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Client Alert: Supreme Court Hears Argument In Matter That May Expand Scope Of Privilege For Dual-Purpose Communications

Publications

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On January 9, 2023, the US Supreme Court heard oral argument in the matter of *In re Grand Jury*, No. 21-1397, which asked the Court to determine when the attorney-client privilege will protect "dual-purpose communications" that involve both legal and business advice. The Court's decision could affect how privilege will apply to the daily work of in-house counsel, and other lawyers, who regularly wear both legal and business hats for their clients.

Petitioner: The Ninth Circuit Improperly Applied The "Primary Purpose" Test Literally.

Petitioner, a law firm that both provided tax advice and prepared tax returns for the target of a grand jury investigation, asked the Court to overturn an order compelling production of dual-purpose communications and to reject the Ninth Circuit's "primary purpose test" that affirmed the order. Traditional application of this test often involves a court examining the motivations for a disputed communication and determining whether legal *or* business concerns were *the* primary purpose. Even where there is a significant legal purpose, the court, forced to choose just one purpose, may find that business interests are *more* significant, thereby leaving the communication unprotected by the attorney-client privilege.

"*A* Primary Purpose" Or "*Significant* Purpose" Test.

While sitting on the US Court of Appeals for the DC Circuit, then-Judge Brett Kavanaugh authored two significant decisions that articulated a more nuanced and broader test that would protect a legal communication even where business concerns also motivate the communication. *Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264 (D.C. Cir. 2018); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). Instead of presuming that a communication has only one primary purpose, Judge Kavanaugh ruled that courts should ask whether obtaining or providing legal advice was "***a*** primary purpose of the communication, meaning ***one of the significant purposes*** of the communication." *In re Kellogg*, 756 F.3d at 760 (emphasis added).

Oral Argument.

Petitioner: Primary Purpose Test, Applied Literally, Is Unworkable.

At oral argument, Petitioner argued that the Ninth Circuit's primary purpose test, applied literally, is unworkable because it requires a court, post hoc, to "disentangle" intertwined business and legal purposes in order to "rank" their respective importance—a forced analysis that deprives attorneys and clients of certainty that their legal communications will be protected. Petitioner argued that attorneys and clients need to be able to predict whether their communications will be privileged in order to enable clients to speak frankly with counsel, and in order for counsel to provide fully informed advice. The prospect that a court might later decide that non-legal aspects of a communication predominate over legal concerns, and thereby defeat the assertion of privilege, would chill open and frank communications. Petitioner argued that applying the "significant purpose test" would provide predictability and obviate the need for a court to make strained "either/or" decisions.

Petitioner: "Significant Purpose" Means "Bona Fide," "Legitimate," Non-Pretextual Purpose.

When asked to explain or further define "significant purpose," Petitioner took the position that it means a "bona fide," "genuine," or "legitimate" legal purpose. (*In re Grand Jury* Oral Argument Transcript (hereinafter "Tr.") pp. 6-7.) In other words, when determining whether seeking or providing legal advice was a "significant purpose" behind a communication, the court should not try to determine the relative importance of purposes, but instead should only ask whether an assertion of privilege based on counsel's participation in a communication is made in good faith, or alternatively, counsel's participation was a pretext to protect the communication. (Tr. pp. 7-9.) Petitioner's position is that if a communication had a "genuine" legal purpose, the communication should be protected even where a business purpose was clearly the predominant purpose of the communication.

When pressed for an example of a dual-purpose communication that would *not* be privileged under this proposed rule, Petitioner explained, "Everybody agrees you can't just copy a lawyer on a communication, you can't just have a lawyer sit in the corner of a meeting and say the whole thing's privileged. That's what [the primary purpose test is] really guarding against." (*Id.* at 9.)

Skepticism From Justices.

Certain Justices expressed concern that Petitioner's proposed approach would displace the test that has been applied by state and federal courts for many years in favor of a test that would significantly expand the scope of communications shielded from discovery. (*See, e.g.*, *id.* at 13-16, 18-20, 35-38.) Justice Kagan noted, "[Y]ou sometimes want a lawyer just to sit in and issue-spot and see if he'll come up with anything. You want a lawyer on your e-mail chain just to see if the lawyer spots anything that you're not spotting about how the law relates to a particular course of conduct. So, you know, that seems to me legitimate. It will also basically immunize [against disclosure] every communication that a business has." (*Id.* at 25-26.) Justice Sotomayor expressed

reticence to adopt an approach in federal cases that would depart from the approach followed by the "vast majority of states." (*Id.* at 13-14.)

Petitioner: Significant Purpose Test Is Not A Sea Change.

To Justice Kagan's concern, Petitioner responded that the party asserting privilege still has the burden of convincing a judge that there was a real goal of seeking or providing legal advice, and that "courts are actually quite good at separating out real from non-real" purposes. (*Id.* at 26.) Regarding Justice Sotomayor's concern, Petitioner argued that the proposed approach is what the courts actually have been applying all along, even when they proclaim to be employing the "primary purpose test." (*Id.* at 14, 22-23. 34.) He said that if you look closely at the cases that use the language "primary purpose" or "predominant purpose," the courts—or at least a substantial portion of them—do not actually try to weigh or rank the various purposes behind a communication, but instead consider whether there was a legitimate legal purpose. (*Id.* at 34.)

Justice Alito: "Significant" Is Not The Same As "Legitimate."

Justice Alito expressed skepticism that "significant" could be reduced to "legitimate": "Significance concerns importance. Maybe it's a lot lower perhaps than primary, but it does involve a . . . certain quantum of importance." (*Id.* at 28.)

Respondent: The More Important Purpose Should Control.

Respondent, the Department of Justice, seized on the Justices' concerns and argued that Petitioner's proposed approach "would vastly expand attorney-client privilege to communications that are currently available to grand juries and to courts." (*Id.* at 41.) Ceding some ground to Petitioner, the government argued that retaining the primary purpose test would not prevent a court from protecting dual-purpose communications where a communication was motivated by both legal and business purposes in roughly equal measure. (*Id.* at 42-43.) But it maintained that where, for instance, the business purpose was 60% of the motivation behind a communication and a legal purpose was 40% of the motivation, the communication should not be privileged. (*Id.* at 51-54.) The government did not provide clarity on *how* a court should go about making these fine distinctions or why it is appropriate for courts to endeavor to do so after the fact. Instead, the government argued that courts have made these judgments for years without any notable trouble or difficulty. (*Id.* at 59-60, 67-68.)

Justice Sotomayor: Courts Have Had No Trouble Applying The Primary Purpose Test.

Justice Sotomayor appeared to agree, commenting to Petitioner, "[Y]ou make this claim that it's so difficult, but I really haven't seen much to say that [the primary purpose test is] difficult to administer. I don't see a rounding number of courts in states or even federal courts saying, I can't figure this out." (*Id.* at 17.)

Analysis And Possible Implications.

If the Court affirms the Ninth Circuit's strict application of "*the* primary purpose test" in this case, practitioners could reasonably understand that where a business or non-legal motivation plays a substantial role in a communication, there is at least a material risk that a court might later deem the communication non-privileged. This could lead counsel, particularly in-house counsel, to try to silo their legal and non-legal advice, potentially inhibiting their ability to provide legal advice in the midst of complex business discussions.

On the other hand, if the Court adopts the "significant purpose test" as Petitioner articulated it at argument—diluting "significant" to "genuine," "bona fide," or "actual and not pretextual"—it could enable aggressive counsel, and their clients, to effectuate Justice Kagan's concern: include counsel in communications where legal concerns are minimal in order to immunize vast swaths of corporate communications.

Justice Kavanaugh's prior articulation of the "significant purpose" test in his DC Circuit opinions is a commonsense and nuanced approach that charts a path that courts may use to protect communications that have a significant legal purpose, while discouraging abuse of privilege in discovery. Courts routinely interpret terms that are difficult to define, such as "reasonable," so perhaps they should be trusted to apply common sense in interpreting "significant."

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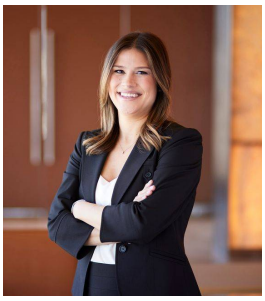

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