May 02, 2023

ARTICLES

# The Unclear Privilege Test for Dual-Purpose Communications

A look at the unresolved circuit split regarding the proper test to determine if a dual-purpose communication is immune from discovery under the attorney-client privilege.

By Emma P. Murphy

Share:

This term, the U.S. Supreme Court was poised to decide one of the biggest attorney-client privilege cases in decades and resolve a three-circuit split over the appropriate test to determine whether a dual-purpose communication (meaning one pertaining to both legal and non-legal advice) is covered by the attorney-client privilege. After hearing oral arguments, the Supreme Court unexpectedly dismissed the case on the ground that the writ of certiorari was "improvidently granted." *In re Grand Jury*, No. 21-1397, 2023 WL 349990, at *1 (U.S. Jan. 23, 2023).

In light of the dismissal, the confusion among lower federal courts regarding the proper privilege test to apply to dual-purpose communications remains. Practitioners must therefore be aware of the potential tests courts could apply so that they can avoid inadvertently risking that communications with clients will later be deemed discoverable.

## The Ninth Circuit: The Primary-Purpose Test

The Supreme Court had granted certiorari to review a Ninth Circuit decision considering the applicability of the attorney-client privilege to certain company tax documents prepared by a law firm. *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 80 (2022), *cert. dismissed as improvidently granted*, No. 21-1397, 2023 WL 349990 (U.S. Jan. 23, 2023). When the law firm withheld these documents as privileged, the District Court for the Central District of California granted the government's motions to compel production and, when the law firm still refused to produce the documents, to hold the law firm and company in contempt.

On appeal, the Ninth Circuit affirmed the contempt order. The Ninth Circuit held the applicable privilege test for such dual-purpose communications was the primary-purpose test, which considers "whether *the* primary purpose of the communication [was] to give or receive legal advice, as opposed to business or tax advice." *Id.* at 1091 (emphasis added). In reaching this conclusion, the Ninth Circuit rejected a "because of" test, which would consider whether, under the totality of the circumstances, a document "was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation." *Id.* at 1092 (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004)). The court reasoned such a test would encourage clients to copy lawyers on all communications to suggest it was being done because of anticipated litigation, making each communication therefore privileged.

The Ninth Circuit noted its primary-purpose test was the test used by the majority of federal courts, including the Second, Fifth, and Sixth Circuits. It also considered and "s[aw] the merits of the reasoning" of a D.C. Circuit case adopting a more expansive test to determine whether a dual-purpose communication was privileged, but left open the question of whether it would adopt such a rule in a closer case. *Id.* at 1094.



## The D.C. Circuit: The Significant-Purpose Test

The D.C. Circuit case cited by the Ninth Circuit was a decision authored by then judge Brett Kavanaugh. *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014). In a case brought by a company's defense contractor under the False Claims Act, the D.C. Circuit considered the discoverability of documents related to the company's internal investigation regarding the alleged fraud.

The D.C. Circuit explicitly rejected the primary-purpose test. Judge Kavanaugh wrote, "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.* at

759. Because it would be difficult for lawyers and clients to predict whether a court would find a dual-purpose communication privileged under this test, the court expressed concern it would potentially create a chilling effect.

Instead, the D.C. Circuit adopted a significant-purpose test, which considers whether "obtaining or providing legal advice [was] *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 760. With respect to the documents sought in that case, the court held they were privileged because one of the significant purposes of the internal investigation was to obtain or provide legal advice, even if it was mandated by regulation and done for other purposes as well.

No other courts of appeals have explicitly adopted this significant-purpose test.

## The Seventh Circuit: No Privilege (at Least for Tax Documents)

In sharp contrast to the D.C. Circuit's broad conception of the attorney-client privilege, the Seventh Circuit has a bright-line rule rejecting the privilege for dual-purpose communications, specifically in the context of tax documents. In *United States v. Frederick*, the Seventh Circuit considered whether documents pertaining to a lawyer's preparation of a client's tax returns were discoverable in an Internal Revenue Service investigation into the client. 182 F.3d 496 (7th Cir. 1999).

The Seventh Circuit rejected the possibility of these documents being privileged. Recognizing there is no accountant's privilege, and not wanting to allow clients to effectively create such a privilege by having a lawyer perform the tasks of an accountant, the court held "a dual-purpose document—a document prepared for use in preparing tax returns *and* for use in litigation—is not privileged." *Id.* at 501.

The Seventh Circuit has not extended the rule in *Frederick* beyond the tax context, nor has it considered *Kellogg Brown & Root*. However, *Frederick* remains good law, and the court has not explicitly rejected the possibility of its test applying to other dual-purpose documents.

## What Should Practitioners Do Now?

In sum, there are at least three privilege tests that federal courts might apply to dual-purpose communications: the primary-purpose test, the significant-purpose test, or a bright-line rule of no

privilege.

The Supreme Court was expected to provide some much-needed guidance regarding the proper privilege test for dual-purpose communications, but its dismissal of *In re Grand Jury* leaves this area as murky as ever. With these uncertainties remaining for the foreseeable future, there are several considerations that practitioners should keep in mind when communicating with clients.

Attorneys should consider the potential circuits where their clients might sue or be sued and proceed accordingly based on whether circuit precedent would suggest a broad or narrow interpretation of the attorney-client privilege as applied to dual-purpose communications. Of course, it is not always possible to predict ex ante where a suit will be brought. Further complicating the picture is the fact that state courts are not bound by this case law, making it even more difficult to predict the applicable test based on the potential jurisdiction.

In addition, attorneys should consider the type of work they are performing for a client. Courts generally are less receptive to privilege arguments regarding dual-purpose communications related to taxes because of the perceived mechanical nature of preparing tax documents. On the other hand, internal investigations seem to be an area where courts are more cognizant of the multiple important purposes a communication might serve and are, therefore, more likely to find a communication to be privileged. There are still many gray areas, however.

For attorneys concerned about the current state of flux in this area of law, the safest course of action would be to avoid dual-purpose communications to the extent possible: Keeping legal advice separate from non-legal advice eliminates the need to even consider the proper test for dual-purpose communications. The Assistant to the Solicitor General who argued on behalf of the United States before the Supreme Court in *In re Grand Jury* explained: "[I]n an ideal world, clients would make their business communications and then they would send an e-mail to the lawyers about the same issue . . . . [T]he legal one [would be] withheld, [and] the business one [would be] produced." Transcript of Oral Argument at 71, *In re Grand Jury*, No. 21-1397 (U.S. Jan. 9, 2023). But such duplicative communication is impractical and provides little guidance to in-house counsel being asked to address both legal and business issues. In addition, given the increased costs associated with segregating communications and the realities of modern business, such an approach may not be a feasible long-term plan. If in doubt over whether a communication would be considered privileged, it is better to make the communication orally, if possible.

With the attention the privilege issue for dual-purpose communications has received because of *In re Grand Jury*, one can expect to see lower courts grappling with the various tests more explicitly in upcoming cases. Attorneys should continue to monitor the case law developments on this front.

*Emma P. Murphy is an attorney at Phillips Lytle LLP in Buffalo, New York.*

---