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Locke Lord QuickStudy: In Re Grand Jury: U.S. Supreme Court ?Punts on How to Apply Attorney-Client Privilege to ?Dual-?Purpose Communications

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On January 23, 2023, the U.S. Supreme Court dismissed *In re Grand Jury*, which had asked it to expand the scope of attorney-client privilege protection for dual-purpose communications, *i.e.*, communications (particularly those involving in-house attorneys) that seek legal advice but also contain business or other non-legal information. The dismissal—a one-line order stating the Court improvidently granted certiorari—leaves a status quo under which most courts find privilege where ***the primary*** purpose of the communication was legal advice. Some courts (most notably, the D.C. Circuit) phrase the test slightly differently, finding privilege if ***a significant*** purpose of the communication was legal advice. As a result, courts around the country will articulate the test for dual-purpose documents slightly differently, although it isn't clear that these different formulations will produce significantly different outcomes in which documents are protected. Like before, significant litigation could still arise regarding whether specific communications involving attorneys—including specific paragraphs or even specific sentences of those communications—are privileged.

Federal circuits have articulated different tests for applying the attorney-client privilege to dual-purpose communications.

Attorney-client privilege protects communications made between attorneys and their clients for the purpose of obtaining or providing legal advice. Many courts have held that merely including an attorney on a communication does not trigger the privilege; the purpose of the communication must be legal advice.

Difficult questions can arise when a single communication has a dual purpose, *i.e.*, a portion relates to legal advice and another portion has a business or other non-legal purpose. In evaluating how privilege applies to such documents, federal courts have generally applied two tests. The primary purpose test protects a communication if ***the primary*** purpose of the communication related to legal advice. Courts in the Second, Fifth, Sixth, and Ninth Circuits apply the primary purpose test.

The D.C. Circuit phrases the test a bit differently, applying a privilege if ***a significant*** purpose of a communication seeks legal advice. See, *e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (holding the test is whether legal advice is “a primary purpose of the communication, meaning one of the significant purposes of the communication.”) (emphasis in original).

In theory, the significant purpose test would protect more communications. The primary purpose test potentially

involves determining all purposes of a communication and only extending privilege if legal advice was the single, overriding, primary purpose. By contrast, the significant purpose test would protect any communication in which legal advice was one of the significant purposes, even if the court were unsure if legal advice was the primary purpose.

The Ninth Circuit in *In re Grand Jury* applied the primary purpose test, and the privilege holder appealed to the Supreme Court.

In *In re Grand Jury*, an unnamed law firm refused to comply with a federal criminal grand jury subpoena for documents relating to the law firm's tax work. The documents included privileged legal advice, but primarily consisted of tax information and advice, which is not considered privileged.

The dispute involved documents that included both legal advice and tax advice. The law firm sought to protect these dual-purpose documents, arguing that privilege protected the documents from disclosure under the significant purpose test. The district court ordered the law firm to produce the dual-purpose documents, but permitted the law firm to redact those portions of the documents containing legal advice.

The Ninth Circuit affirmed the district court's primary purpose analysis, but it also "[saw] the merits of the reasoning in *Kellogg*." *In re Grand Jury*, 23 F.4th 1088, 1094 (9th Cir. 2021). But the Ninth Circuit declined to adopt the significant purpose test because: (i) no other circuit courts had done so; and, (ii) the court thought there was only a limited universe of documents where applying one test instead of the other would make a difference. *Id.*

The law firm petitioned—and obtained—certiorari, asking the Supreme Court to adopt the significant purpose test going forward.

The Court dismissed the case after oral argument, leaving the status quo intact.

Although every amicus to submit a brief supported the petitioner's position, the Court dismissed the case two weeks after oral argument. Although the one-sentence dismissal order gives no explanation for the Court's action, the Court at oral argument seemed unsure what impact a different test would have in most cases. Given the district court's redaction of legal advice in dual-purpose communications, petitioner's counsel struggled to identify specific documents that the district court should have treated as privileged. Justice Kagan may have summarized the feeling of multiple justices when she asked petitioner's counsel to comment on the "ancient legal principle, if it ain't broke, don't fix it." In other words, the Court seemed to believe that lower courts were doing a fine job evaluating privilege for dual-purpose communications.

It is difficult to determine what type of case would trigger the Court to review this circuit split again. There would likely need to be a case in a primary purpose jurisdiction where non-privileged business information was so intertwined with privileged legal information that redaction wasn't a practical remedy. Thus, the Court may not address this issue in the foreseeable future.

Parties should treat dual-purpose communications with care.

Parties required to review dual-purpose communications for privilege and potential production should expect courts will continue to be reluctant to grant privilege to an entire document simply because some part of the document relates to legal advice. Regardless of which test applies, parties should plan to justify privilege for discrete components of communications. Courts faced with a privilege challenge will look for ways to produce non-legal communications through redaction of legal advice. Thus, privilege review will likely continue to be a time-consuming process.

Parties concerned about risking privilege for legal communications should (to the extent possible) attempt to separate legal advice from non-legal business communications. Parties should try to put legal advice for which they may wish to assert privilege in stand-alone communications, eliminating lengthy prior email chains where possible and avoiding forwards of such legal advice. Of course, such habits are easier in theory than in practice, but diligence regarding particularly sensitive communications can make claiming privilege for such communications easier and less risky in the future.

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