

insights

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Supreme Court to decide limits of attorney client privilege: Why the Ninth Circuit decision spells disaster for the sanctity of legal advice

The attack on the attorney client privilege

This article presents a summary of the issues and concerns regarding the curtailment of the attorney client privilege raised by the *In re Grand Jury* case decided by the Ninth Circuit Court of Appeals. That case has created nationwide confusion about the extent of the protection. *In re Grand Jury*, 23 F. 4th 1088 (9th Cir. 2022). Corporate managers and counsel must take heed of this decision because it impacts the confidentiality of legal advice, whether it is routine or strategic. The decision will be reviewed by the United States Supreme Court (SCOTUS), but the outcome of that review is anyone's guess.

In the *Grand Jury* case, the Ninth Circuit Court of Appeals affirmed a district court's decision that ordered production of a law firm's documents that included so called "dual purpose" advice to its client. That is, advice provided to a client by a lawyer that addresses both business and legal matters.

In writing its opinion, the Court expressly decided against the law firm's position that any document that contained both legal and business advice is protected from production by the attorney client privilege. Instead, the Ninth Circuit crafted a "test" that must be employed in order to determine whether the documents must be produced for review by an adversary as follows: Where "dual purpose" advice is provided, if the nonlegal purpose of the advice is found to outweigh the legal purpose, then the communication is not privileged and is subject to disclosure. *See In re Grand Jury*, 23 F. 4th at 109.

The primary concern about this "test" is that it gives the trial judge unfettered discretion to "weigh" the advice given. That discretion is seemingly without limit. Admittedly, the "weight" of the advice cannot be determined as if the advice were placed on a counter scale in a meat market. However, no guidelines have been provided by the Ninth Circuit about how to conduct that weighting of the advice.

Without question, management and corporate counsel must be aware of the *Grand Jury* decision since most businesses regularly obtain "dual purpose" advice. Strategies should be developed regarding the request and rendering of legal advice in order to deal with a SCOTUS decision that might approve of the Ninth Circuit's ruling. Also, this article describes the significant and rare opportunity that businesses and their counsel have right now to present their views directly to SCOTUS about how the controversy should be resolved. The vehicle for presenting those views, without becoming embroiled in the case as a party, is an amicus curiae, or friend of the court, brief that can be prepared by legal counsel and filed directly with SCOTUS. *See* SUP. CT. R. 37.1, 37.3(a) (Filing deadlines and other conditions precedent are strictly enforced.).

Factual context of *In re Grand Jury*.

In order to fully grasp the threat to the attorney client privilege, it is important to understand the facts in the *Grand Jury* case. That case arose from a grand jury proceeding initiated by the federal government to investigate a company's suspected tax fraud. As part of that investigation, the federal government's lawyers demanded the company's lawyers produce all documents that contained tax advice it gave to the company. The law firm objected to production based on the protections afforded by the attorney client privilege. However, the trial court overruled the objection and ordered production of so called "dual purpose" documentary evidence withheld by the firm. That decision was appealed by the law firm to the Ninth Circuit Court of Appeals where the firm sought reversal of the trial court's order.

After full briefing and submission to the Ninth Circuit, a decision was rendered affirming the trial court's order. In so doing, the Ninth Circuit crafted the "test" described above, *i.e.*, where "dual purpose" advice is provided, if the nonlegal purpose of the advice is found to outweigh the legal purpose, then the communication is not privileged and is subject to disclosure. *See In re Grand Jury*, 23 F. 4th at 1091-93.

That decision caused the law firm to appeal to our court of last resort, SCOTUS. Recently, the law firm's appeal, asserted by filing a Petition for Writ of Certiorari (Petition), was granted. So, SCOTUS should hear and decide the case in the next year. In its petition, the law firm made it clear that the Ninth Circuit's decision requiring production of the evidence of its advice to its client is not only erroneous, but it creates uncertainty in all aspects of corporate or business management where legal guidance is obtained.

The "split" of authority compounds the uncertainty

In its briefing, the law firm pointed out to SCOTUS that there is a "split" of authority between three Circuit Courts of Appeal. That "split" heaps additional uncertainty upon the viability of the attorney-client privilege because the "tests" of each of the three Circuit Courts are materially different.

The Seventh Circuit holds that in the case of a dual purpose communication, the privilege does not apply to communications that serve both legal and nonlegal purposes. *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999). There is no requirement to determine which type of advice outweighs the other. The mere fact that the document contains nonlegal information renders the privilege inapplicable. *Id.*

In marked contrast with the Ninth and Seventh Circuits, the D.C. Circuit decision "boils down to whether obtaining or providing legal advice *was one of the significant purposes* of the attorney-client communication." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014), (Emphasis added); accord *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267-68 (D.C. Cir. 2018). While *Frederick* concerned a document created to prepare an income tax return and for use in litigation, the ultimate application of the holding could apply to any part of a communication from attorneys to their clients.

Specific irreconcilable dilemmas.

The lawyers who petitioned SCOTUS and three Amici that have filed preliminary "friend of the court" briefs have identified a list of irreconcilable dilemmas that are raised by the Ninth Circuit decision. Any business should be concerned about these issues:

1. **"Dual purpose" advice is common. So, that is an adversary's target for production.** A trial court must follow the law so if appellate courts set up rules that require production, trial judges will likely order a business and its lawyers to turn over those documents. If the documents are produced, the company's adversary will become privy to the company's innermost business and legal strategy. That would mean a company could not be assured discussions with legal counsel are confidential.
2. **The nature of the advice in a document is not always clear.** It is commonplace for business and legal advice to be inextricably intertwined. So, that determining what is legal as contrasted with business advice can be virtually impossible.
3. **The judge's decision about which type of advice predominates is an imprecise judgment call.**
4. **Judges are not likely to understand a company's business, so it may be virtually impossible for a trial judge to differentiate business advice from legal advice.** So, when a trial judge makes what could be called a close, discretionary "judgment call," that decision could be sorely mistaken. However, when appellate courts are asked to review those decisions, they tend to defer to discretionary, "judgment call" decisions of trial courts and accept them.
5. **After the fact analysis is uncertain.** "Balancing *ex post* * * * introduces substantial uncertainty into the privilege's application" and "[f]or just that reason, [this Court has] rejected use of a balancing test in defining the contours of the privilege." *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998)." Petition at 20.
6. **Chilling of communications.** "[T]he Ninth Circuit's rule will chill communications between clients and their attorneys. See *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 110 (2009) (recognizing that '[t]he breadth of the privilege' 449 U.S. at 392 [*Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)] (explaining that 'narrow scope' of privilege would hinder corporate attorneys' ability 'to formulate sound advice' and 'to ensure their client's compliance with the law'). Petition at 21.
7. **Any legal discipline is implicated.** "[W]hile the issue in this case is presented in the context of a tax attorney providing advice to a client, the same privilege issue confronts attorneys advising clients regarding countless other areas of law. For example, insurance, health, environmental, real property, entertainment, and intellectual property, to name just a few, are legal specialties where the advice given often has both legal and nonlegal purposes." Amicus Brief of California Lawyers Association at 5.
8. **Lack of uniformity of rules creates chaos.** "Attorneys and clients with interests in multiple circuits will be presented with either conflicting privilege standards regarding attorney-client communications or a lack of

settled authority. One test that applies to all dual-purpose communications is necessary to ensure uniformity and protection of the sanctity of the attorney-client privilege.” *Id.* at 9.

9. **Regulatory legislation advice is hampered.** “[A] ‘vast and complicated array of regulatory legislation confront[s] the modern corporation.’” citing *Upjohn* 449 U.S. at 392. Businesses rely on lawyers to navigate this legal thicket. Amicus Brief of American Chamber of Commerce at 15.

10. **Non-lawyers will be less likely to seek legal advice.** The “practical import” of the Ninth Circuit decision is that businesses and non-lawyers will be less likely to seek legal advice from in house and outside counsel. It will also heap additional costs on the business community because communications with lawyers will need to be “siloe[d]” by category. *Id.* at 18.

11. **Internal investigations will be hampered.** “[C]ompanies have leaned heavily on in-house counsel when conducting internal investigations. The Ninth Circuit’s rule would have a chilling effect on the free exchange of information between in-house counsel and corporate executives.” Amicus Brief of Washington Legal Foundation at 6.

12. **Information flow to outside counsel will be limited.** “[T]he flow of information from corporations to outside counsel will be choked if the Ninth Circuit’s decision stands. Companies will learn from this case and no longer ask outside counsel for advice that later could be used as evidence in a criminal investigation or civil case.” *Id.*

13. **Information learned during investigations will not be shared.** “Protecting communications that include facts that companies learn during internal investigations is key to in-house counsel’s ability to properly conduct internal investigations. But if a dual-purpose communication includes these facts and provides legal advice, it is not protected under the Ninth Circuit’s rule.” *Id.* at 9.

14. **Limitation of rewards for internal compliance.** “[P]enalizing companies with compliance policies would conflict with many legal regimes and doctrines that encourage corporations to comply with the law. For example, in *Faragher v. City of Boca Raton*, this Court held that an employer has an affirmative defense to a hostile-work-environment claim where the employer has ‘provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense.’ 524 U.S. 775, 806 (1998). The Federal Sentencing Guidelines also reward internal-compliance programs and similar efforts to ‘promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.’ U.S.S.G. § 8B2.1(a)(2).” *Id.* at 10.

15. **Delegation of internal investigations to outside counsel will be limited.** “Two examples prove the point. Last year, a former professional hockey player sued the Chicago Blackhawks alleging that the team was complicit in a sexual assault by the team’s video coach. Rather than have in-house counsel investigate the allegations, the team hired outside counsel to handle the investigation. *See generally Reid J. Schar, Report to the Chicago Blackhawks Hockey Team Regarding the Organization’s Response to Allegations of Sexual Misconduct by a Former Coach*, Jenner & Block LLP (Oct. 2021). Two months ago, Temple began investigating a toxic workplace environment at the Hope Center. But again, rather than rely on in-house employment counsel, the university hired outside counsel to handle the investigation. *See Colleen Flaherty, The Hope Center’s Revolving Door*, Inside Higher Ed (Apr. 14, 2022), <https://bit.ly/3yx4Mf>.” *Id.* at 12.

The importance of amicus curiae briefs

It is the job of SCOTUS to decide what test should be applied in the *Grand Jury* case. Even more important is the fact that whatever “test” SCOTUS adopts will be applied in the future to any case in the United States.

The above listed complications of the Ninth Circuit “test” that weakens, if not abrogates the attorney client privilege as to “dual purpose” advice, are not exclusive. No doubt, many businesses could demonstrate other flaws in the Ninth Circuit’s opinion by discussing how the “test” affects that business’s unique methods and processes. A non-duplicative amicus brief supplying that type of information can significantly aid SCOTUS in order that SCOTUS can gain an understanding of the fundamental concerns and issues impacting businesses.

Further, amicus briefs filed by significant industry players or their trade associations are likely to draw the attention of the justices and their staffs. Unquestionably, when making significant decisions involving the law and policy, SCOTUS does consider positions announced in Amicus briefs. For instance, in the opinion, concurrences, and dissent issued in SCOTUS’s recent opinion in the case of *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022), the justices made at least thirty six references to arguments made by amicus curiae.

Without the unique information that can be supplied by businesses, SCOTUS could make a “wrong turn.” The advice offered in amicus curiae briefs will be critical in SCOTUS’s deliberations.

Conclusion

The uncertainty created by the *Grand Jury* case is potentially crippling to any business. If that Ninth Circuit “test” becomes “the law” across the United States, management will be asking for legal advice about just what types of advice can be counted on to be privileged. Any lawyer worth her salt, of necessity, is going to give an answer like



this: “It depends.” Of course, such advice is not helpful, but it would be accurate if the *Grand Jury* case holding were to be adopted by SCOTUS. Amicus briefs could make the difference between a SCOTUS decision that renders a uniform, reasonable “test” and one that chills requests for legal advice.

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