

Ninth Circuit Applies "Primary Purpose" Test to Dual-Purpose Communications in Determining Whether Attorney-Client Privilege Applies

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Traditionally, only communications made for the purpose of giving or receiving legal advice have received the protections of the attorney-client privilege. Attorneys, however, often wear multiple hats and serve as both lawyers and business advisors for their clients. Questions about the applicability of the attorney-client privilege therefore often arise in so-called "dual-purpose" communications that include both legal and business matters.

Joining the United States Courts of Appeals for the Second, Fifth, Sixth, and D.C. Circuits, the United States Court of Appeals for the Ninth Circuit in *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. Jan. 27, 2022) held that, in evaluating whether dual-purpose communications that implicate both legal and business concerns are protected by the attorney-client privilege, courts should apply the "primary purpose" test, which looks at "whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice." The Ninth Circuit expressly rejected application of the broader "because of" test, under which the privilege applies to dual-purpose communications that would not have been made but for the need to give or receive legal advice.

Attorneys

- Joel Kurtzberg
- Miles Wiley