

THE JOURNAL RECORD

Gavel to Gavel: Potential Changes to Attorney-Client Privilege?

COMMENTARY

By: Contributing Author January 11, 2023



Adam C. Doverspike



Rhyder M. Jolliff

The attorney-client privilege is rightfully considered sacrosanct. That privilege protects communications between a client and their attorney made to obtain or provide legal advice. But when is a communication made “to obtain or provide legal advice?” Most corporate communication involves interwoven business and legal advice.

For example, when considering discharging an employee, companies often seek legal advice about that business decision’s risks. If the employee later sues, must the company disclose this “dual purpose” communication?

The U.S. Supreme Court is poised to decide the proper standard for the issue this term in *re Grand Jury*. 13 F.4th 710 (9th Cir. 2021).

In re Grand Jury concerns a company and law firm that refused to comply with a subpoena to produce tax preparation documents during a criminal investigation. The company and law firm withheld the documents, citing attorney-client privilege and the work-product doctrine.

Attorney-client privilege does not ordinarily protect attorney communications regarding tax return preparation. But if a client seeks a lawyer’s legal advice about tax return claims, that advice may be privileged.

Generally, circuit courts have employed a “primary purpose” test to determine proper attorney-client privilege assertions. That test, which the 9th Circuit adopted, asks if legal advice was the primary purpose of the communication. If so, the communication is privileged. Yet, whether legal advice must be “a” or “the” primary purpose remains unsettled.

While on the D.C. Circuit, then-Judge Brett Kavanaugh wrote that legal advice need only be a primary purpose of the communication. *In re Kellogg Brown & Root, Inc.* 756 F.3d 754 (D.C. Cir. 2014). Justice Kavanaugh reasoned that finding the sole primary purpose for a communication motivated by two sometimes overlapping purposes can be an “inherently impossible task.” Thus, “[i]t is not useful or even feasible to determine whether the purpose was A or B when the purpose was A and B.”

Given the rise of written corporate communications via email and other messaging apps, the proper standard for privilege assertions may be the most significant U.S. Supreme Court guidance on attorney-client privilege since *Upjohn Co. v. United States* (1981). Oral arguments were heard on Jan. 9, 2023, and a decision is expected this term. *Adam C. Doverspike and Rhyder M. Jolliff are attorneys with [GableGotwals](#).*

[Gavel to Gavel: Potential changes to attorney-client privilege? | The Journal Record](#)