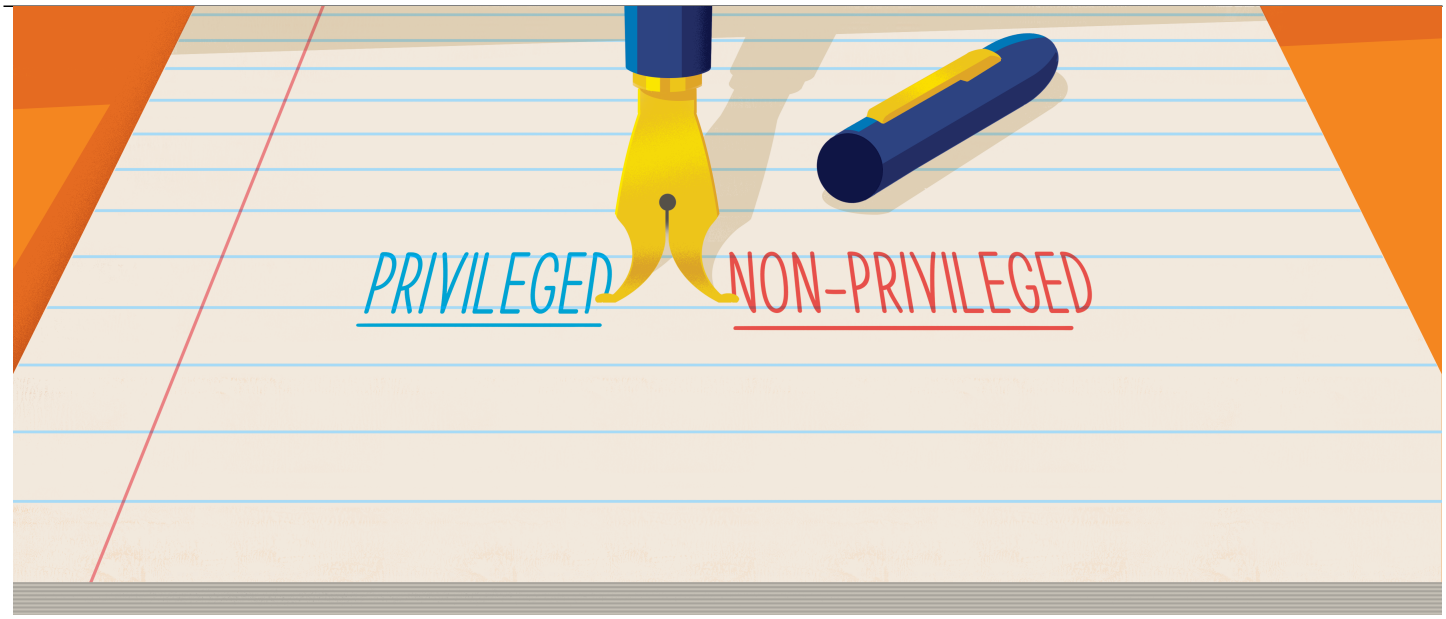
Attorney-Client Privilege Lessons from In re Grand Jury

Law Department Management



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Cheat Sheet

- **Purpose and predominance.** Courts assess whether the legal advice outweighs non-legal purposes in dual-purpose communications.
- **Significance test.** Protection depends on the whether there is a significant, whether or not predominant, legal purpose in the communication.
- **Equipoise approach.** If legal and non-legal purposes are equally significant, privilege may apply.
- **Subject-matter impact.** Context matters; certain situations may be presumptively legal or non-legal for privilege.

Clients often call on their lawyers for advice that spans legal and business questions. In-house lawyers are routinely asked to advise their business clients on both legal and business issues — often at the same time. Last term, the US Supreme Court took up the question of how the attorney-client privilege applies to such “dual purpose” communications, in *In re Grand Jury*, but dismissed the case

without issuing a decision. This has left an uncertain legal landscape, where courts have articulated different tests for determining the existence of privilege. But lawyers called on to offer both legal and business advice can still apply some basic ground rules to protect the privilege over attorney-client legal communications.

It is in the best interest of an attorney to establish a direct protocol for clients seeking both business and legal advice. VectorMine / *Shutterstock.com*

> If the communication served *only* a legal purpose — it would be privileged. If it served *only* a non-legal one, it would not be. What happens when a single communication is both legal and non-legal?

The dilemma of “dual purpose” communications to the attorney-client privilege

The attorney-client privilege is “the oldest of the privileges for confidential communications to the common law.” Lawyers routinely assume that communications to or from their clients relating to the provision of legal advice will be protected from disclosure in subsequent litigation. In the past few years, however, courts have increasingly wrestled with a difficult and unsettled question: When does the privilege attach to so-called “dual purpose” communications — i.e., communications that both transmit or request legal advice *and* serve a non-legal purpose? If the communication served *only* a legal purpose — it would be privileged. If it served *only* a non-legal one, it would not be. What happens when a single communication is both legal and non-legal?

How have in-house counsel reacted? Explore some practical insights from different industries in our latest ACC Resource Library piece.

Lawyers counsel clients on both what is legal and what is desirable

Dual-purpose communications are nothing new. As one district court judge explained almost 75 years ago, the "modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable." *United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

Corporate lawyers may advise clients about the rules for different legal structures or the legal contours of deals — communications that clearly convey legal advice — but simultaneously advise them on the commercial and business risks and advantages of those structures and deals. Family law attorneys may advise clients on how a divorce will affect marital property and custody — clear legal advice — and at the same time counsel the client on the emotional and economic impacts of ending a marriage. A probate lawyer may advise an elderly client about legal instruments in anticipation of death or disability, but in doing so, also "ask clients probing questions about medical conditions and potential treatments" and be "prepared to assist the client in identifying and evaluating moral and religious considerations." Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 Geo. J. Legal Ethics 201, 214 (2010). And of course, in-house counsel, as well as government advisors, famously wear multiple hats — routinely providing both legal and non-legal advice in the same communication.

As one commentator has explained: "The distinctions drawn by the courts" relating to the attorney-client privilege "are especially difficult to identify in the business setting, where attorneys are consulted for and expected to render both legal and business opinions and the governmental setting, where officials serve in dual roles as attorneys as well as government advisors."

Virtually all legal communications could be considered dual-purpose

In fact, communications may be dual-purpose even when neither the lawyer nor client realizes. For example, lawyers and clients routinely take for granted that internal investigations into legal compliance, in particular those conducted by outside counsel, are legal in nature. But some courts have recognized that such reports can serve dual purposes: They can investigate and identify violations of the law, and also gather facts to provide recommendations related to a company's business and operational practices.

In the midst of going unnoticed, internal investigations can also serve as dual purpose communication by unveiling legal compliance issues and creating a means for new viable solutions. TarikVision / *Shutterstock.com*

Citing such dual purposes, the Minnesota Supreme Court recently ordered the disclosure of a report produced by outside counsel that investigated a vehicle manufacturer's safety practices, including its compliance with federal regulations. That report summarized the findings of an internal investigation by an outside law firm into a vehicle manufacturer's safety processes and policies, including addressing the company's compliance with federal regulations. But the Minnesota court concluded that the report was used to implement non-legal operational changes, and therefore did not constitute privileged legal communications from the outside lawyers.

In other words, dual-purpose communications present a dilemma to lawyers, clients, and courts. Such communications are inevitable in modern legal practice. One of the leading privilege treatises

observes that “virtually all internal legal communications are, to some extent, relevant to the business ends of the company.” Yet they pose a unique risk of disclosure. If a document serves both legal and non-legal purposes, when, if ever, should it be disclosed? And how can a lawyer plan for — and avoid — such disclosure?

What test will courts apply to determine if a dual purpose communication is privileged?

As *Polaris* illustrates, the test that courts apply to decide whether a dual-purpose communication should be protected from disclosure is an important question, with implications for the entire legal profession. So, what is that test?

Unfortunately, to say there is no one answer would be an understatement. Courts have only recently recognized the dual-purpose problem in so many words. And as the case-law has developed, judges have disagreed on both what test should apply and how any given test should apply to a given

communication.

As to the test itself, recently, in *In re Grand Jury* (U.S. Sup. Ct. No. 21-1397), the Supreme Court had the opportunity to clarify what test courts should employ to determine whether a dual-purpose communication is privileged. It declined to do so. In that case, a law firm specializing in tax law sent a number of dual-purpose communications to its client. Such communications both advised the client about legal issues relating to expatriation and facilitated the preparation of tax filings. The Ninth Circuit held that these dual-purpose communications were unprivileged because the legal purpose (advice about tax law) was not equally or more significant than the non-legal purpose (tax form preparation work).

Before the Supreme Court, the law firm (which two of the authors of this article represented) argued that the Ninth Circuit applied the wrong test: Instead, the test should be simply whether the legal purpose was, viewed alone, significant — i.e., a bona fide. In other words, would the *legal* part of the communication meet the classic test for the attorney-client privilege, or wouldn't it? *See* 8 Wigmore, Evidence § 2292 (1961 ed.) (providing the most famous formulation).

The United States (as respondent), argued that a communication should be protected from disclosure only if its *primary* purpose was legal — at least, outside of certain subject areas not at issue in the case.

Rather than determine what test to apply, the court ultimately determined *certiorari* had been improvidently granted — "digging" (in Supreme Court practitioner speak) the case.

Four possible tests to determine privilege

In the wake of *In re Grand Jury*, courts are undecided as to which of four possible tests apply to determine the privileged status of dual-purpose communications.

Test #1: If the primary purpose is non-legal, disclosure will be ordered

First, a court may apply the "primary or predominant" purpose test. Under that test, if a court reviewing a dual-purpose communication concludes that a non-legal purpose was more important than a legal one — even if there is an undeniable legal purpose — the court will order disclosure (albeit, where possible, subject to redactions of legal material). As described by the Minnesota court *Polaris*, "when a document contains both legal advice and business advice, for the attorney-client privilege to apply to the document in its entirety, the predominant purpose of the communication must be legal advice. The privilege does not protect the entirety of the document if legal advice is merely one purpose and not the primary purpose of the communication." 967 N.W.2d at 408.

Test #2: Significant purpose means it's protected

Second, a court may apply the "significant purpose" test. Under that test, if a legal communication is "significant," the communication is protected from disclosure, even if there is also a significant, competing non-legal purpose. That test was set forth by the DC Circuit, in an opinion penned by then-Judge Brett Kavanaugh in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758–59 (D.C. Cir. 2014). The D.C. Circuit held that, "so long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." Although the D.C. Circuit declined to define exactly when a legal purpose becomes "significant," this test — at least on its face — is more protective of attorney-client communications.

Test #3: All things being equal, the communication is protected

Third, a court might apply the equipoise test: if the legal and non-legal communications are *equally* significant, even if neither is primary, the communication is protected from disclosure. The Ninth Circuit has at least suggested that this tie-goes-to-runner approach is the problem the DC Circuit was trying to address in *Kellogg*. *See In re Grand Jury*, 23 F.4th 1088, 1095 (9th Cir. 2021) (narrowly reading *Kellogg* to protect disclosure of a dual-purpose document only "where the legal purpose is just as significant as a non-legal purpose").

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Test #4: Context determines which test is applied

And fourth, a court may apply the subject-matter dependent primary purpose test — the test for which the United States argued in *In re Grand Jury*. Under that test, certain contexts are presumptively legal — including internal investigations — and certain contexts are not — including, in the government's estimation, tax return preparation. When the nature of the communication is part of a "predominantly legal" context, a court may apply the significant purpose test. When, in contrast, the context is not predominantly legal, the primary purpose test should apply. Courts have not yet expressly adopted this approach, but if this test becomes popular, it may lead to a microcosm of privilege tests, making the project especially uncertain.

Even when courts agree on the test, the outcome is uncertain

Even when a court settles on a particular test, that does not make it clear how the test will come out in a given case. As one leading commentator recognized, "[t]he primary purpose requirement has been widely adopted by the courts despite the fact that neither the purpose, logic, nor focus of the requirement is clear." *See* Rice, § 7:7. Indeed, *Polaris*, described above, illustrates the point: In that case, the Minnesota Supreme Court ordered disclosure of the internal investigation report over a sharp dissent. The dissenting justice agreed the primary purpose test should apply, but disagreed

entirely how the test should come out.

Best practices for navigating the dual-purpose uncertainty

Given the uncertainty around what test courts will apply to determine whether a dual-purpose communication should be disclosed, in-house and outside counsel should tread carefully. Whatever test a given court applies, privilege questions are notoriously fact dependent. When privilege disputes are litigated, courts often resolve them on a document-by-document, or even line-by-line basis — regardless of what test the court purports to apply. But there are guideposts that both inside and outside counsel can keep in mind to help navigate privilege issues when lawyer-client communications implicate both legal and non-legal purposes.

Be certain to tread lightly around the uncertainty of which test will be applied during the duration of court. Image Vectory / *Shutterstock.com*

The bedrock principle for application of the attorney-client privilege is that the lawyer has to be acting as a lawyer and the communication must involve legal advice. Some courts, including the Ninth Circuit, have applied a rebuttable presumption that, if a person hires a lawyer for advice, then the lawyer has been hired to give legal advice, not business advice. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). But courts in the Ninth Circuit have declined to extend that same presumption to communications with in-house counsel on the theory that in-house counsel more often switch between legal and business advising. *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). In-house counsel therefore may not be able to rely on a court presuming that they are acting as lawyers and giving legal advice in all of their communications with their business colleagues.

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In deciding whether a lawyer is acting in a non-legal capacity, such as a business advisor, some courts have considered whether a non-lawyer could have given the same advice as the lawyer. That approach has a certain simplicity to it, but likely sweeps too broadly. After all, lawyers are often called upon to advise in areas in which non-lawyer professionals also give advice, and those non-lawyer professionals often have expertise that overlaps with legal expertise. A real estate professional may be able to advise a client about zoning requirements or lease agreements, but most clients who ask a lawyer for advice on those subjects would be seeking the lawyer's legal advice. Likewise, financial professionals inside a company may be knowledgeable about SEC disclosure requirements, but executives who seek advice about disclosure obligations from the legal department would presumably be doing so to take advantage of their lawyers' legal expertise.

When communicating confidentially with clients, make sure any legal advice given is protected and privileged.

Don't assume privilege is automatic, and remember jurisdiction matters

Many clients may assume that any communication they have with a lawyer — in-house or outside counsel — is protected and privileged. Because the privilege is not automatic, lawyers should keep in mind some basic considerations as they advise their business-side clients.

- Merely copying a lawyer on an email, by itself, will not transform a non-privileged communication into a privileged one. Every privilege claim depends on the specific facts and circumstances. And, of course, it is possible that by copying a lawyer into an email, a business side-client intends to ask the lawyer's legal advice on the subject. **But courts have been skeptical of claims that just copying a lawyer on what is otherwise a business communication creates a privileged communication.** *See* *Jordan* v. *U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 232 n.22 (D.D.C. 2017).
- By the same token, employing a lawyer to provide advice on a clearly non-legal topic will *not* transform the communication into a protected one. Restatement § 72 cmt. b ("a consultation with one admitted to the bar but not in that other person's role as lawyer is not protected.")
- **Lawyers should be candid with clients that using them to assist in non-legal tasks will not "buy" a privilege that does not otherwise exist.**
- Lawyers can help maintain the privilege over their communications with clients by being clear about the nature of their communications. If an in-house lawyer is frequently called upon to advise on both legal and business subjects, the lawyer may avoid confusion later by being clear about when she is putting on her "lawyer hat" and providing legal advice and when she is wearing her "business hat" and providing business advice.
- **Ensure that any written legal guidance is narrowly and clearly tailored to the relevant business unit and issue under consideration.**
- Something as simple as labeling communications as privileged can help avoid confusion later. But stamping privilege on a document does not make it so. The internal report in *In re Polaris* was stamped privileged on every page, and the court still ordered it disclosed.
- **The communication must still satisfy all of the requirements for a privilege claim.**
- To be privileged, the lawyer and client must intend the communication be confidential. Legal advice can, in theory, be broadly disseminated within a company with the expectation of confidentiality all around. But the more broadly legal advice is shared, the harder it may be to convince a court that there was an intent to keep the advice confidential.
- **Be mindful about who is receiving multi-pronged communications.**
- Similarly, the privilege is waived if a confidential attorney-client communication is later disclosed to a non-privileged person. If a client forwards a lawyer's advice on to a non-privileged person that may be a waiver.
- **In-house lawyers in particular should be aware of the risk of one of their business clients passing on their advice to others in a way that waives the privilege.** For example, if a client engaged in a business negotiation tells the other side, "Legal told me we can't agree to X because it would violate our obligations to Company A," the client has likely waived the privilege over that communication with her lawyer.
- The test for dual-purpose communications is not the same in every federal court of appeal; and not the same in every state. A privilege battle might, in turn, happen in federal court or state court. **Lawyers should always assume the most disclosure-friendly rule will apply when communicating with clients** — i.e., some variation of the primary purpose test.
- Courts are hesitant to allow entire dual-purpose communications or documents to be withheld on privilege grounds, but they are far more receptive to redactions. **Lawyers should consider whether important legal advice can be redacted from documents**; and, in turn, should consider whether — for instance, in long board meetings — the lawyer can make clear when legal portions of the meeting are beginning and ending. The effect might be to make it harder to protect the entirety of these documents (or minutes) from disclosure. But in turn, the lawyer may help to protect the truly legal parts of the communications and meetings.
- **Pay attention to the subject matter.** Courts have been hesitant — in our view, wrongly — to protect tax advice, but (with some notable exceptions), more receptive to protecting internal investigations. Although, as noted, it is important to assume a court will apply the most

disclosure-friendly rule (think of *In re Polaris*), a lawyer should pay attention to how privilege cases have treated given subject matter — both when arguing against (or in favor of) disclosure, and when anticipating what communications may be more or less vulnerable to disclosure.

Lawyers who communicate with their clients for both legal and non-legal purposes should be aware of the complicated landscape around dual-purpose communications. To be clear — that is, for the most part, all lawyers. Communications between lawyers and clients are not automatically privileged in every circumstance. Lawyers who want to maintain the privilege need to be aware of the requirements for privilege, pay attention to the specific approach in their jurisdiction, and follow some common-sense guidelines to protect their ability to communicate confidentially with their clients.

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