U.S. Supreme Court Takes Up, Then Passes on, the Opportunity to Clarify Attorney-Client Privilege for Dual-Purpose Communications

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The U.S. Supreme Court recently took up *In re Grand Jury,* No. 21-1397, from the U.S. Court of Appeals for the Ninth Circuit to address a common, recurring, and sometimes vexing question as to attorney-client privilege: how to apply the privilege to communications with counsel that contain both legal and non-legal advice? This is a particularly important question for corporate in-house counsel who, as the courts often say, "wear two hats," providing both legal and business or policy advice to their employers.

The attorney-client privilege protects confidential communications between a lawyer and client made for the purpose of soliciting or providing legal advice.[1] However, many communications with counsel are made for reasons in addition to legal advice, and such communications made "[w]hen an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend" are "not privileged."[2] As a result, difficulties in applying privilege may arise when communications to or from a lawyer contain *both* legal and non-legal advice, *i.e.*, dual-purpose communications.

Dual-purpose communications are often analyzed by the federal courts under the "primary purpose" or "predominate purpose" test, where a communication will be considered protected by the attorney-client privilege if its primary or predominate purpose is to solicit or render legal advice, even if that communication also contains non-legal advice.[3] While not universally adopted in the federal courts, this test has been routinely utilized by many courts to analyze privilege as to dual-purpose communications.[4]

In 2014, the U.S. District Court for the District of Columbia slightly modified that test and adopted the "significant purpose" test in an opinion authored by then D.C. Circuit Judge, and current Supreme Court Justice, Kavanaugh.[5] Therein, the court held that so long as the provision of legal advice was a significant reason for a communication, it would be protected by attorney-client privilege.[6] While not widely adopted, the modified rule in *Kellogg* has been utilized by a number of federal district courts to analyze the application of privilege to dual-purpose communications.[7]

In addition, and relevant for this discussion, courts have applied, in the work product context, a much broader test, whereby a document created "because of" anticipated litigation, which tends to "reveal mental impressions, conclusions, opinions or theories concerning the litigation," does not lose its work product protection simply because it may also influence a business decision.[8]

In re Grand Jury concerned a company and its law firm that refused to produce, on privilege grounds, certain tax advice documents in response to grand jury subpoenas.[9] The U.S. District Court for the Central District of California had originally reviewed the withheld documents and ordered their production because their "primary purpose" was the provision of tax advice, not legal advice. The company and law firm appealed and argued that the court should have utilized the broader work product "because of" test to conduct its privilege analysis of the dual-purpose tax communications at issue.

Siding with the lower court, the Ninth Circuit affirmed and declined to apply the "because of" test to attorney-client privilege. Further, the Ninth Circuit left open whether it should adopt the *Kellogg* "significant purpose" test, stating that the differences between that test and the "primary purpose" test were very fine and, regardless, would not have led to a different result in that case (or, indeed, many other cases).

The company and law firm petitioned the Supreme Court for a writ of certiorari, which was granted on October 3, 2022. The issue slated for decision was: "Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication."

Because of the previously noted importance of attorney-client privilege to companies, in particular, which routinely draft and distribute dual-purpose communications, thirteen *amicus curiae* briefs were submitted by major industry organizations such as the U.S. Chamber of Commerce, the American Association of Corporate Counsel, the Securities Industry and Financial Markets Association, and the American Bar Association. Oral argument took place on January 9, 2023. The questions put to counsel mainly concerned whether there was an actual dispute among the courts or a real problem to remedy. In other words, most Justices appeared to think that the federal courts do not seem to have significant difficulty in analyzing privilege as to dual-purpose communications.

Perhaps not surprisingly then, the Court shortly thereafter, on January 23, 2023, dismissed the writ of certiorari as improvidently granted. There was no reason given for the order, but it could have been made for any number of reasons. First, perhaps because the case involved a confidential grand jury criminal inquiry, it did not present the fullest public record on which the Court could base its decision. Second, it is possible that the Court did not hear anything new at argument that made the issue one it deemed worthy of decision. Third, and given the line of questioning at argument, it may be that the Court did not clearly see a problem that required a remedy. Most federal courts seem to have been able to apply either the "primary purpose" test or "significant purpose" test, even if the decisions, being very factually intensive, have necessitated extensive *in camera* review of potentially privileged communications.

Thus, for the time being, the federal courts are left without clear and explicit guidance from the U.S. Supreme Court and will continue to apply either the "primary purpose" or "significant purpose" test in reviewing the potential application of attorney-client privilege to dual-purpose communications. Companies and counsel should recognize that, regardless of the test ultimately applied, there are pitfalls inherent to dual-purpose communications such that they may not be deemed protected by attorney-client privilege even if they contain important legal advice. Accordingly, companies and counsel should take appropriate steps to protect attorney-client privilege as to such communications to the extent necessary or feasible, and, if possible, separate legal advice from business advice and clearly label it as privileged.

For More Information

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1 *See United States v. Sanmina Corp.,* 968 F.3d 1107, 1116 (9th Cir. 2020) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

2 *See In re County of Erie,* 473 F.3d 413, 420 (2d Cir. 2007).

3 *See In re County of Erie,* 473 F.3d at 420; *E.E.O.C. v. BDO USA, LLP,* 876 F.3d 690, 695 (5th Cir. 2017).

4 *See, e.g., Alomari v. Ohio Department. of Public Safety,* 626 Fed. App'x. 558 (6th Cir. 2015); *Towne Place Condominium Association v. Philadelphia Indemnity Insurance Co.*, 284 F. Supp. 3d 889, 893 (N.D. Ill. 2018); *Fox News Network, LLC v. U.S. Department of the Treasury,* 739 F. Supp. 2d 515, 560 (S.D.N.Y. 2010).

5 *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754 (D.C. Cir. 2014).

6 *Id* at 760.

7 *See, e.g., Edwards v. Scripps Media, Inc.*, No. 18-10735, 2019 WL 2448654, at *1-2 (E.D. Mich. June 10, 2019); *Pitkin v. Corizon Health, Inc.,* No. 16-cv-02235, 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017).

8 *See U.S. v. Adlman,* 134 F.3d, 1194, 1195 (2d Cir. 1998); *Binks Manufacturing Co. v. National Presto Industries, Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983).

9 *In re Grand Jury,* 23 F.4th 1088 (9th Cir. 2022).