

GUEST COLUMN

Attorney-client privilege differing standards in state versus federal courts

By Benjamin Whittle

Recent rulings have established differing standards between California and federal courts for attorney-client privilege as applied to dual-purpose communications. A 2022 Ninth Circuit decision held the “primary purpose test” governs whether attorney-client privilege applies to dual-purpose communications. This standard differs from California’s broader “dominant purpose” test. Attorneys should be aware of this discrepancy between the state and federal standards when advising and communicating with clients.

In *In re Grand Jury* (2023) ___ U.S. ___ [143 S.Ct. 543], the U.S. Supreme Court dismissed its consideration of a Ninth Circuit decision on attorney-client privilege, *In re Grand Jury* (9th Cir. 2022) 23 F.4th 1088 (“Grand Jury”). In *Grand Jury*, the Ninth Circuit held the “primary purpose” test governs whether attorney-client privilege covers dual-purpose communications. The “primary purpose” test asks whether the communications’ primary purpose is to give or receive legal advice, rather than business or other non-legal advice. The Supreme Court’s dismissal leaves intact the “primary purpose” test as the operable law in the Ninth Circuit’s jurisdiction.

The attorney-client privilege protects communications between an attorney and their client for the purpose of providing legal advice. The privilege’s application becomes unclear, however, when communications are made for more than one purpose, i.e., “dual-purpose communications.” For example, a tax attorney advising a client on a tax return often gives both legal and business advice, as was the case in *Grand Jury*.

Grand Jury arose when the Central District of California held a

company and law firm in contempt for failing to produce tax documents they claimed were attorney-client privileged. The district court reasoned under the “primary purpose” test the documents’ primary purpose was to obtain tax advice.

The company and law firm appealed, arguing the district court should have used the broader “because of” test. Under the “because of” test (borrowed from the attorney work product doctrine), a court asks whether 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.” The Ninth Circuit had not previously adopted a test for whether dual-purpose communications were entitled to attorney-client privilege, but held the “primary purpose” test applies.

The court reasoned attorney-client privilege “encourages full and frank communications between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice,” and the privilege is not necessarily tied to litigation. The court worried applying the broader “because of” test would “create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in the future.” The “primary purpose” test has been adopted in some form by the Second, Fifth, Sixth, and D.C. Circuits.

Understanding the Difference between the “Primary Purpose” Test and California’s “Dominant Purpose” Test

The “primary purpose” test the Ninth Circuit adopted is narrower than the “dominant purpose” test for dual-purpose communica-

tions used in California. Under the “dominant purpose” test, a court asks whether the dominant purpose of the relationship between the parties to the communication is one of attorney-client. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.) The “relevant inquiry is not the content of the communication but is instead the relationship of the communicators.” (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52.) However, the communication must occur in the course of the attorney-client relationship. The attorney-client privilege would not apply, for example, if the attorney is merely acting as a client’s business advisor.

Because California courts look to the purpose of the attorney-client relationship, rather than a particular document’s contents, attorney-client privilege arguably applies to a broader range of communications in California courts. However, the California Supreme Court slightly narrowed the scope of the attorney-client privilege in its decision *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, holding an attorney’s invoices to a client may not be considered privileged after litigation ends.

Practical Implications for You and Your Clients

One rarely knows with absolute certainty if they might end up in federal or state court, so caution warrants operating under the narrower federal “primary purpose” test. Recall that under this test, whether the attorney-client privilege applies is determined on a document-by-document basis. An attorney lulled into thinking California’s broader attorney-client privilege protects their communications may get a rude awakening if litigating in federal court.

Ideally, all legal and non-legal communications between an attorney and client would be kept separate, so no doubt exists in the first place whether the communications were dual-purpose. Keeping conversations separate is difficult in practice, however. Email threads between attorneys and their clients often drift from their original intent.

When communicating with clients, care should be taken to make explicit the communication is made for the purpose of giving or receiving legal counsel. When bringing on a new client, remind them of the scope and limitations of the attorney-client privilege. If there are non-legal reasons to communicate with a client, or a legal conversation drifts into non-legal territory, create a separate thread of conversation for the non-legal conversation. Clear separation of legal and non-legal discussion will also save time and expense in the future if communications need to be reviewed for privilege or redacted.

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