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Fortify attorney-client privilege over dual-purpose communications before Supreme Court decides *In Re Grand Jury*

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(January 5, 2023) - Susan Combs and Richard Kiely of Holland & Hart LLP offer insights on ensuring legal advice remains privileged as the Supreme Court reviews questions about the scope of the attorney-client privilege where communications are for legal advice and non-legal purposes.

A communication must be made for the purpose of legal advice to be protected from disclosure by the attorney-client privilege. If legal advice is not the purpose of the communication, the attorney-client privilege does not apply. What about communications that are for the purpose of legal advice along with other non-legal purposes? That is the question the Supreme Court will address in its upcoming review of *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022).

The case arises in the tax context, but the outcome of the Supreme Court's decision will have a profound impact on all civil and criminal matters where multipurpose communications are involved. Oral argument is scheduled for Jan. 9, 2023. While we wait for the Supreme Court to weigh in, this article offers practical insights to help you ensure that legal advice remains privileged.

I. The purpose requirement of the attorney-client privilege

The attorney-client privilege protects communications between attorneys and clients made in confidence for the purpose of receiving or giving legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); Restatement (Third) of the Governing Lawyers § 68. The privilege recognizes that sound legal advice or advocacy serves public ends and depends upon the lawyer's being fully informed by the client. *Upjohn Co.*, 449 U.S. at 389.

Some communications implicate both legal and business concerns. A corporate client might ask an employment lawyer to gather information as part of an internal investigation. The corporate client may have the dual purpose for the lawyer to provide legal advice but also so the corporation

can use the information collected to make changes to its business practices.

Similarly in the tax context, a corporate client might ask a tax lawyer to assess whether a legal and factual basis exists for a claim for refund (tax legal advice) and, if so, to file a claim for refund (tax preparation). This is a common dual-purpose relationship in the tax context, where the lawyer's advice may integrally involve both legal and non-legal analysis. *See, e.g., United States v. Sanmina*, 968 F.3d 1107, 1116 (9th Cir. 2020) (observing that the engagement of a law firm to prepare a valuation report in support of a tax deduction may have had a dual legal and non-legal purpose).

The question of whether a communication that seeks or provides both legal advice and non-legal advice meets the purpose requirement of the attorney-client privilege is uniquely complicated. What is the proper legal standard to use to answer that question is the subject of the Supreme Court's review of *In re Grand Jury*.

II. The *In re Grand Jury* decision

The *In re Grand Jury* case arose from a grand jury subpoena issued to a law firm as part of a criminal investigation of its client. The law firm had provided the client legal advice about the tax consequences of the client's anticipated expatriation and prepared several individual tax returns and IRS Form 8854.

In response to the subpoena, the law firm produced some documents, but withheld others as protected by the attorney-client privilege. Some of the withheld documents were made both to allow the law firm to provide the client with legal advice about taxes and to facilitate the preparation of the client's tax returns.

In considering whether the attorney-client privilege attached to the disputed dual-purpose communications, the district court used the "primary purpose" test. The district court held that the attorney-client privilege did not protect a subset of documents whose predominate purpose was the procedural aspects of tax return preparation and not tax legal advice.

On appeal, the 9th U.S. Circuit Court of Appeals affirmed the district court's order. The court held that "the primary purpose test applies to attorney-client privilege claims for dual-purpose communications." *In re Grand Jury*, 23 F.4th at 1092. The court described the test as looking at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice.

In adopting this test, the court reasoned that common law principles guide the interpretation of the attorney-client privilege's scope, and at common law, the privilege extends only to communications made for the purpose of facilitating the rendition of legal services. *In re Grand Jury*, 23 F.4th at 1092-93. The court observed that most, if not all, of the other federal circuit courts to have considered the issue have adopted some version of the "primary purpose" test. *In re Grand Jury*, 23 F.4th at 1094 (9th Cir. 2022) (citing cases). The court also noted that "[t]he natural implication of this

inquiry is that a dual-purpose communication can only have a single 'primary' purpose." *In re Grand Jury*, 23 F.4th at 1092.

In deciding to adopt the "primary purpose" test, the 9th Circuit did not follow the 7th Circuit's *per se* approach, stated in *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999), that "a document prepared for use in preparing tax returns and for use in litigation" is not privileged no matter how significant the legal purpose. *In re Grand Jury*, 23 F.4th at 1092 n.2.

The 9th Circuit also did not adopt a more protective version of the "primary purpose" test articulated by the District of Columbia U.S. Circuit Court of Appeals in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). The D.C. Circuit's formulation looks to whether obtaining or providing legal advice is a primary purpose — meaning one of the significant purposes — of the communication, 756 F.3d at 759-60. The D.C. Circuit reasoned that "trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task." *Id.*

The 9th Circuit stated that it saw the merits of *Kellogg's* reasoning but had no need to apply it in this case. In the court's view, the *Kellogg* court was dealing with a corporate internal investigation, and the reasoning for "a primary purpose" test has less force in the tax context. *In re Grand Jury*, 23 F.4th at 1094 & n.5. The court further stated that the *Kellogg* test would make a difference only in "truly close cases" where the legal purpose of a communication is at least as significant as the non-legal purpose. *In re Grand Jury*, 23 F.4th at 1094. The court left open the possibility that it could adopt the *Kellogg* test in a future different case.

III. Practical steps to strengthen the attorney-client privilege over dual-purpose communications while awaiting the Supreme Court's decision

While the scope of the attorney-client privilege over communications made for legal and business advice reasons is in flux, parties should exercise the utmost caution. If a party leaves it up to a court to disentangle and weigh the different reasons why a communication was made, it generates unnecessary risk.

The following practical steps will help clients and lawyers ensure that privileged communications will remain protected.

(1) Avoid commingling of legal and non-legal advice. The most effective tactic to preserve the attorney-client privilege is to have separate communications for legal and non-legal purposes. Although it seems unlikely the Supreme Court would adopt the more extreme *per se* view of *Frederick*, if it did, then at least in the tax return context, no dual-purpose documents would be privileged regardless of how significant the legal purpose. For example, an email discussing business and legal matters should be separated into two emails or a new string should be started if non-legal advice is added to the scope of the discussion. While this measure can be hard to implement, failing to separate legal and non-legal

advice substantially increases the risk of having to disclose the communication.

(2) Clearly communicate the legal advice that is being requested or provided. A communication that states the intention (purpose) to seek or provide legal advice, the nature of the advice, and an identifiable legal question will support a finding that the predominant purpose of the communication was legal advice. Use language in communications that clarifies purpose, such as "You asked me to analyze the legal issue of" or "Thank you for asking these legal issues."

(3) Mark communications as legal advice. Clearly label communications, when appropriate, as "Attorney-Client Privileged" or "For purposes of legal advice." Do not overuse these labels or the assertion of privilege will be diluted. The labels cannot transform a communication's purpose, but they provide a court with useful indicia of how the parties viewed its purpose. The labels help to avoid uncertainty even for communications that have a single purpose to provide legal advice.

(4) Consider whether a written communication is necessary. Exercise good judgment in deciding how to communicate sensitive legal advice, especially when it also serves a business purpose, and consider whether communicating over the phone or by virtual meeting is sufficient. If a document is created, consider what details and level of severity are necessary for the advice to be effective. A lawyer acting in a dual capacity should be particularly circumspect about putting in unnecessarily critical statements in writings that may be subject to disclosure.

(5) Limit the recipients and invitees. Sending a document beyond those whose job responsibilities normally involve legal consultation increases the risk that a court will find the primary purpose was for business advice and not legal advice. For example, if a document is sent beyond those whose job responsibilities normally involve legal consultation, the risk increases that a court will find the primary purpose was for business advice and not legal advice.

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