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U.S. Supreme Court to Decide When Attorney-Client Communications That Contain "Hybrid" Legal and Business Advice Are Protected by the Attorney-Client Privilege

By Erik Snapp, Andrew S. Boutros, Jacqueline Harrington, Christina Guerola Sarchio and Jay Schleppenbach*

In this article, the authors discuss a case pending before the U.S. Supreme Court addressing an important issue for in-house counsel: when "dual-purpose" attorney-client communications that contain both legal and non-legal advice are protected by privilege.

The Supreme Court recently granted certiorari to review the U.S. Court of Appeals for the Ninth Circuit's application of the "primary purpose" test for deciding the privilege status of "dual-purpose communications," which refers to communications that are intertwined with both legal and non-legal advice. A three-way split currently exists among the federal circuit courts of appeals on the issue.

As such, the case presents an opportunity for the Court to resolve the circuit split and decide whether and when hybrid communications are protected by the attorney-client privilege. In doing so, the Court will necessarily clarify how courts should make such a determination – and, even more importantly – will likely offer guidance that attorneys can apply to maximize the likelihood that their dual-natured communications with clients will be protected by the privilege.

This article examines the existing circuit conflict, outlines the implications of a future Supreme Court decision for in-house attorneys, and provides practical tips for in-house attorneys looking to strengthen their claims of privilege.

THE CIRCUIT SPLIT: "DUAL-PURPOSE" COMMUNICATIONS AND ATTORNEY CLIENT PRIVILEGE

The attorney-client privilege protects confidential communications between an attorney and client for the purpose of giving or receiving legal advice. As such, purely business advice, even when given by an attorney, is not protected. However, where communications are made with a "dual-purpose" to provide or obtain both legal and

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business (or other non-legal) advice, courts disagree as to when the attorney-client privilege applies.

A majority of federal courts agree that some version of the "primary purpose" test applies to dual-purpose communications.[1] But those same courts disagree as to the scope and application of that test. The Supreme Court's recent grant of certiorari to review the decision by the Ninth Circuit, In re Grand Jury,[2] promises to resolve this uncertainty.

The three-way split can be characterized as:

(1) The narrow "the primary purpose" test, adopted by the U.S. Courts of Appeals for the Second, Fifth, Sixth and Ninth Circuits;

(2) The broader "a primary purpose" test, adopted by the U.S. Court of Appeals for the District of Columbia Circuit; and

(3) The "per se" test, adopted by the U.S. Court of Appeals for the Seventh Circuit.

"The Primary Purpose" Test

In In re Grand Jury, the Ninth Circuit joined the Second, Fifth, and Sixth Circuits in applying a relatively narrow version of the primary purpose test.[3] Under "the primary purpose test," legal advice must be the primary purpose of the communication to be privileged. Under the Ninth Circuit's version of the test, the court must compare the relative significance of the legal purpose to the non-legal purpose of a hybrid communication. Only if the legal purpose is more significant than the non-legal purpose is the communication privileged. The Ninth Circuit test is not only narrow, but unpredictable. It puts courts in the unenviable position of making an ex post facto judgment on which purposes are more or less significant. Even worse, the test offers little guidance for attorneys attempting to conform their communications to the governing legal standard for privilege application.

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[1] See In re Grand Jury, 13 F.4th 710, 716 (9th Cir. 2021) ("[M]ost, if not all" of the federal circuit courts that "have addressed this issue have opted for some version of the 'primary purpose' test."); In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (considering if legal advice was "one of the significant purposes.") (emphasis added); In re County of Erie, 473 F.3d 413, 420 (2d Cir. 2007) (considering "whether the predominant purpose of the communication is to render or solicit legal advice"); Alomari v. Ohio Dep't of Pub. Safety, 626 F. App'x 558, 570 (6th Cir. 2015) (same); United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997) (stating in dicta that privileged communications must be made for the "for the primary purpose" of legal advice).

[2] 13 F.4th 710.

[3] See supra note 1.

"A Primary Purpose" Test

The District of Columbia Circuit announced a broader interpretation of the primary purpose test in a 2014 decision authored by then-Judge Kavanaugh, In re Kellogg Brown & Root, Inc.[4] Under the District of Columbia Circuit's test, a communication is privileged if legal advice is a primary purpose – or "one of the significant purposes."[5] The District of Columbia Circuit looks at the legal purpose behind a communication and decides whether it is significant, without evaluating the relative significance of other, non-legal purposes. So long as one of the significant purposes of the communication is to provide or obtain legal advice, the communication is protected by the attorney-client privilege. This test has the virtue of being both easier and more practical to apply for all attorneys, especially in-house attorneys.

"Per Se" Test

The Seventh Circuit, on the other hand, has not embraced the "primary purpose" analysis but has applied a "per se" test to dual-purpose communications, at least in the tax advice context.

In United States v. Frederick, the court held that, "a dual-purpose document – a document prepared for use in preparing tax returns and for use in litigation – is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns."[6] The court opined that "by using [their attorney] as their tax preparer, [petitioner] ran the risk that his legal cognitions born out of his legal representation of them would creep into his worksheets and so become discoverable by the government."[7] According to the Seventh Circuit, therefore, it is the client who bears the risk that dual-purpose communications will be disclosed when they rely on counsel to provide anything other than pure legal advice. Although the Seventh Circuit has not addressed whether this reasoning applies outside of the context of tax advice, broader application of the "per se" test would severely narrow the scope of privilege afforded to corporate communications.

THE EXISTING CIRCUIT SPLIT CREATES UNCERTAINTY FOR IN-HOUSE ATTORNEYS WORKING ACROSS JURISDICTIONS

The existing circuit split creates uncertainty for companies and their counsel who face the prospect of litigation and government investigations, especially those crossing over multiple jurisdictions. Although the potential for litigation in different jurisdictions with different substantive laws is likely familiar to many in-house lawyers, the threat of inconsistent privilege rulings regarding the same documents makes planning for

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4 756 F.3d at 760.
5 Id. at 758-59.
6 182 F.3d 496, 501 (7th Cir. 1999).
7 Id.

and minimizing disclosure risks untenable. In-house attorneys aware of the issue are necessarily forced to comply with the narrowest version of the test to protect important communications from disclosure.

Indeed, in the briefing before the Supreme Court, both parties stressed the need to avoid uncertainty in the application of the privilege. The petitioner argued that applying the primary purpose test "requires courts to engage in an ad hoc balancing exercise that will create unacceptable uncertainty and deter open dialogue between lawyers and their clients."[8] The United States, in contrast, claimed that the primary purpose test has been widely accepted, such that "[o]verturning the consensus would destabilize courts, engender uncertainty in the application of a new approach, and impede the justice system's search for truth."[9] Regardless of which side the Supreme Court ultimately takes, and given the rarity in which the Supreme Court takes up privilege disputes, the mere existence of a decision on this issue from the high court is certain to engender greater clarity for practitioners.

TIPS FOR IN-HOUSE COUNSEL

Pending the Supreme Court's resolution of the issue, in-house counsel can and should take precautionary measures to protect their privileged communications.

First, both in-house and outside counsel must ensure that their attorney teams and clients are aware that the various federal courts make a distinction between purely legal communications and dual-natured legal and non-legal communications and, in the case of the latter, apply different tests to those hybrid communications. In our experience, many clients are understandably not aware of the issue at all, hence why we believe it is important to "spread the word" that the issue exists and that the uncertainty it creates is real.

Second, the narrow nature of both the Ninth and Seventh Circuit tests suggest that the safest course of action is to separate legal and business advice completely, at least where possible. To facilitate this separation, in-house attorneys should clearly state in their communications – such as with a header that includes language to the effect of, "ATTORNEY-CLIENT PRIVILEGE/FOR PURPOSES OF LEGAL ADVICE" – when they are providing legal advice or receiving information to provide legal advice. In the case of the latter, counsel can even add extra text in the body of the communication that states, "this information is requested for the purpose of rendering legal advice."

Third, as a corollary to item two, counsel should also encourage clients, especially business professionals and other employees, to make clear requests for legal advice. Business professionals can do this, for example, by sending a separate email to a legal team member labeled "REQUEST FOR LEGAL ADVICE" or "FOR PURPOSES OF

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8 Brief for the Petitioner, In re Grand Jury, No. 21-1397 (Nov. 16, 2022), at 2.

9 Brief for the United States, In re Grand Jury, No. 21-1397 (Dec. 16, 2022), at 33.

LEGAL ADVICE" instead of simply copying in-house counsel on a general request to the larger group for review or comment.

Fourth, where it is impractical to separate legal and business advice into different communications or documents, counsel should clearly label legal and business advice whenever feasible. Similarly, for multidisciplinary committees on which attorneys often sit, any information that memorializes the legal advice of an attorney should be clearly labeled.

Fifth, attorneys should be deliberate in their use of headers and other language that specify that those communications are intended to be privileged. Like the "child who cries wolf," using an automatic privilege label on all communications could have the opposite effect than that intended by counsel – namely, it could cause after-the-fact decisionmakers to give less deference to the privilege marker contained on dual-purpose or purely legal communications. So, as a matter of best practice, attorneys should refrain from labeling, to give a few examples, lunch and dinner invitations, sports and entertainment communications, and other social or personal communications as privileged. The privilege label should only be used when the communication in question is intended to be privileged or when the sender or recipient wants to preserve the ability to argue that the communication should enjoy privileged status.

Sixth, in-house counsel should clearly define their roles and responsibilities when serving dual business and legal roles and should ensure that employees are aware of the risks and limits of the privilege protection when counsel also serves a business function. Furthermore, in those instances, counsel and their clients may elect as a matter of practice to hold old-fashioned in-person meetings or video/phone conversations as opposed to creating a written record subject to after-the-fact scrutiny and second guessing.

Finally, in consultation with counsel and with careful attention to governing legal standards, business organizations would do well to take this opportunity to review (or implement for the first time) and rigorously apply a document-retention policy to all communications, including communications to and from legal counsel. Of course, document retention policies should never be used to destroy communications that are otherwise subject to legal holds or that should be preserved pursuant to legal obligations.[10]

[10] On January 23, 2023, the Supreme Court dismissed the writ of certiorari as improvidently granted. The circuit split, therefore, still awaits resolution.