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September 24, 2021

The Purpose, A Purpose? Because of Litigation Concerns? Ninth Circuit Adopts Stringent Test for Dual-Purpose Communications



When are communications with counsel that are for both legal advice and business purposes protected by the attorney-client privilege? From least to most stringent, courts have required that a communication be "because of" anticipated litigation, that legal advice be "a" primary goal of the communication, or that legal advice be "the" primary goal of the communication. Earlier this month, the U.S. Courts of Appeal for the Ninth Circuit addressed that important question in *In Re Grand Jury*, ruling that "the primary purpose test" applies to attorney-client communications to determine whether they are protected. Under this test, courts analyze whether *the* primary goal of a communication was to give or receive legal advice. In a decision stripped of most identifying facts and details, the court affirmed the lower court's application of the primary purpose test and overruled the urgings of an unnamed law firm and its client to protect dual-purpose documents created *because of* litigation concerns.

Prior to *In Re Grand Jury*, the Ninth Circuit had not adopted a test to determine whether dual-purpose communications are entitled to attorney-client privilege. The most recent Ninth Circuit decision on the issue, *United States v. Sanmina Corporation*, recognized an intracircuit split, but declined to establish a test for dual-purpose communications, finding that the communications at issue were not dual-purpose. *In re Grand Jury* resolves this split among trial courts and aligns the Ninth Circuit with a majority of other circuit courts. The U.S. Courts of Appeal for the Second, Fifth, and Sixth Circuits have also adopted "the primary purpose" test. In the minority, the U.S. Court of Appeal for the District of Columbia Circuit has adopted the "a primary purpose" test in at least some contexts. No circuit has adopted the "because of" analysis advanced by the defendants and adopted by some trial courts.

Although the Ninth Circuit reserved judgment on whether it may later adopt a more lenient "a primary purpose" test in other circumstances, *In Re Grand Jury* articulates a strict analysis. The test requires a single primary purpose to establish protection. Therefore, although advice often has complex motivations, in the event of litigation a court must determine the primary purpose of a communication. It cannot find a communication

protected because legal advice was merely one among many purposes or because litigation was anticipated. Nonetheless, the court clarified that this rule does not dictate that all dual-purpose opinions are rendered unprotected.

Importantly, by adopting "*the* primary purpose" test, the Ninth Circuit rejected a broad "because of" privilege test modeled after work-product law, which protects any dual-purpose document created in anticipation of potential litigation. The court reasoned that this broader framework would incentivize businesses to include attorneys in business decisions for the purpose of immunizing documents in any future litigation.

Takeaways

Ultimately, because the primary purpose inquiry is fact-specific, it requires future privilege determinations to be made on a case-by-case basis. Because there are costs associated with litigating these issues, the fact-specific nature of the test justifies precautionary measures, which may help companies avoid later challenges in court. For example, the purpose of a communication may be substantiated by:

- Communicating and documenting an attorney's role in a project;
- Documenting the receipt of any legal advice;
- Clearly defining the relationship of employees working with attorneys; and
- Creating or updating company policies to clearly indicate when counsel will be consulted for business or legal advice.

In Re Grand Jury represents a change in the privilege landscape in the Ninth Circuit. Prior to this decision, district courts in the circuit have applied both "the primary purpose" and the "because of" tests to attorney-client privilege claims for dual-purpose communications. Taking steps to define the purpose of communications that include attorneys (particularly between companies and their in-house counsel, who often wear multiple hats) can help preserve protection, even under the Ninth Circuit's stringent test.

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