polaris filed the report and other claimed confidential materials under seal in the court of appeals.

The court of appeals denied the writ of prohibition. *In re Polaris, Inc.*, No. A20-0427, Order at 4 (Minn. App. filed July 1, 2020). The court of appeals concluded that "the advice provided" in the audit report was "primarily nonlegal in character." *Id*. at 3. According to the court of appeals, the report "focused on corporate culture and safety issues, not legal strategy." *Id.* The court of appeals stressed that the district court had specifically authorized the redaction of the sections of the report that contained legal opinions "regarding the interpretation of federal regulatory requirements." *Id*. Therefore, the court of appeals concluded that Polaris "failed to establish that the district court ordered production of information that is clearly not discoverable." *Id*.

Polaris sought further review of the court of appeals' order denying the writ of prohibition. Polaris asked us to review whether the audit report is protected by the attorney-client privilege. Polaris did not raise an issue regarding attorney work product. We granted the petition for review. After the conclusion of briefing, Thompson filed a motion to dismiss the appeal for lack of jurisdiction.

ANALYSIS

This appeal arises from Polaris's petition for a writ of prohibition to protect the confidentiality of the audit report prepared by the Crowell attorneys. "Prohibition is an extraordinary remedy and should be used only in extraordinary cases." *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 46 (Minn. 1965). In discovery disputes, a writ of prohibition

limits a district court's broad discretion and is appropriate only in limited circumstances: where "it appears that the court is about to exceed its jurisdiction" or the issue is "decisive of the case"; "where the court has ordered the production of information clearly not discoverable and there is no adequate remedy at law"; or "in rare instances" where a decision "will settle a rule of practice affecting all litigants." *Id.*

I.

We begin with the threshold issue of jurisdiction. For the first time on appeal, Thompson argues that Minnesota appellate courts lack jurisdiction to issue a writ of prohibition to address Polaris's claw-back request. A challenge to appellate jurisdiction may be raised at any time and cannot be waived or forfeited. *Speyer v. Savogran Co.*, 124 N.W.2d 827, 829 (Minn. 1963). Whether we have appellate jurisdiction is a question of law that we review de novo. *See City of Saint Paul v. Eldredge*, 800 N.W.2d 643, 646 (Minn. 2011).

Thompson challenges the right of Polaris to seek a writ of prohibition for the district court's privilege ruling under Minn. R. Civ. P. 26.02(f)(2). Rule 26.02(f)(2) outlines a process for how parties may proceed when a document for which a claim of privilege is made is inadvertently produced in discovery. Rule 26.02(f)(2) provides:

> [T]he party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim.

Following the process set forth in Rule 26.02(f)(2), Polaris notified Thompson of its claim that the audit report is privileged. Polaris then sought to claw back the report in a hearing before the special master, filing the document under seal. After conducting an *in camera* review of the report, the special master rejected, in part, Polaris's claim that the report is protected by the attorney-client privilege. The district court affirmed.

Polaris filed a petition for a writ of prohibition in the court of appeals under Minn. R. Civ. App. P. 120.01. Thompson acknowledges that we have long held that a writ of prohibition is appropriate when a "court has ordered the production of information clearly not discoverable and there is no adequate remedy at law." *Shiller*, 135 N.W.2d at 46. He argues, however, that a writ of prohibition is not appropriate in a claw-back dispute arising under Rule 26.02(f)(2). Thompson points out that the district court did not order Polaris to produce the audit report; rather, the district court simply determined, after Polaris had *already* produced the report, that the report is not privileged. According to Thompson, "Having let the horse out of the barn on its own, Polaris cannot seek interlocutory review as if this disclosure never took place." Thompson also contends that Rule 26.02(f)(2) does not explicitly provide for interlocutory appeals, and a post-judgment appeal affords sufficient review.

Polaris responds that Thompson seeks to draw an "illusory" line between privileged documents that a party has inadvertently produced and privileged documents that a party has withheld from production. Polaris also maintains that Thompson's arguments go to the merits of whether Polaris is entitled to a writ of prohibition here.

We agree with Polaris. The parties throughout this appeal have preserved the claimed privileged status of the audit report by filing the report and related materials under seal. Interlocutory review is appropriate because an appeal is not an adequate remedy. It would be too late on appeal from the final judgment in the product-liability litigation—after the report is out in the open and used in litigation—to decide whether the report should have been treated as privileged and copies of the report should have been returned, sequestered, or destroyed. *See In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 150 (D.C. Cir. 2015) (concluding that an "appeal after final judgment will come too late because the privileged documents will have been disclosed").

Accordingly, the court of appeals had appellate jurisdiction to resolve the dispute over the privileged status of the audit report, and we have appellate jurisdiction to review the court of appeals' denial of the writ of prohibition, *see* Minn. R. Civ. App. P. 120.05. We therefore deny Thompson's motion to dismiss for lack of jurisdiction.

II.

We now turn to the issue raised in Polaris's petition for review: whether the attorney-client privilege protects the audit report in its entirety from disclosure, and thus, whether it is appropriate to issue a writ of prohibition. "A district court has 'broad discretion' under Minn. R. Civ. P. 26.03 'to fashion protective orders and to order discovery only on specified terms and conditions.' " *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17–18 (Minn. 2009) (quoting *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987)). "On appeal, we review 'a district court's order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by

improperly applying the law.' " *Id.* (quoting *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007)).

A.

Polaris argues that the court of appeals erred by creating a new privilege test that "parses the content of attorney-client communications line-by-line to determine which parts are 'legal advice' or 'legal strategy.' " Determining the appropriate legal standard is a question of law that we review de novo. *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310, 320 (Minn. 2021).

At issue here is the privileged status of the audit report related to the safety processes and policies of Polaris. "The purpose behind the attorney-client privilege is to promote open and honest discussion between clients and their attorneys." *Leer v. Chi., Milwaukee, St. Paul & Pac. Ry.,* 308 N.W.2d 305, 309 (Minn. 1981). The threshold inquiry in a privilege analysis is determining "whether the contested document embodies a communication in which legal advice is sought or rendered." *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 444 (Minn. 1998). A document is "not cloaked with the privilege merely because it bears the label 'privileged' or 'confidential.' " *Id.* at 441. Because "the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts," we strictly construe the privilege. *Leer*, 308 N.W.2d at 309.

There is no dispute that the audit report contains both legal advice and business advice. The attorney-client privilege protects legal advice. *Kobluk*, 574 N.W.2d at 444. The privilege "does not protect ordinary business advice." *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982); *see also Bowne of New York City, Inc. v. AmBase*

Corp., 150 F.R.D. 465, 471 (S.D.N.Y. 1993) ("If the communication concerns business matters, the privilege does not apply."). We have not previously determined whether a corporate report that contains both legal advice and business advice is protected in its entirety by the attorney-client privilege.

Polaris argues that the attorney-client privilege protects the entirety of the audit report because the purpose of the report was to provide legal advice. According to Polaris, "if the communication arises out of the attorney-client relationship and relates to the purpose of providing legal advice, then the communication is protected by the privilege in its entirety." *See State ex rel. Toledo Blade Co. v. Toledo-Lucas Cnty. Port Auth.*, 905 N.E.2d 1221, 1229 (Ohio 2009) (holding that the attorney-client privilege protects an investigative report prepared by outside counsel where the report was related to the "rendition of legal services"). Polaris contends that "it is error to parse the communication line-by-line in search of nuggets of a 'nonlegal character' and then apply the privilege piecemeal." Thompson, in contrast, asks us to adopt the majority rule that "legal advice must predominate" over business advice for the entirety of a communication from an attorney to a client to be protected under the attorney-client privilege. *Neuder v. Battelle Pac. Nw. Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000).

There is "general agreement" among courts that the protection of the attorney-client privilege "applies only if the *primary or predominant purpose* of the attorney-client consultation is to seek legal advice or assistance." 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 7:6 (2020 ed.); *see Harrington v. Freedom of Info. Comm'n*, 144 A.3d 405, 416 (Conn. 2016) (noting the "broad consensus in other jurisdictions" that

providing legal assistance must be the primary purpose of the communication); *In re Grand Jury*, 13 F.4th 710, 716 (9th Cir. 2021) (observing that "most, if not all," of the federal circuit courts that "have addressed this issue have opted for some version of the 'primary purpose' test"); . Under the predominant purpose test, the attorney-client privilege applies to the entirety of a document only if the predominant purpose of the communication is to render or solicit legal advice. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991); *see also, e.g.*, *In re Appraisal of Dole Food Co.*, 114 A.3d 541, 561 (Del. Ch. 2014) (stating that a document containing both legal and business aspects will only be considered privileged if the legal aspects predominate); *Jackson v. Kennecott Copper Corp.*, 495 P.2d 1254, 1257 (Utah 1972) (holding that to be privileged, a communication must have the primary purpose of securing an opinion on the law or legal services). *But see In re Fairway Methanol LLC*, 515 S.W.3d 480, 489 (Tex. App. 2017) (holding that communications made to facilitate the rendition of legal services are privileged, regardless of the primary purpose of the communication). "[W]hen the legal advice is merely incidental to business advice, the privilege does not apply." *Neuder,* 194 F.R.D. at 292 (citation omitted) (internal quotation marks omitted).

We formally adopt the predominant purpose test now. The predominant purpose test aligns with our strict construction of the attorney-client privilege as a barrier to the disclosure of relevant evidence. *See Leer,* 308 N.W.2d at 309. Because the purpose of the attorney-client privilege is "to promote the dissemination of sound legal advice," the privilege applies "only to advice which is legal in nature." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007). The predominant purpose test therefore preserves "the

integrity" of the attorney-client privilege by separating legal advice from business advice in a document that serves primarily business purposes. *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 147 (D. Del. 1977); *see also Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 47 (N.D. Cal. 1971) (determining that "it is important that the attorney-client privilege not be downgraded in the interests of expedient results"). Further, by applying the predominant purpose test to a corporate report prepared by legal counsel, we ensure that clients do not hide business and operational communications behind the veil of privilege, while still protecting the portions of the report that contain legal advice.

For these reasons, we hold that, when a document contains both legal advice and business advice, for the attorney-client privilege to apply to the document in its entirety, the predominant purpose of the communication must be legal advice. The privilege does not protect the entirety of the document if legal advice is merely one purpose and not the primary purpose of the communication. *See Harrington*, 144 A.3d at 416 & n.7.[1] We stress, however, that even when the predominant purpose of the communication is business advice, the attorney-client privilege will protect any portions of the document that contain legal advice. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 798 (E.D. La.

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[1] The D.C. Circuit has held that the attorney-client privilege applies if "legal advice was one of the significant purposes" of the communication, "even if there were also other purposes." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758–59 (D.C. Cir. 2014). Because we apply the attorney-client privilege narrowly, we agree with the overwhelming majority of state courts that have adopted the predominant purpose test and conclude that legal advice must be *the* primary purpose of the communication. *See, e.g.*, *Univ. of Kentucky v. Bunnell*, 532 S.W.3d 658, 693 (Ky. Ct. App. 2017); *Gottwald v. Sebert*, 63 N.Y.S.3d 818, 822 (N.Y. Sup. Ct. 2017); *Vela v. Superior Ct.*, 255 Cal. Rptr. 921, 925 (Cal. Ct. App. 1989); *see also Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998) (stating that we look to the common law of other states to develop our common law).

2007) (explaining that when "non-legal services are mixed with legal services it does not render the legal services any less protected by the privilege").

B.

We turn next to the application of the predominant purpose test to the audit report. But first we must resolve the parties' disagreement about the standard of review. We have long held that whether a document is privileged is "a question of fact." *Brown v. St. Paul City Ry.*, 62 N.W.2d 688, 701 (Minn. 1954), *quoted in In re Paul W. Abbott Co.*, 767 N.W.2d at 18; *accord Sprader v. Mueller*, 121 N.W.2d 176, 180 (Minn. 1963) ("The existence of the privilege is a question of fact which must be proved by the one asserting it.").

Polaris argues that determining whether the predominant purpose of the audit report was legal advice or business advice is a question of law, relying on our decision in *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Minn. 1998). Although we reviewed the district court's privilege rulings in *Kobluk* de novo, *id.* at 439, that case is not on point. In *Kobluk*, an assistant professor at the University of Minnesota sought to obtain preliminary drafts of a letter denying him tenure under the Minnesota Government Data Practices Act, and the district court decided the privileged status of the draft letters on cross-motions for summary judgment. 574 N.W.2d at 438–39. We emphasized that the facts were "not disputed." *Id.* at 439. In contrast, the privilege issue here arises from a claw-back request under Minn. R. Civ. P. 26.02(f)(2), not a summary judgment motion under Minn. R. Civ. P. 56, and the facts are disputed.

Specifically, the parties dispute whether the predominant purpose of the audit report was to provide legal advice or business advice. We hold that determining the predominant purpose of a document is a question of fact. Applying the predominant purpose test to a document is "necessarily a fact-specific determination." *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1060. As we have previously explained: "When facts are presented upon which the claimed privilege rests, it then becomes necessary for the court to determine whether the privilege exists much the same as in the determination of other fact issues." *Brown*, 62 N.W.2d at 701.

Accordingly, we review the district court's ruling on the predominant purpose of the audit report as a finding of fact. When reviewing privilege rulings, we "give great deference to the district court's findings of fact and will not set them aside unless clearly erroneous." *State v. Taylor*, 869 N.W.2d 1, 21 (Minn. 2015) (citation omitted) (internal quotation marks omitted). "Findings of fact are not clearly erroneous unless we are left with the definite and firm conviction that a mistake has been made." *In re Pamela Andreas Stisser Grantor Tr.*, 818 N.W.2d 495, 507 (Minn. 2012) (citation omitted) (internal quotation marks omitted). We do not "reweigh the evidence when reviewing for clear error." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021). "When the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Id.* at 223 (citation omitted) (internal quotation marks omitted).

C.

The party asserting the attorney-client privilege has the burden of proving it. *Sprader*, 121 N.W.2d at 180. To establish that the entirety of the audit report is protected by the attorney-client privilege, Polaris was required to prove that the predominant purpose of the communication was legal advice and not business advice.[2]

Determining the predominant purpose of a document is "a highly fact-specific" inquiry, which requires courts to consider "the 'totality of the circumstances' surrounding each document." *In re Grand Jury Procs.*, 220 F.3d 568, 571–72 (7th Cir. 2000). Relevant factors include (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be redacted. *See generally* 2 Andrew J. Levander & Hector Gonzalez, *Successful Partnering Between Inside and Outside Counsel* § 33:8 (2021) (citing cases). Although the line between legal advice and business advice in the corporate setting is "not always clear," as a general matter, attorneys provide legal advice when they draw

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[2] The dissent relies heavily on what it describes as "the *Kobluk* presumption"—our quotation from Wigmore that "a matter committed to a professional legal adviser is *prima facie so committed for the sake of the legal advice*." 8 John Henry Wigmore, *Evidence* § 2296, at 567 (McNaughton rev. 1961), *quoted in Kobluk*, 574 N.W.2d at 442. We do not agree with the dissent's presumption that "a communication regarding a matter committed to an attorney is privileged in its entirety." Any presumption that arises from the commitment of a matter to a lawyer has limited utility when determining the predominant purpose of a dual-purpose document that contains both legal advice and business advice. Moreover, it is only a presumption that can be overcome by contrary evidence that the communication is not to provide legal advice. That is precisely the inquiry that the special master undertook here.

on their legal training and apply legal principles to the specific circumstances of their client. *Harrington*, 144 A.3d at 415; *see* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 7:10 (2020 ed.).[3] We acknowledge that determining the predominant purpose of a document may not be a simple task, but this determination is the type of fact-finding and analysis that "fall[s] within the district court's expertise." *Valero Energy Corp. v. United States*, 569 F.3d 626, 630 (7th Cir. 2009) (explaining that "[f]indings regarding privilege are fact-intensive, case-specific questions").

Although we had not formally adopted the predominant purpose test when this dispute over the audit report arose, both parties, as well as the special master, analyzed the privilege issue in terms of the predominant purpose of the report. The special master found that the predominant purpose of the report was business advice. Polaris challenges this finding, asserting that the report focuses on legal compliance issues, which are "inextricably intertwined" with business advice. Polaris further argues that "safety is the subject of extensive federal regulation" and that failure to comply with safety regulations subjects its business to legal penalties. *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (observing that, "[i]n light of the vast and complicated array of regulatory

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[3] The dissent concludes that business advice is advice that makes "the client's enterprise *more profitable*." We find this definition far too narrow. Not all business advice is aimed at making a client's enterprise more profitable; moreover, it is not clear how this definition would apply in the context of a nonprofit corporation like a hospital or to another type of entity like a university. In addition, lawyers often have dual roles and may provide advice in other professional areas like accounting, real estate, and finance. Because of the broad range of business settings in which lawyers operate, it is not feasible to offer a specific, all-encompassing definition of business advice. Instead, courts should consider the business purpose of a document on a case-by-case basis and focus on the distinction between legal and nonlegal advice.

legislation," corporations " 'constantly go to lawyers to find out how to obey the law' " (quoting Bryson P. Burnham, *The Attorney–Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913 (1969))). Thompson responds that the primary purpose of the report was business advice, claiming that the "[t]he audit relates to a series of facts about Polaris's 'corporate culture,' " and the report provided "business recommendations," which Polaris used to make business and operational improvements.

The special master found that the predominant purpose of the audit report was "giving business advice," reasoning that the report was distributed to Polaris management and the board of directors to "implement operational changes."[4] The report addresses the organizational culture of Polaris and discusses the areas of product design, engineering, and manufacturing practices, with the express goal of "improv[ing] the process Polaris uses to assess safety risks."[5] The special master essentially determined that the primary purpose of the report was setting corporate policy. We conclude that the special master did not clearly err in finding that these aspects of the report address business matters. *See Marceau v. IBEW Local 1269*, 246 F.R.D. 610, 613–14 (D. Ariz. 2007) (concluding that an audit

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[4] We recognize that the communication of privileged information to a company's board of directors does not waive the privilege. *See, e.g.*, *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977) (en banc).

[5] Polaris has argued consistently throughout this dispute that the entirety of the audit report is protected by the attorney-client privilege. After the district court rejected this argument, Polaris immediately sought a writ of prohibition. Although the district court ruled that it is "appropriate to redact" the sections of the report that contain legal advice, Polaris has not yet had an opportunity to address which specific sections of the report contain legal advice. Therefore, we will not discuss the substance of the report in any detail.

report prepared by outside attorneys was not privileged where "the general nature of the audit" was a "tool for improving the business operations" of the company). *See generally* Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 Harv. Envtl. L. Rev. 365, 381 (1992) (explaining that "management audits generally are not entitled to the protections of the attorney-client privilege," even when attorneys conduct the audits, because the attorneys are not "predominantly" acting as attorneys).

It is true that portions of the audit report focus on compliance with federal regulations; however, not all compliance advice is legal advice. *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2020 WL 9211219, at *1 (N.D. Ohio Mar. 30, 2020). The attorney-client privilege "does not apply if the client seeks regulatory advice for a business purpose." *Fed. Trade Comm'n v. Abbvie*, *Inc.*, No. 14-5151, 2015 WL 8623076, at *9 (E.D. Pa. Dec. 14, 2015). Tellingly, the title of the report here is "Embracing Safety as a *Business* Priority." (Emphasis added.) Polaris suggests that, because safety is the focus of extensive regulation in the vehicle industry, any discussion of safety matters should be classified as legal matters. But we apply the privilege narrowly; "[t]he fact of extensive or pervasive regulation does not make the everyday business activities legally privileged from discovery." *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 1995058, at *7 (M.D. Fla. May 7, 2008); *see also Abbvie*, 2015 WL 8623076, at *9 (observing that companies in highly regulated industries "consider regulatory matters in making nearly all" of their business decisions).

Polaris also stresses the context of the recall and the investigation by the Consumer Product Safety Commission, but the report makes clear that Crowell did not represent

Polaris regarding the recall or any investigation by government regulators. And Polaris has not challenged the court of appeals' conclusion that the report is not protected by the work-product doctrine. *In re Polaris, Inc.*, No. A20-0427, Order at 3 (concluding that the report does not focus on "legal strategy"). In any event, the special master specifically found that addressing "the regulatory requirements related to recall reporting" was "not the predominant purpose of the report."

Finally, the legal portions of the audit report are not "intimately intertwined" or "difficult to distinguish" from the nonlegal portions. *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982). The special master specifically found it possible "to redact those limited sections" of the report that "contain legal opinions" regarding the interpretation of Commission regulations.

In sum, we are not left with a definite and firm conviction that the special master erred in finding that Polaris did not establish that the predominant purpose of the audit report was legal advice. Under our deferential standard of review, we conclude that the record reasonably supports the special master's finding and that the district court did not order "the production of information clearly not discoverable," *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 46 (Minn. 1965). We therefore affirm the court of appeals' denial of a writ of prohibition. On remand, the district court must identify the portions of the report that contain legal advice, which should be redacted.[6]

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[6] At oral argument, the parties clarified that there has not yet been a determination of which portions of the report contain redactable legal advice and which portions contain business advice. We have not been asked to make that determination. We direct the district court to make that determination on remand with the input of the parties.

CONCLUSION

For the foregoing reasons, we deny Thompson's motion to dismiss the appeal for lack of jurisdiction and we affirm the decision of the court of appeals.

Affirmed; motion to dismiss denied.

D I S S E N T

ANDERSON, J. (dissenting).

I agree with the court's reasoning regarding our jurisdiction, the predominant purpose test, and the standard of review. But I disagree with the court's conclusion that the report drafted by Crowell & Moring LLP (the Report) provides predominantly business advice and therefore is not subject to the attorney-client privilege in its entirety.

Appellant Polaris, Inc. (Polaris) sought professional assistance after receiving notice of an investigation from the Consumer Product Safety Commission (CPSC) regarding alleged violations of the Consumer Product Safety Act (CPSA). Polaris specifically desired legal advice regarding compliance weaknesses and how to successfully address those weaknesses. To that end, Polaris did not hire a business consultant; nor did it retain an engineer, a public relations expert, or an operations analyst. The company hired an attorney; specifically, Polaris retained the former general counsel of the very government agency investigating it—the CPSC. That attorney, Cheryl Falvey, along with her law firm, Crowell & Moring, investigated Polaris for CPSA compliance issues and, in a 32-page Report, provided recommendations on how to address those issues. Polaris did not ask Falvey for her input on better engine design. And Polaris did not ask for—nor does the Report provide—advice on how to run its business more profitably.

Despite Falvey's expertise in CPSA compliance, the Report's findings and recommendations regarding the regulatory environment for CPSA compliance, and its dearth of advice on how to increase the profitability of Polaris, the court concludes that the predominant purpose of the Report is *business* advice and, therefore, the Report is not

entirely privileged. Not only is the court's conclusion wrong, but it will also frustrate attorney-client relations, discourage businesses from seeking legal advice, and require lawyers to pepper client communications with legalese and superfluous citations.

I respectfully dissent.

I.

I begin by discussing the importance of attorney-client privilege. A time-honored doctrine, it is the oldest of common law privileges. *See In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 66 F. Supp. 3d 406, 409 (S.D.N.Y. 2014); Minn. Stat. § 595.02, subd. 1(b) (2020) (statutorily codifying the privilege). At common law, the attorney-client privilege was viewed as so important—so fundamental—that it arose contemporaneously with the doctrine of testimonial compulsion. 8 John Henry Wigmore, *Evidence* § 2290, at 542–43 (McNaughton rev. 1961). From the very moment that courts began forcing witnesses to testify, those courts also immediately recognized the dangers of compelling disclosure of attorney-client communications. *Id.*[1]

The purpose of attorney-client privilege is well-founded. "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such

[1] Originally, the recognized purpose of the privilege was to defend the "oath and honor of the attorney . . . ." Wigmore, *supra*, at 543; *see also Berd v. Lovelace*, 21 Eng. Rep. 33 (1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580). When the persuasive value of that justification diminished in the 1700s, courts continued to sustain the privilege out of recognition of an equally important value: "the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal adviser." Wigmore, *supra*, at 543.

disclosure except on the client's consent." *Id.* at 545. This protection is "essential to the beneficent administration of justice," *Wade v. Ridley*, 32 A. 975, 976 (Maine 1895), because it "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice," *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The Supreme Court of the United States has cautioned that, "for the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). When this privilege is applied in an unpredictable manner, it is not just attorneys or clients who suffer, but also the public at large. If uncertainty clouds application of the privilege, "every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case." *Greenough v. Gaskell*, 39 Eng. Rep. 618, 620 (Ch. 1833). The purpose of attorney-client privilege is therefore served when a client seeks legal advice to better understand and therefore follow the rule of law.

To further this purpose, we have relied on Wigmore's "classic explication" of the privilege:

> (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.

Kobluk v. Univ. of Minn., 574 N.W.2d 436, 440 (Minn. 1998) (emphasis added) (quoting Wigmore, *supra*, at 554).

At issue is the first prong—whether the Report "embodies a communication in which legal advice is sought or rendered." *Id.* at 444. Even when the other elements of the attorney-client privilege are met, communications relating to "sundry nonlegal purposes" are not protected. Wigmore, *supra*, at 566. Purely nonlegal business advice, for instance, is not privileged. *See United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996). But in cases where a communication includes both legal and nonlegal advice, courts have held that the communication remains privileged in its entirety when it is "*predominately* of a legal character." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991) (emphasis added). Absent that predominant purpose, only those portions of the communication containing legal advice are privileged. *See F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71–72 (D. Md. 1998). I agree with the court that it is time for us to adopt the predominant purpose test in Minnesota.

In applying the predominant purpose test, however, our precedent in *Kobluk* requires us to start from the presumption that a matter "committed to a professional legal adviser *is prima facie so committed for the sake of the legal advice* . . . ." 574 N.W.2d at 442 (quoting Wigmore, *supra*, at 567). This presumption is consistent with federal precedent. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977) (en banc) ("Here, the matter was committed to . . . a professional legal adviser. Thus, it was prima facie committed for the sake of legal advice and was, therefore, within the privilege absent a clear showing to the contrary."); *Chen*, 99 F.3d at 1501 (acknowledging a rebuttable presumption that a lawyer hired to give advice is hired to give legal advice, unless "the facts show that the lawyer was 'employed without reference to his knowledge or discretion

in the law' "); *see also United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (quoting *Chen*, 99 F.3d at 1501). We therefore presume that a communication regarding a matter committed to an attorney is privileged in its entirety " 'unless it clearly appears to be lacking in aspects requiring legal advice.' " *Kobluk*, 574 N.W.2d at 442 (quoting Wigmore, *supra*, §2296, at 567).

In other words, once the proponent of privilege has established "the other factual elements of the privilege," this presumption "shifts to the opponent [of the privilege] the equally difficult, *if not greater*, burden of demonstrating that the services were not legal." 1 Paul R. Rice, *Attorney-Client Privilege in the United States*, § 7.10 (2020 ed.) (emphasis added). Because Polaris has carried its burden in meeting the other factual elements of the privilege, and because Polaris submitted this issue to a legal advisor, Crowell & Moring, the only issue before us is whether respondent Colby Thompson has carried his "equally difficult, if not greater burden" in rebutting the presumption of privilege. To do so, Thompson must show that the Report is clearly lacking in aspects that require legal advice, *Kobluk*, 574 N.W.2d at 442, because the Report predominately delivers "business advice."

II.

With the question properly framed, the flaw in the court's analysis becomes obvious. It fails to meaningfully articulate what "business advice" and "legal advice" mean. The court provides factors to look *at* but fails to provide guidance as to what a district court should look *for*. The court proclaims that legal advice draws on legal training and applies legal principles to specific circumstances. But everything a lawyer does will be informed by the lawyer's training in some fashion; the court fails to articulate the

difference between a lawyer acting as an educated professional and a lawyer acting as a lawyer. *See Chen*, 99 F.3d at 1502 ("Calling the lawyer's advice 'legal' or 'business' advice does not help in reaching a conclusion; it *is* the conclusion."). Having failed to meaningfully define its terms, the court then proceeds to conclude that the Report constitutes business, rather than legal, advice. But the court's conclusion is meaningless and provides no clear guidance for Minnesota courts to follow.

Although the court is correct that the distinction between legal and business advice can at times be murky, the court fails to acknowledge that this distinction has been applied repeatedly in federal cases. *See* Rice, *supra*, at §§ 7.4–7.10 (collecting cases). With ample guidance available, our court is more than capable of providing some contours to these terms. For that reason, I attempt to distinguish between "legal advice" and "business advice" for the benefit of Minnesota courts, clients, and attorneys.

A.

I begin with the definition of "legal advice." Justice Holmes once explained that "[t]he object of our study . . . is prediction, the prediction of the incidence of public force through the instrumentalities of the courts." Oliver Wendell Holmes, *Path of the Law*, 10 Harv. L. Rev. 457, 457 (Mar. 25, 1897). Describing legal advice as the "prediction" of the likelihood of legal consequences is apt, but not all-encompassing. Very similarly, legal advice has been described as that which "requires a lawyer to rely on legal education and experience to inform judgment" and "involves the interpretation and application of legal principles *to guide future conduct or to assess past conduct*." *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (emphasis added).

Notably, legal advice need not include "legal research." Legal advice includes communications reflecting "the attorney's professional skills and judgments. [It] may be grounded in experience as well as research." *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061–62. "In giving advice to a client, the role of an attorney is certainly not restricted to citing cases and espousing legal theories." *ABB Kent-Taylor, Inc. v. Stallings & Co.*, 172 F.R.D. 53, 56 (W.D.N.Y. 1996). Legal advice is "an amalgamation of education, knowledge, experience and legal wisdom which counsel may draw upon to give a frank and unconstrained opinion. That is the essence of effective legal representation." *Id.* at 57.

In defining legal advice, the focus must remain on the purpose for which the lawyer is acting. John W. Gergacz, *Attorney-Corporate Client Privilege* § 3:30 (2021 ed.). A lawyer acting in a purely investigative or fact-finding role is not covered by the privilege. *E.g.*, *Wartell v. Purdue Univ.*, No. 1:13–cv–00099, 2014 WL 3687233, at *5 (N.D. Ind. 2014); *Cont'l Cas. Co. v. Marsh*, No. 01 C 0160, 2004 WL 42364, at *2 (N.D. Ill. Jan. 6, 2004); *Metalsalts Corp. v. Weiss*, 184 A.2d 435, 439 (N.J. Super. Ct. Ch. Div. 1962). But when a lawyer's investigation is "to provide information from which the attorney can develop legal advice," the privilege will still attach. Gergacz, *supra*, at § 3:35.

Consider some examples. Courts have concluded that legal advice includes: tax advice and the preparation of tax returns by an attorney, *see Colton v. U.S.*, 306 F.2d 633, 637 (2d Cir. 1962); advice on whether to file an amended return, *see United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972); advice on tax implications and corporate-law consequences of a corporate restructuring, *see In re Grand Jury Subpoena Duces Tecum*

Dated Sept. 15, 1983 (1983 Subpoena), 731 F.2d 1032, 1037 (2d Cir. 1984); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002); advice on whether a proposed transaction would be lawful, *see 1983 Subpoena*, 731 F.2d at 1038; advice on how to deal with an alleged breach of contract, *see Am. Nat'l Bank & Tr. Co. of Chi. v. Equitable Life Assur. Soc. of U.S.*, 406 F.3d 867, 879 n.6 (7th Cir. 2005); advice on whether to file financial disclosure statements and the "vulnerability generally of the corporation and its personnel to criminal and civil sanctions," *In re Grand Jury Subpoena*, 599 F.2d 504, 511 (2d Cir. 1979); advice on whether a client qualifies for a public defender and assistance in completing financial affidavits, *see United States v. Montgomery*, 990 F.2d 1264, 1993 WL 74314, at *3 (9th Cir. 1993) (unpublished table decision); assessment of a potential business partner's perceived trustworthiness and a subsequent recommendation on whether to close on a deal, *see ABB Kent-Taylor, Inc.,* 172 F.R.D. at 56–57; and advice on how to respond to a warning letter from the FDA, even if the initial draft of the response letter was prepared by a nonlawyer, *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 802–03 (E.D. La. 2007).

While the above examples demonstrate that legal advice reaches a broad swath of practice areas, these decisions have one clear and obvious through-line: a requirement that an attorney employ his or her legal training or experience by providing recommendations for future conduct, or an analysis of past conduct, with an eye toward avoiding or obtaining certain legal outcomes. That is the definition of "legal advice" that is consistent with persuasive legal authority, *see, e.g.*, Rice, *supra*, at § 7.10 (collecting cases); *In re County of Er*ie, 473 F.3d at 419, and is therefore the definition that Minnesota courts should apply.

B.

Now I turn to defining "business advice." I begin by noting that the court's conclusion that the Report is primarily business-oriented appears to be influenced by the fact that "safety, engineering, design, and corporate practices"[2] are all activities associated with a "business"—that is, a corporation. But it cannot be that everything associated with a corporation is therefore "business." Defining business advice in that way would transform virtually *all* legal advice to a corporate entity into unprotected business advice. *See* Rice, *supra*, at § 7.2 ("[V]irtually all internal legal communications are, to some extent, relevant to the business ends of the company."). Rather than generically referring to corporate operations, the word "business" refers to the "activity by which people try to earn money." *Business*, *Garner's Dictionary of Legal Usage* 126 (3rd ed. 2011). It means "[a] commercial enterprise carried on for profit." *Business*, *Black's Law Dictionary* (11th ed. 2019). The court believes that this definition is far too narrow. But the court offers nothing in its place.

Decisions that distinguish privileged legal advice from nonprivileged advice are consistent with a profit-focused definition of business. Thus, "business advice" has been described as mechanical or "mathematical calculations," *Cote*, 456 F.2d at 144; advice on whether a corporate restructuring would be profitable, *see 1983 Subpoena*, 731 F.2d at 1037; "technical information," *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975);

[2] As the court notes, Polaris submitted the Report under seal pursuant to Minn. R. Civ. App. P. 112.02. My quotations do not come directly from the Report, but instead come from the court's opinion.

a factual report conducted *solely* by company management in the regular course of business, *In re Grand Jury Subpoena*, 599 F.2d at 510; advice on whether it makes good business sense to continue a relationship with a certain party, *In re Hum. Tissue Prod. Liab. Litig. (Human Tissue)*, No. CIV. 06-135, 2009 WL 1097671, at *3 (D.N.J. Apr. 23, 2009); advice that is "purely financial," *ChevronTexaco Corp.*, 241 F. Supp. 2d at 1078; advice on how "to get value for [the client's] money," *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 166 (E.D.N.Y. 1994); internal communications related to "technical, scientific, promotional, management, regulatory or marketing matters," *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 630 (D. Nev. 2013); marketing advice, *In re Feldberg*, 862 F.2d 622, 626 (7th Cir. 1988); spreadsheets used to track tasks to be done in the course of a project, "ranging from designing a way to route calls to setting up deadlines for print production," *Acosta v. Target Corp.*, 281 F.R.D. 314, 324 (N.D. Ill. 2012); and investment advice, *Jacob v. Duane Reade, Inc.*, No. 11 Civ. 0160 (JMO)(THK), 2012 WL 651536, at *1–3 (S.D.N.Y. Feb. 28, 2012).

Similar to the decisions that identify privileged legal advice, the various types of advice that fall under the umbrella of "business" share one commonality. The advice at issue in these decisions all relates to making the client's enterprise more *profitable*. This can include recommendations for improved efficiency of business processes, investment, marketing, and technological advice, or purely factual investigations. But one other characteristic is also worth mentioning. The increased profitability that is representative of business advice is not analogous to increased profit resulting from mitigated legal liability. *See Exxon Mobil Corp. v. Hill*, 751 F.3d 379, 382 (5th Cir. 2014) (holding that

the "manifest purpose" of an attorney memorandum was to deliver legal advice because it addressed potential "legal liability" arising from a transaction); *Restatement (Third) of the Law Governing Lawyers* § 72 cmt. c (2000) ("So long as the client consults to gain advantage from the lawyer's legal skills and training, the communication is [privileged], even if the client may expect to gain other benefits as well."). In other words, the diminution of legal liability is solely attributable to good legal advice.

I have now provided at least *some* contours to the concepts of business and legal advice. Legal advice is that which requires an attorney to employ her legal training or experience to provide a recommendation for future conduct, or an analysis of past conduct, with an eye *toward avoiding or obtaining certain legal outcomes*. Conversely, business advice is that which is intended to make a client's enterprise *more profitable other than through the mitigation of legal liability*. With this distinction in mind, I now turn to the question of whether the Report is predominately legal advice or business advice.

III.

The determination of whether a communication falls under legal or business advice is "highly fact-specific." *Human Tissue*, 2009 WL 1097671, at *2. To assess whether the predominant purpose of the Report is legal or business advice, we must examine both (1) the content and (2) the context in which it was written. *Phillips*, 290 F.R.D. at 629; *see also Exxon Mobil*, 751 F.3d at 382 ("Context here is key . . . ."). We must look at all "the facts surrounding the creation of the document and the nature of the document" itself. *Phillips*, 290 F.R.D. at 629. Again, we presume that a matter "committed to a professional legal adviser *is prima facie so committed for the sake of the legal advice* . . . unless it clearly

appears to be lacking in aspects requiring legal advice." *Kobluk*, 574 N.W.2d at 442 (quoting Wigmore, *supra*, at 567).

In determining that the Report is predominantly business-oriented, the court errs in at least two significant ways. First, it emphasizes mainly the *content* of the Report. The court concludes that the Report must be predominantly business advice because it devotes space to matters such as corporate "culture" as well as "corporate practices, safety, engineering, and product design." But in so concluding, the court glosses over the context in which the Report was written. *See Phillips*, 290 F.R.D. at 629. Second, the court errs by flatly failing to adhere to the presumption in favor of privilege. *Kobluk*, 574 N.W.2d at 440–443. Ultimately, the court's flawed analysis creates a completely unpredictable standard for, and therefore undermines the purpose of, the attorney-client privilege.

A.

Context is key in applying the predominant purpose test. *Exxon Mobil*, 751 F.3d at 382. Reading the Report in the context in which it was requested and written, it is obvious that the predominant purpose here is legal advice.

Polaris requested the Report in response to a letter alerting it to an investigation by the CPSC involving potential violations of the CPSA. *See* 15 U.S.C. §§ 2051–89. Specifically, the letter explained that Polaris was subject to an investigation for alleged violations of the timely reporting requirements of 15 U.S.C. §§ 2064(b), 2068. The CPSC expressly warned Polaris of "the possibility of enforcement action, including . . . litigation." Crowell & Moring's assignment from Polaris was to examine its policies and explain how to avoid similar problems in the future. To understand what type

of advice was solicited and received, then, we must look to the CPSA and some of the CPSC's regulations.

As a manufacturer of consumer goods, Polaris is subject to the strictures of the CPSA. *See* 15 U.S.C. § 2052 (defining "consumer products"); *see also* CPSC Advisory Opinion No. 213 (July 15, 1975) ("[S]now machines are 'consumer products' and therefore within the jurisdiction of the Commission.").[3] Under the CPSA, the CPSC has the authority to investigate injuries or deaths allegedly resulting from consumer products. 15 U.S.C. § 2054. For businesses of any size, an investigation by the CPSA is no trivial matter.

If, after investigation, the CPSA determines that a product presents an "unreasonable risk of injury" and that "no feasible consumer product safety standard" could "adequately protect the public," the CPSC has the authority to impose an outright ban on the sale of that product. 15 U.S.C. § 2057. In assessing that risk, the CPSC considers "foreseeable misuse of a consumer product." *Southland Mower Co. v. Consumer Prod. Safety Comm'n*, 619 F.2d 499, 513 (5th Cir. 1980) (citation omitted) (internal quotation marks omitted).[4]

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[3] *But see* CPSC Advisory Opinion No. 258 (Jan. 26, 1978) (suggesting that "competition snowmobiles . . . intended solely for use on special tracks" by "qualified racing drivers" might not fall under the CPSC's jurisdiction). The CPSA itself disclaims jurisdiction over "motor vehicles" that are "manufactured primarily for use on public streets, roads, and highways." *See* 15 U.S.C. § 2052(a)(5)(C); *see also* 49 U.S.C. § 30102(a)(7).

[4] Parts of the Report touch on this doctrine and explain why, in light of that doctrine, past compliance practices by Polaris were potentially problematic.

Additionally, the CPSC can impose steep civil penalties on the subject of an investigation. In determining the amount of those penalties, the CPSC considers several factors. Crucially:

> The [CPSC] may consider . . . *whether a person had at the time of the violation a reasonable and effective program or system for collecting and analyzing information related to safety issues*. Examples of such information would include incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns. The Commission may also consider whether a person conducted adequate and relevant premarket and production testing of the product at issue; *had a program in place for continued compliance with all relevant mandatory and voluntary safety standards*; and other factors as the Commission deems appropriate.

16 C.F.R. § 1119.4(b)(1) (emphasis added). Moreover, "[t]he [CPSC] may consider whether a person benefitted economically from a failure to comply, *including a delay in complying*, with the CPSA, FHSA, FFA, and other laws that the CPSC enforces, and the regulations thereunder." *Id.* at § 1119.4(b)(3) (emphasis added).[5] CPSC investigations therefore become a question of determining who knew what, and when. *See* 15 U.S.C. § 2064(b) (requiring manufacturers to "immediately inform" the CPSC of known defects).

When read in this context, the Report is positively dripping with legal advice. A substantial portion of the Report addresses the question of who in Polaris knew what, and when. In other words, it advises Polaris on its potential legal exposure under its current

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[5] By looking to just a few recent settlement agreements relating to defective engines, it is obvious that the CPSC takes these factors seriously. It regularly examines: (1) the dates of when the manufacturer gained knowledge of a defect, including the number and severity of reports from consumers; (2) attempts to redesign the product in response to the defect; and (3) the timeliness in which the defect was reported to the CPSC. *See, e.g.*, *Murray, Inc.*, 2003 WL 22333279, at *1–2 (C.P.S.C. June 3, 2003); *Briggs & Stratton Corp.*, 2002 WL 32178915, at *1–2 (C.P.S.C. Aug. 7, 2002); *Toro Company*, 1988 WL 411067, at *1–2 (C.P.S.C. Jan. 12, 1989).

compliance practices—the precise legal question at issue here. The first 19 pages of the Report provide detailed fact-finding related precisely to those legal considerations. And the rest of the Report includes recommendations on how to recognize compliance issues more effectively and report those issues to the CPSC in the future. The Report's discussion of "corporate practices, safety, engineering, and product design" is therefore not an explanation on how to increase *profitability*; rather, it is an analysis on how to better understand how risk and safety issues relate to the CPSC regulatory environment to minimize past and future *legal liability*. Because this analysis required Falvey to apply her knowledge of the CPSA and CPSC regulations, her recommendations are purely the "application of legal principles to guide future conduct" and to "assess pass conduct." *See In re County of Erie*, 473 F.3d at 419. I would thus conclude that the primary purpose of the Report is to provide legal advice.

My conclusion is further bolstered by the recognition that we do not operate in a vacuum; the court's decision causes us to break from the practice of other courts. When a corporation or business learns that it is under investigation by government regulators, they frequently turn to lawyers for aid. Although these lawyers investigate the underlying facts of the situation, their actions "are generally considered law-related and the attorneys considered lawyers for purposes of the privilege." Gergacz, *supra*, at § 3:35.

In reaching a different conclusion, the court is perhaps led astray by the Report's use of the term "safety audit" and its references to workplace culture. I address each point in turn.

1.

The court suggests that the factual nature of the audit renders the Report predominately business advice because conceivably an audit could have been performed by a non-attorney. In support, the court relies solely on one case: *Marceau v. IBEW Local 12694*, 246 F.R.D. 610, 614 (D. Ariz. 2007). The court's suggestion is incorrect for several reasons.

To begin with, the mere fact that a non-attorney may have been able to perform part of an investigation leading to the writing of a client memorandum is not dispositive. *See, e.g.*, Rice, *supra*, at §§ 7.4 ("Interviews conducted by an attorney may fall within the ambit of the attorney-client privilege even though . . . lay investigators could conduct these interviews."), 7.5 ("Whether the work could have been performed by a non-lawyer . . . is not persuasive evidence that the privilege should not apply."); *Diversified Indus.*, 572 F.2d at 610 (noting that the client could have hired accountants "to audit the books and records" and used lay investigators to interview employees, "but neither would have had the training, skills and background necessary to make the independent analysis and recommendations which the Board felt essential to the future welfare of the corporation"); *In re County of Erie*, 473 F.3d at 420–21 (stating that "[t]he predominant purpose" test should be applied "dynamically and in light of the *advice being sought*," including consideration of whether it is "*advice* that can be given by a non-lawyer" (emphases added)).

The court's mistake is to overlook the purpose for which an attorney has been hired: the focus is *not* on whether a non-attorney could have participated in the factual inquiry

necessary to render the advice; rather, the focus is on whether the *sought-after advice itself* could have been given by a non-attorney. *Diversified Indus.*, 572 F.2d at 610; *In re County of Erie*, 473 F.3d at 420–21; *see also Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015); Gergacz, *supra*, at § 3:30. Here, a non-attorney could not have done so. This was not a situation in which "[n]o legal background would be necessary or even particularly useful in completing the task." Gergacz, *supra*, at § 3:35. As explained above, Falvey clearly relied on her legal experience to determine what facts were relevant to Polaris's CPSA compliance program. A determination of those facts was necessary for her to render legal advice on how to comply more closely with federal regulations.

For that reason, *Marceau* is distinguishable. The investigation in that case seems to have dealt mainly with determining whether the corporation's internal practices "were subject to abuse" *by its employees*. *Marceau*, 246 F.R.D. at 613. It is not clear that the attorneys needed to employ their legal training to determine what facts were relevant to their report, and it is further unclear that their recommendations were even related to the law.[6] *See id.* at 614; *see also In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d at 803–04 ("Suffice it to say, the advice envisioned by the attorney-client privilege is advice about

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6 The analysis in *Marceau* might be read to suggest that attorneys in that case did, in fact, employ their legal education and experience to guide their work. But if that is the case, then the federal district court would have clearly erred by holding that the report was not privileged in its entirety. *See ABB Kent-Taylor, Inc.*, 172 F.R.D. at 57 (stating that legal advice is "an amalgamation of education, knowledge, experience and legal wisdom which counsel may draw upon to give a frank and unconstrained opinion"); *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061–62 (stating that legal advice includes communications reflecting "the attorney's professional skills and judgments").

the laws imposed on us by society, not the rules that we impose on ourselves through guidelines, manuals, or otherwise."). By contrast, this case involves an examination of Polaris's CPSA compliance practices and recommendations on how to adhere to those statutes and regulations more closely. Because *Marceau* is nonbinding and distinguishable,[7] there is no principled reason for our court to rely on it.

Instead of *Marceau*, this case is more similar to an Eighth Circuit decision, *Diversified Industries*, 572 F.2d 596. The plaintiff in that case sued the defendant for allegedly using a secret "slush fund" to bribe the plaintiff's purchasing agents. *Id.* at 607. In response, the defendants hired a law firm "to conduct an investigation . . . for the purposes of eliciting facts, making certain findings, and providing to the Board of Directors of this Corporation a report possibly containing recommendations as to course of action." *Id.* The report drafted by the law firm was very similar to the Report at issue in this case. It "summarized these interviews, analyzed the accounting data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct and made recommendations as to steps [the defendant] should take." *Id.* at 608. Despite the fact that

[7] Additionally, *Marceau* may have been abrogated by a recent Ninth Circuit case. *Marceau* declined to apply the presumption that a matter submitted to legal professionals is predominately a request for legal advice. *See Diversified Indus.*, 572 F.2d at 610 (explaining and applying the presumption); *Chen*, 99 F.3d at 1501 (a Ninth Circuit case doing the same); *Sanmina Corp.*, 968 F.3d at 1116 (same). *But see Marceau*, 246 F.R.D. at 613 (distinguishing *Chen*). Because it declined to apply *Chen*, *Marceau* may have been abrogated by the Ninth Circuit's more recent decision in *Sanmina Corp.*, which explicitly relied on the presumption as articulated in *Chen*. *Samina Corp.*, 968 F.3d at 1116, 1118 n.2 ("While [the privilege proponent] does not explicitly describe the advice sought as 'legal,' such an inference would not be unreasonable given the undisputed fact that DLA Piper is a law firm, which comes with a 'rebuttable presumption' that the firm was engaged for its legal knowledge." (citing *Chen*, 99 F.3d at 1502)).

"[a]ccountants and lay investigators" could have conducted the investigation, the Eighth Circuit held that the resulting report was *clearly* privileged. *Id.* at 610.

Notably, the court applied the presumption that the matter was legal in character because it was committed to attorneys. *Id.* From there the court found it important that the attorneys in *Diversified Industries* were "given the authority to analyze . . . data [and] to evaluate and draw conclusions as to the propriety of past actions and to make recommendations for possible future courses of action." *Id.* The same is true here.

2.

The court is also led astray by the Report's mention of workplace culture. Specifically, the court states that the "report addresses the organizational culture of Polaris" and therefore is merely "setting corporate policy." In different circumstances, the court's conclusion might well have merit. For instance, advice on how to resolve a breach of contract claim may be entirely unrelated to the workplace culture in which the breach occurred. But the court is wrong to dismiss the legal relevance of that element in the work done here.

The workplace culture of an organization is an important factor examined by regulators, including the CPSC. *See* 16 C.F.R. § 1119.4(b)(1). For example, a company's workplace culture can factor into a regulator's decision to pursue an enforcement action against that company. *See Halebian v. Berv*, 869 F. Supp. 2d 420, 453 (S.D.N.Y. 2012) (considering the compliance culture of a company in a securities case); *see also* Robert C. Bird, *Caremark Compliance for the Next Twenty-Five Years*, 58 Am. Bus. L. J. 63, 109 (2021) ("A culture of integrity can foster improved relations with outside regulators. Front-

line regulators who interact with firms may make the initial decision of whether certain misconduct merits leveraging their agency's limited enforcement resources against those firms."). And in the CPSA context, a company's compliance culture can inform the severity of civil penalties. 16 C.F.R. §§ 1119.4(b)(1), (b)(3). References in the Report to culture therefore are not a reflection of the "non-legal" aspects of Polaris's business. Those references are direct responses to the legal question posed by Polaris: Identifying corporate compliance weaknesses and providing advice and recommendations on how to address those issues going forward.[8]

Because the context reveals that the Report's findings and recommendations relating to Polaris are purely focused on CPSA compliance, a topic squarely within Falvey's legal training, expertise, and experience, I would conclude that the predominant purpose of the Report is legal advice and therefore it is privileged in its entirety.[9]

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8 One part of the Report explicitly ties workplace culture to federal regulatory standards.

9 The court's conclusion also may have been influenced by the relatively few legal citations present in the Report. If that is true, then unfortunately the court has followed a red herring to the wrong conclusion. Legal advice need not include "legal research." *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061–62. Attorneys do more than simply "cit[e] cases and espous[e] legal theories." *ABB Kent-Taylor, Inc.*, 172 F.R.D. at 56. Moreover, due to Falvey's intimate understanding of the CPSA and CPSC regulations, she likely found it unnecessary to resort to precise citations to bolster her already clearly authoritative analysis. Simply put, the Report obviously reflects her "professional skills and judgments" as well as her "experience" with the CPSC and CPSA. *See Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061–62.

B.

This conclusion is mandated by our decision in *Kobluk*, 574 N.W.2d at 440–43. The plaintiff in that case presented an argument nearly identical to the argument advanced by Thompson. *See id.* at 441. Kobluk argued that two drafts of a letter "represented a request for and provision of literary or personnel, rather than legal, advice." *Id.* We rejected that argument by explicitly relying on the presumption that a matter "committed to a professional legal adviser *is prima facie so committed for the sake of the legal advice* . . . unless it clearly appears to be lacking in aspects requiring legal advice." *Id.* at 442 (quoting Wigmore, *supra*, at 567).

As I have explained, the reliance by Thompson and the court on the Report's discussion of workplace culture and process improvements aimed at CPSA compliance fails as evidence of business advice. Rather, in the context of the regulatory environment in which Polaris operates and its regulatory obligations for CPSA compliance, those discussions are classic legal advice justifying the protection of the attorney-client privilege. Because Thompson's sole argument on this point fails, he essentially urges us to do precisely what we rejected in *Kobluk*. He asks us to conclude that he has overcome the presumption of legal advice because he makes a "mere assertion" that the Report is "of a nonlegal character." *Id.* That argument failed in *Kobluk*, and stare decisis requires that we reject it here. What, then, does the court rely on to rebut *Kobluk*'s presumption in this case?

Nothing. The court essentially overrules the *Kobluk* presumption—in a footnote. The court attempts to distinguish *Kobluk* by declaring that the presumption has "limited

utility" in the context of mixed legal and nonlegal advice. But that was precisely the situation in *Kobluk*, and there we held that a "mere assertion" could not overcome the presumption that a communication with counsel was for legal advice. 574 N.W.2d at 442–43. The court simply declines to follow *Kobluk*.

As a matter of stare decisis, "we are 'extremely reluctant' to overturn our precedent and 'require a compelling reason to do so.' " *County of Hennepin v. Laechelt*, 949 N.W.2d 288, 292 n.1 (Minn. 2020) (quoting *Warren v. Dinter*, 926 N.W.2d 370, 377 n.7 (Minn. 2019)). This is doubly true for issues—such as attorney client privilege—that rely on stability and uniformity. *See Jicarilla Apache Nation*, 564 U.S. at 183 ("[F]or the attorney-client privilege to be effective, it must be predictable."). The court offers no compelling reason to depart from our precedent in *Kobluk*.

Nor could Thompson carry the "equally difficult, if not greater, burden of demonstrating that the services were not legal." Rice, *supra*, at § 7.10. The court acknowledges that the Report discusses Polaris's legal duties, litigation defenses, and the role that lawyers play in responding to CPSC requests and investigations. But then the court simply declares that the Report does not embody a communication in which legal advice is sought or rendered. From there, the court concludes that the portions of the Report containing legal advice are not "intimately intertwined with and difficult to distinguish from" the parts of the Report that contain "business advice." *See Sedco Int'l, S. A. v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982). Thus, in a matter of paragraphs, the court concludes that the Special Master reached the correct decision and all that remains is to redact portions of the Report as the Special Master directed.

I cannot begin to fathom how the district court, or the parties, will implement this command. The portions of the Report that come closest to business advice are its recommendations that may have an incidental effect of improving the efficiency of Polaris's business operations. But for reasons explained above, those very same recommendations also directly relate to legally relevant considerations of CPSA compliance. Far more than being merely "intertwined," *id.*, the Report's legal recommendations and business recommendations are, in fact, *the same recommendations*.[10] The Report is simply not susceptible to a line-by-line redaction process in which the district court could reveal to Thompson's attorneys the Report's business-only advice and at the same time shield as privileged the Report's legal-only advice.

More importantly, requiring district courts to closely parse attorney-client communications in this manner will inevitably lead to inconsistent results. This Report is a prime example. By failing to adhere to the *Kobluk* presumption that the Report predominately relates to legal advice, the court's holding would allow some district courts to conclude that certain portions of the Report are privileged and, at the same time, would allow other district courts to reach contrary conclusions. The lack of predictability

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[10] The court does not identify any part of the Report that is solely intended to increase the *profitability* of Polaris.

stemming from the court's holding undermines the effectiveness of the privilege, precisely the risk the Supreme Court cautioned against in *Jicarilla Apache Nation*, 564 U.S. at 183.[11]

Similar to the approach rejected in *Jicarilla Apache Nation*, the court's reasoning creates a dilemma for businesses considering seeking legal advice. Although a client might think a problem is entirely legal, that client "will not always be able to predict" what type of advice an attorney would provide. *Id*. Lawyers should account for "moral, economic, social, and political factors," Minn. R. Prof. Conduct 2.1, and should consider more than just "narrow legal terms," *id.* cmt. 2. Indeed, there are times when "[p]urely technical legal advice" would be "inadequate" to advance a client's interests. *Id*. To obtain effective legal advice, clients often must disclose to their attorneys all sorts of facts they would rather keep private. *See Upjohn Co.*, 449 U.S. at 389. Line-by-line redaction exposes those

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[11] In that case, the Supreme Court considered whether the "fiduciary exception" applies to the attorney-client privilege that would otherwise protect confidential communications between government officials and government attorneys. *Jicarilla Apache Nation*, 564 U.S. at 165–70. That exception states that a "trustee cannot withhold attorney-client communications from the beneficiary of the trust." *Id.* at 165. In holding that the exception does not apply, the Court distinguished true private trusts from statutory trusts established for the benefit of Indian tribes. *Id.* at 173–78. Crucially, the Court rejected the Federal Circuit's "case-by-case" approach in which the Government would need to articulate a "specific competing interest" against the tribe to maintain privilege. *Id.* at 182–83.

> If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. The Government will not always be able to predict what considerations qualify as a "specific competing interest," especially in advance of receiving counsel's advice. Forcing the Government to monitor all the considerations contained in each communication with counsel would render its attorney-client privilege "little better than no privilege at all."

Id. at 183.

potentially unsavory and damaging facts to forcible disclosure through the discovery process because those *facts* are not "legal advice."

Rather than confront the risk that a variable and hard-to-define standard might yield damaging disclosures, businesses will inevitably choose to forgo seeking legal advice altogether. Or, to avoid the line-by-line redaction the court adopts, lawyers will be forced to drape advice and recommendations in the fabric of legal citations and legal research—formalities that thus far no court has insisted on and an expense that few clients will want to incur. Thus, the court today has, perhaps inadvertently, undercut the prime rationale for the attorney-client privilege, first advanced hundreds of years ago. *See* Wigmore, *supra*, at 545. In short, the court has significantly limited the "freedom of consultation of legal advisers by clients" by reinstating "the apprehension of compelled disclosure by the legal advisers." *Id.*

For these reasons, we should hold the entirety of the Report privileged. I would conclude that the Report predominately delivers legal advice, grant the petition for a writ of prohibition, and remand to the district court with instructions to grant the motion of Polaris to claw back the Report.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.