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

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,<sup>1</sup> 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.

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## I. Factual and Procedural Background

In connection with a criminal investigation into the owner of an unnamed company, a grand jury issued subpoenas to the company and the company's law firm, requesting documents and communications. In response, the company and law firm each produced some documents but withheld others on attorney-client privilege and work-product protection grounds.

The government moved to compel production of the withheld documents, and the United States District Court for the Central District of California granted the motion in part. The district court explained that the documents either were not protected or were discoverable under the crime-fraud exception, holding that certain documents identified as dual-purpose communications were not privileged because the “primary purpose” of the documents was to obtain tax advice, not legal advice. In ordering the documents produced, the district court rejected the company's

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<sup>1</sup> See *In re County of Erie*, 473 F.3d 413, 420 (“We consider whether the predominant purpose of the communication is to render or solicit legal advice.”); *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997) (requiring communication to be made “for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding”); *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 572-73 (6th Cir. 2015) (applying primary purpose test); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

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and law firm's request to apply a "because of" test that would protect dual-purpose communications made "because of" the need to give or receive legal advice.

The company and the law firm disagreed with the district court's ruling and continued to withhold the disputed documents. On the government's motion, the district court held the company and the law firm in contempt. The company and the law firm appealed the orders, arguing that the district court erred by relying on the "primary purpose" test, instead of the broader "because of" test for dual-purpose communications.

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## II. The Ninth Circuit's Decision

On September 13, 2021,<sup>2</sup> the Ninth Circuit affirmed the district court's ruling, holding that the "primary purpose" test applies to attorney-client privilege claims for dual-purpose communications.<sup>3</sup> Examining principles of common law, the purposes and policy goals of the attorney-client privilege and work product doctrine, and the practical effects of applying the "primary purpose" or "because of" tests, the unanimous panel held that, consistent with the common law, the scope of the attorney-client privilege must be defined by the purpose of the communication, and therefore the "primary purpose" test should apply to dual-purpose communications.

The court explained the two potential tests for dual-purpose communications. The "primary purpose" test looks at whether the primary purpose of the communication was to give or receive legal advice, as opposed to business or tax advice. *In re Grand Jury*, 23 F.4th at 1091. The "because of" test, which typically applies in the work-product context and is broader than the "primary purpose" test, "does not consider whether litigation was a primary or secondary motive behind the creation of the document," but rather "affords protection when it can be fairly said that the 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 1091-92 (citing *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 908 (9th Cir. 2004)). In the context of the attorney-client privilege, the "because of" test might ask whether a dual-purpose communication was made "because of" the need to give or receive legal advice.

In adopting the "primary purpose" test, the Ninth Circuit explained that interpretation of the attorney-client privilege must be guided by common law principles. *In re Grand Jury*, 23 F.4th at 1092 (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). The court emphasized that the scope of the privilege at common law historically has been defined by the purpose of the communication, not its relation to anticipated litigation. *Id.* at 1092-93. The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Id.* at 1092 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

The Ninth Circuit also explained that the work-product doctrine and attorney-client privilege serve different policy goals, and therefore it makes sense to apply different tests to determine the scope of the separate protections. *Id.* at 1093. The work-product doctrine aims to protect the fairness of the adversarial system by permitting litigators to develop legal theories and strategies without fear that their adversaries can use the discovery process to obtain access to this work. *Id.* By contrast, the attorney-client privilege encourages full and frank communications between attorneys and their clients. The privilege is not tied to the adversarial process and "provid[es] a sanctuary for candid communication about any legal matter, not just impending litigation." *Id.* The Ninth Circuit explained that expanding

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<sup>2</sup> The September 13, 2021 opinion was amended on January 27, 2022 to make minor phrasing revisions not relevant to the court's determination of which test to apply to dual-purpose communications.

<sup>3</sup> The court applied federal common law, which governs the availability and scope of the attorney-client privilege in nondiversity actions. See, e.g., Fed. R. Evid. 501; *Admiral Insurance Co. v. United States District Court for the District of Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989) ("Pursuant to Fed.R.Evid. 501, federal law governs the availability and scope of the attorney-client privilege in nondiversity actions.").

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the attorney-client privilege by applying a broader “because of” test might “harm our adversarial system if parties try to withhold key documents as privileged by claiming that they were created ‘because of’ litigation concerns.” *Id.* Furthermore, applying a broader “because of” protection would create perverse incentives for companies to add layers of lawyers to every business decision to shield materials from production in any future litigation. *Id.* at 1093-94.

Finding no persuasive reason either to abandon the common-law rule focusing on the purpose of the communication, or to borrow the “because of” test from the work-product doctrine, or to depart from the holdings of most, if not all, of the other circuit courts that have addressed this issue,<sup>4</sup> the Ninth Circuit held that the “primary purpose” test applies to dual-purpose communications. *Id.* at 1094.

The Ninth Circuit explicitly declined to consider whether the “a primary purpose” rather than “*the* primary purpose” test may apply in some circumstances. In *In re Kellogg Brown & Root, Inc.*, the D.C. Circuit adopted a version of the “a primary purpose” test, which asks, “[w]as obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?” 756 F.3d 754, 760 (D.C. Cir. 2014). In *Kellogg*, a company conducted an internal investigation for both legal and business reasons, and the D.C. Circuit explained that finding “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” because often it is impossible “to try to determine whether the purpose was A or B when the purpose was A and B.” *Id.* at 759. Acknowledging that the “a primary purpose” test may benefit courts by sparing them the burden of having to identify a predominate purpose among multiple potentially equal purposes, the Ninth Circuit nonetheless declined to apply the “a primary purpose” test in *In re Grand Jury*. The Ninth Circuit distinguished *Kellogg* on the grounds that it dealt with “the very specific context of corporate internal investigations” and “its reasoning does not apply with equal force in the tax context” relevant to evaluating the dual-purpose communications at issue. 23 F.4th at 1094-95. Whether the “a primary purpose” test should be applied to non-tax related dual-purpose communications remains an open question in the Ninth Circuit.

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### III. Implications

By joining circuit courts of appeals in the Second, Fifth, Sixth, and D.C. Circuits<sup>5</sup> in applying the narrow “primary purpose” test to dual-purpose communications between attorneys and clients, the Ninth Circuit has clarified that, where communications between clients and attorneys have multiple purposes, the communications will be protected by the attorney-client privilege when the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice.

When communicating with clients, practitioners potentially subject to the jurisdiction of the Ninth Circuit must be mindful of this potential limit on the scope of the attorney-client privilege protections offered to their clients. To the extent communications are dual-purpose, the attorney-client privilege will not shield such communications from disclosure if the primary purpose of the communications is to dispense business or tax advice. Where possible, it may be wise for practitioners to highlight in their communications the legal advice they are providing and the importance of that advice to the broader issues at hand.

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<sup>4</sup> See *supra* n. 1.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or [jkurtzberg@cahill.com](mailto:jkurtzberg@cahill.com); Miles Wiley (Counsel) at 212.701.3395 or [mwiley@cahill.com](mailto:mwiley@cahill.com); or Christine Kim (Associate) at 212.701.3536 or [ckim@cahill.com](mailto:ckim@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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