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Navigating the Protection of Attorney-Client Privilege in Uncertain Times

As every first-year law student knows, attorney-client privilege is a common-law doctrine that protects from disclosure confidential communications between client and counsel. The privilege encourages "full and frank communication between attorneys and their clients" and promotes "broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Even so, this area of the law can, and does, change, and there are several areas attorneys must keep abreast of to preserve and protect privilege and avoid disclosure of privileged communications. Over the last decade, the Federal Rules of Civil Procedure and case law have continued developing the contours of the doctrine. This article explores three recent developments and trends on privilege law as it relates to (1) dual-purpose communications containing legal and non-legal advice, (2) communications with insurance brokers, and (3) testifying, but non-reporting experts.

Dual-Purpose Communications

In an increasingly complex regulatory, compliance, and business environment, corporate counsel fulfill multiple roles by providing legal and business advice when communicating with corporate employees. This fact makes the privilege analysis more complex, considering attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Though the scope of attorney-client privilege is defined by the purpose of the communication, *see Swidler & Berlin v. United States,* 524 U.S. 399, 410 (1998), federal courts have grappled with whether attorney-client privilege protects communications that have multiple purposes and provides a combination of legal and business advice. This section addresses when communications containing both legal and non-legal advice are protected by the attorney-client privilege.

In response to a three-way circuit split, the U.S. Supreme Court granted the petition in *In re Grand Jury* to address when a communication containing both legal and non-legal advice is protected by the attorney-client privilege. 23 F.4th 1088, 1091 (9th Cir. 2021), *cert. granted In re Grand Jury*, No. 21-1397, 2022 WL 4651237 (U.S. Oct. 3, 2022). However, only two weeks after hearing oral argument, the Supreme Court dismissed the writ of certiorari as "improvidently granted," meaning that the Court should not have accepted the case. *See In re Grand Jury*, No. 21-1397, 2023 WL 349990 (U.S. Jan. 23, 2023). Accordingly, the issue as to whether dual-purpose communications are protected by attorney-client privilege is still open. While it is unclear why the Supreme Court declined to hear this case, cases are usually dismissed as improvidently granted when the Supreme Court: (1) discovers after the cert grant that the case is a poor vehicle for resolving the issue before the Court; (2) perceives a "bait and switch," which happens when petitioners rely on a different argument in briefing than they did in their petition for cert; or (3) is unable to reach a consensus and apparently thinks that a dismissal as

improvidently granted is preferable to fractured opinions with no controlling rationale.[1] Here, the third reason seems most likely, as the Court dismissed the case only two weeks after oral argument, hinting that there was likely disagreement on the best path forward.

There were several complicating factors in *In re Grand Jury* that support this reason for dismissal. First, the underlying case involved the provision of accounting services, and was fact-specific, arising from an appeal of a contempt order. Observers noted this probably was not the best case for the Supreme Court to use for establishing precedent. Further, the case involved grand jury information, which is conducted in secret, so few facts were available to the public. Finally, at the oral argument stage, both attorneys had shifted their arguments from their briefing.

Some courts generally use a "primary purpose test" to assess whether a dual-purpose communication's predominant purpose is to provide legal advice or non-legal advice. In *In re Grand Jury*, the Ninth Circuit adopted the "primary-purpose test" and found that "dual-purpose communications can only have a single 'primary' purpose." 23 F.4th at 1091–92. There, a company and law firm were served with grand jury subpoenas requesting communications relating to a criminal tax investigation. Both the company and the law firm produced documents in response to the subpoena but withheld others based on attorney-client privilege and work-product doctrine. *Id.* at 1090. After the government moved to compel the withheld documents, the district court granted the motion in part, finding that the documents were either not protected by any privilege or discoverable under the crime-fraud exception. *Id.* The company and the law firm rejected the district court's ruling and continued to withhold documents. *Id.* at 1090–91. The government later moved to hold the company and law firm in contempt, and the district court granted that motion. *Id.* at 1091.

On appeal, the Ninth Circuit affirmed the district court's finding that the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications. *Id.* at 1090. The appellate court determined when deciding whether attorney-client privilege should apply to dual-purpose communications, especially in the context of tax law where "attorney's advice may integrally involve both legal and non-legal analyses," courts must analyze whether the communication was made to obtain legal advice. *Id.* at 1091–93 (quoting *United States v. Sanmina Corp.*, 968 F.3d 1107, 1118 (9th Cir. 2020)). The Ninth Circuit concluded that the district court did not err in finding that "the predominate purpose of the disputed communications was not to obtain legal advice," and thus, affirmed to hold the company and law firm in contempt. *Id.* at 1095. Since the U.S. Supreme Court dismissed its prior grant of certiorari, this opinion stands as the current law in the Ninth Circuit.

By contrast, the D.C. Circuit has taken a broader view of privilege by holding that communications are privileged when "obtaining or providing legal advice was one of the

[1] *See* Debra Cassens Weiss, *Attorney-Client Privilege Case Dismissed by Supreme Court*, ABAJournal, (Jan. 23, 2023, 11:22 A.M.), https://www.abajournal.com/news/article/attorney-client-privilege-case-is-dismissed-by-supreme-court.

significant purposes." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014). In *In re Kellogg*, a company appealed a district court's ruling that attorney-client privilege did not protect communications related to a prior internal investigation overseen by the company's legal department. In an opinion authored by Justice Kavanaugh, the *In re Kellogg* court ruled that the district court erred and rejected the idea that a court should "try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes." *Id.* at 760. Instead, the D.C. Circuit explained that courts should determine whether "obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." *Id.*

Finally, the Seventh Circuit has held that "a dual-purpose document—a document prepared for use in preparing tax returns *and* for use in litigation—is not privileged." *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999). Judge Posner reasoned that "otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns." *Id.* While the holding is confined to the tax law context, the reasoning conflicts with the tests adopted by the Ninth Circuit and D.C. Circuit.

The Supreme Court recognized over forty years ago that "the vast and complicated array of regulatory legislation confronting the modern corporation" necessitates that corporations "constantly go to lawyers to find out how to obey the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (internal citations omitted). Consistent with this understanding, some court observers hoped the Supreme Court would adopt the reasoning in *Kellogg* and resolve the current circuit split through *In re Grand Jury*; particularly, because corporate counsel need the ability to openly communicate legal advice in business communications without fear that advice is going to later be divulged through litigation.[2] Until the Supreme Court decides to resolve this circuit split, advocates and corporate counsel should continue monitor evolving case law on dual-purpose communications in order to safeguard corporate communications and prevent protracted discovery disputes. For many companies who operate throughout the country, the practical effect is they should seek to keep other purposes out of their legal advice communications. Perhaps lawyers will consider marking communications with clients as "Confidential and Privileged Attorney-Client Communication: Primary Purpose Legal Advice" going forward.

Interplay with ABA Model Rules of Professional Conduct

Model Rule 1.1 - Competent representation - A lawyer shall provide competent

[2] *See, e.g.*, Lucy Addleton, *ACC Issues Statement Regarding US Supreme Court's Decision to Dismiss In re Grandy Jury case*, (Jan. 24, 2023), https://www.thelawyermag.com/au/news/general/acc-issues-statement-regarding-us-supreme-courts-decision-to-dismiss-in-re-grand-jury-case/433821 (discussing the Association of Corporate Counsel's disappointment in the Supreme Court's decision not to decide the case, thereby leaving this area of law "murky"); *Association of Corporate Counsel, ACC Statement Regarding U.S. Supreme Court's Disappointing Decision to Dismiss In re Grand Jury Case* (Jan. 23, 2023), https://www.acc.com/about/newsroom/news/acc-statement-regarding-us-supreme-courts-disappointing-decision-dismiss-re ("The dismissal of *In re Grand Jury* is a missed opportunity to provide [in-house counsel] to provide them needed clarity.").

representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Model Rule 1.6(c) - Keep client confidences - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Model Rule 2.1 – Advisor - In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Model Rule 2.3 – Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Communications with Insurance Brokers

Attorneys and their clients often work with third parties to obtain legal advice and develop litigation strategy. However, such open communications may jeopardize the attorney-client privilege. In the world of insurance, this section addresses how to protect from disclosure communications between counsel and insurance brokers. If the purpose of the communications was to obtain legal advice, then communications between counsel and insurance brokers are generally protected.

While generally the attorney-client privilege is limited in that only “confidential” communications (*i.e.* communications made exclusively between an attorney and client) are protected and the presence of a third party on a communication generally loses the privilege, courts have recognized circumstances when a third-party disclosure does not vitiate the protections of the doctrine. *See, e.g.*, *High Point SARL v. Sprint Nextel Corp.*, 2012 WL 234024, at*7 (D. Kan. Jan. 25, 2012) (subsequent history omitted) (discussing the “common interest” doctrine which protects disclosures to third parties when the third party has a close, common interest with the represented party). Counsel must remain abreast of developments in this changing area of the law as well.

For example, in the insurance context, it may be necessary for an insured’s or insurer’s counsel to work with an insurance broker to gain information about a pending action or

insurance claim. Counsel should know whether communicating otherwise confidential information with an insurance broker breaks the protection of client confidentiality. Generally, the answer is no, and courts find that the "necessary intermediary doctrine" applies. This exception dictates that the attorney-client privilege is not destroyed when a third party's participation is necessary to provide adequate legal representation. *M&C Holdings Delaware Partnership v. Great American Ins.*, 2021 WL 4453636, at *5–6 (S.D. Ohio Sept. 29, 2021). For the exception to apply, "[t]he purpose of the communication with the third-party broker or agent must be to assist the attorney in providing legal services to the client." *Id.* at *7 (citations omitted). To be clear, despite the name of the doctrine, *Great American Insurance* suggests that a third party's participation need not be *necessary* to the litigation. Instead, the disclosures to a third party are still protected if they are made simply *with the purpose* of obtaining legal advice or developing legal strategy. *See id.* at *7–8.

Discovery Land Co. LLC v. Berkley Insurance Co. illustrates this point. 2022 WL 194527 (D. Ariz., 2022). The dispute in *Discovery Land* arose when the plaintiff's initial funds for purchasing a Scottish castle were stolen—a royal conundrum. *Id.* at *2–3. Defendants argued that communications between plaintiff's counsel and insurance broker took place "in the ordinary course of business" and were not protected from discovery. *Id.* at *8. Ultimately, although the communications between Plaintiff's counsel and the insurance broker discussed the structure of the real estate deal, the court believed that the communications were also made "for the purpose of developing legal recommendations and strategies in connection with this anticipated litigation." *Id.* at *9. Thus, the communications were privileged. *Id.*

Conversely, in *Sony Computer Ent. America, Inc. v. Great American Insurance*, the defendant failed to establish that a meeting between the plaintiff, counsel of plaintiff, and plaintiff's insurance broker was held to obtain legal advice. 229 F.R.D. 632, 634 (N.D. Cal. 2005). There, "[the plaintiff] provided no evidentiary support for its claim that [the insurance broker] was present to further the interest of [the plaintiff] in the consultation or someone to whom disclosure was reasonably necessary to accomplish the purpose for which the lawyer was consulted" and, thus, "failed to carry its burden of proving the privilege." *Id.* The lesson is that, although communicating confidential information to an insurance broker does not ordinarily remove the attorney-client privilege, the party asserting the privilege must bear the burden of proof. Parties must adequately establish that the communications were made with the intent of receiving legal advice, and communications should be made with this standard in mind.

Ultimately, attorneys should still exercise caution when making confidential communications that include an insurance broker, ensuring that the communications address legal advice and strategy. *Sony* also warns attorneys that such discussions should be well-documented so that the communications may withstand motions to compel and preserve confidentiality.

Non-Reporting But Testifying Experts

Communications between counsel and expert witnesses are often protected by the attorney- client privilege, but not always. This section addresses attorney communications with experts who will testify at trial but are not required to file an expert report. Whether communications with such experts are protected is a complex determination that depends on the nature of the testimony and whether the expert will serve as a hybrid fact/expert witness.

Experts can make or break a case. And although expert reports are subject to disclosure to opposing parties, disclosure is not required for all expert communications, and advocates must understand what is protected from discovery prior to retaining their experts. Unfortunately, the expert disclosure requirements found in Rule 26 are not exhaustive, leaving attorneys with incomplete guidance. In response, however, courts have defined the bounds of the attorney-client privilege in the context of expert communications.

As the Eastern District Court of California has pointed out, the 2010 amended version of Federal Rule of Procedure 26 ("Rule 26") is "silent as to communications between a party's attorney and non-reporting experts." *United States v. Sierra Pac. Indus.*, 2011 WL 2119078, at *5 (E.D. Cal. May 26, 2011). The Court, however, provided the following language from the 2010 Advisory Committee Notes:

> The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any 'preliminary' expert opinions. . . . The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.[3] *Id.* (quoting 2010 Advisory Committee Note to Rule 26).

The issue thus arises as to whether a party has waived the attorney-client privilege when it discloses testifying, but non-reporting, expert witnesses. One area in which the distinction between reporting and non-reporting experts has been significant is testimony by employee opinion witnesses. Other potential examples include "former employees, in-house counsel, independent contractors, treating physicians, and accident investigators." *Id.* at 9.

In *Graco, Inc. v. PMC Global, Inc.*, the New Jersey District Court considered the issue when the plaintiff's employee opinion witnesses who had not yet been named as testifying witnesses and did not regularly give expert testimony, but had submitted affidavits containing expert opinions. 2011 WL 666056, at *4 (D.N.J. Feb. 14, 2011). The defendant had noticed the depositions of two of the plaintiff's employees and served requests for documents to be

[3] Rule 26 was again amended in 2015. However, the 2015 changes did not affect any of the privilege provisions of Rule 26. See 2015 Advisory Committee Note to Fed. R. Civ. P. 26.

produced at the deposition, including all documents considered or relied on in drafting the affidavits, all drafts of the affidavits, and all communications with those individuals concerning their affidavits. *Id.* at *1. Objecting to the requests, the plaintiff asserted that the employee declarants "should be treated as non-experts and maintain[ed] that the material requested is protected by the attorney-client privilege or work-product privilege." *Id.* After acknowledging "a significant divergence between the 1993 version (and related case law) and the 2010 version of Rule 26," the Court found, based on the 2010 Advisory Committee Notes and on the plaintiff's "affirmative reliance on the facts and opinions set forth in [the witnesses'] respective affidavits," that the employee opinion witnesses "should be considered 'testifying witnesses.'" for Rule 26 analysis. *Id.* at *13. (citations omitted). Accordingly, the *Graco* Court decided the following about the employee opinion witnesses:

1) [Defendant] is not entitled to a written report . . . pursuant to current, and amended, Rule 26(a)(2) and the 2010 Advisory Committee Note;

2) [Defendant] is entitled to a disclosure stating the subject matter and a summary of the facts and opinions proffered . . . pursuant to amended Rule 26(a)(2)(C) and the 2010 Advisory Committee Note and supplements thereto pursuant to amended Rule 26(a)(2)(E);

3) [Defendant] is not entitled to any drafts, regardless of form, of expert reports, affidavits, or disclosures pursuant to amended Rule 26(b)(4)(B) and the 2010 Advisory Committee Note;

4) [Defendant] is entitled to all relevant discovery regarding the facts/data considered, reviewed or relied upon for the development, foundation, or basis of their affidavits/declarations . . . pursuant to amended Rules 26(b)(4)(B) and (C) and the 2010 Advisory Committee Note;

5) Communications between [the plaintiff's] counsel and the Employee Opinion Witnesses are protected by the attorney-client privilege [citation omitted];

6) [Defendant] is not entitled to documents and tangible things prepared in anticipation of litigation or for trial without showing it has a substantial need for the materials to prepare its case and, cannot, without undue hardship, obtain their substantial equivalent by other means pursuant to amended Rule 26(b)(3)(A) and the 2010 Advisory Committee Note[.]

Id. at *14–15. The findings of *Graco* have also been affirmed elsewhere. *Benson v. Rosenthal*, 2016 WL 11678622, at *2–3 (E.D. La. May 12, 2016); *Mitchell v. Mgmt. & Training Corp.*, 2018 WL 4957290, at *4 (N.D. Ohio Mar. 9, 2018).

Yet the California District Court in *Sierra Pacific* found that "*Graco* . . . provides little assistance to address the issue presented in this motion." *United States v. Sierra Pac. Indus.*, 2011 WL 2119078, at *5 (E.D. Cal. May 26, 2011). Similar to *Graco*, the defendants in *Sierra Pacific* moved to compel the United States to produce testimony and documents relating to communication between two of the United States' designated expert witnesses and attorneys for the United States and another plaintiff. *Id.* at *1. These witnesses were employees of the United States and the other plaintiff who had investigated a large fire at issue, for which they had prepared an Origin and Cause Report. *Id.* The United States cited *Graco* to argue that its attorney's communications with employee witnesses were protected. *Id.* at *9. The *Sierra Pacific* Court was not persuaded by the decision in *Graco* in part because "the analytical basis for that result is not explained. *Graco* discussed at length the text of the 2010 amended *Rule 26* and the advisory committee notes, but it engaged in little analysis in support of its conclusion." *Id.*

During its analysis, the *Sierra Pacific* Court provided general guidance on non-reporting expert witnesses: "[s]ome of these non-reporting witnesses should not be treated differently than reporting expert witnesses. For example, there is no immediately apparent policy reason to treat an employee expert whose duties regularly involve giving expert testimony any differently than an employee expert whose duties involve only intermittently giving expert testimony." *Id.* at *10. On the other hand, "some non-reporting witnesses, such as treating physicians and accident investigators, should be treated differently than reporting witnesses with respect to the discoverability of their communications with counsel." *Id.* (citing Minutes, Civil Rules Advisory Committee Meeting (April 20-21, 2009) p.14) ("The Committee did not want to protect communications by one party's lawyer with treating physicians, accident investigators, and the like. An employee expert, moreover, may be an important fact witness."). In conclusion, the Court stated, "at least in some cases, discovery should be permitted into such witnesses' communications with attorneys, in order to prevent, or at any rate expose, attorney-caused bias." *Id.*

The *Sierra Pacific* Court, however, decided that "counsel's communications with [its employee experts] should not be protected." *Id.* The Court reasoned that the experts were "hybrid fact and expert witnesses" and "have percipient knowledge of the facts at issue in this litigation. . . . If their communications with counsel were protected, any potential biases in their testimony regarding the causes of the fire would be shielded from the fact-finder." *Id.* While the Court "decline[d] to hold that designating an individual as a non-reporting witness waives otherwise applicable privileges in all cases, . . . in this particular factual scenario, the United States waived its privilege and work-product protection by disclosing [the employees] as expert witnesses." *Id.* Although no circuit courts have addressed the issue, many district courts have found the reasoning in *Sierra Pacific* persuasive. *See, e.g.*, *Garcia v. Patton*, 2015 WL 13613521, *4 (D. Colo. July 9, 2015); *Trading Techs. Int'l, Inc. v. IBG*, 2020 WL 12309208, at *2 (N.D. Ill. Sept. 14, 2020); *City of Mankato, Minnesota v. Kimberly-Clark Corp.*, 2019 WL 4897191, at *11 (D. Minn. May 28, 2019); *see also* Peter M. Durney, Julianne C. Fitzpatrick, Retaining and Disclosing Expert Witnesses: A Global Perspective, 83 Def. Couns. J. 17 (2016) (discussing the difference between testifying and non-testifying experts). The United States also made an argument that the decision would force it to protect its communications by

retaining the witnesses for a nominal fee, thus transforming them into reporting experts, but the Court refused to rule on the permissibility or effect of such an action "given the history of this discovery dispute." *Id.* at *11.

Graco and *United States v. Sierra Pacific Indus*. were decided shortly after the Rule change, but federal courts are still struggling to define the outlines of Rule 26. In 2016, a federal Minnesota case, *Luminara Worldwide, LLC v. RAZ Imports, Inc*., 2016 WL 6774231 (D. Minn. Nov. 15, 2016), held that a non-reporting expert had no protection under the attorney-client privilege. In *Luminara*, the inventor of certain patents who had founded the plaintiff's predecessor corporation and acted as a paid consultant to the plaintiff on related technical issues was disclosed as a non-reporting testifying expert. *Id.* Defendants directed document subpoenas at the expert and deposed him, over the plaintiff's repeated objections. *Id*. at *2. The magistrate judge in the case agreed with the defendants that plaintiff had waived the attorney-client privilege about information provided to Patton for purposes of the case. *Id.* The magistrate reasoned that, because non-reporting experts were not mentioned in Rule 26(b)(4)(C), the protections of that Rule did not apply to a non-reporting expert, and he had to produce all information he "considered," which he ultimately held to be all materials the expert "generated, saw, read, reviewed, and/or reflected upon," including communications with counsel. *Id*. at *3. The district court upheld the magistrate's finding, and the plaintiff eventually withdrew the expert. This case is an outlier, as most courts have found otherwise, but it got the attention of defense counsel across the nation, and it has not been overturned.

Conclusion

The attorney-client privilege is multifaceted in its applications and exceptions. As the case law evolves, attorneys are expected to track new developments. Although such a task is challenging, it is important to remember that the privilege is ultimately about serving and protecting the client's interests. Therefore, along with maintaining current knowledge, attorneys should update clients on the changing landscape of the attorney-client privilege. In providing current information, attorneys and clients can better shield critical communications, leading to greater success in and outside the courtroom.