

## Privilege Newsletter

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# United States Supreme Court to Review the Scope of the Attorney-Client Privilege

By: [David M. Greenwald](#)

On October 3, 2022, the U.S. Supreme Court granted review in a federal grand jury proceeding that may result in the Court expanding the scope of the attorney-client privilege for dual-purpose business communications.<sup>[1]</sup> Petitioner argues that the Court should adopt the test articulated in two decisions by the U.S. Court of Appeals for the D.C. Circuit, which were authored by then Judge Brett Kavanaugh.

Petitioner is a law firm that provided tax advice and prepared tax returns for the target of a criminal investigation. The grand jury subpoenaed Petitioner for production of documents relating to the preparation of the client's tax returns. Petitioner produced some documents, but invoked the attorney-client privilege over communications that had the dual purposes of enabling Petitioner to provide legal advice and to prepare client's tax returns.

Petitioner explains that, in the tax context, courts distinguish between two types of work performed by an attorney.<sup>[2]</sup> Advice regarding tax planning and controversy is treated as legal, and communications for that purpose are privileged.<sup>[3]</sup> Preparation of tax returns is deemed a non-legal function, and communications for that purpose are not privileged.<sup>[4]</sup> Where a lawyer provides legal advice and prepares tax returns, inevitably there will be communications with mixed business and legal purposes.

### The Primary Purpose Test – Narrow Approach

Communications are not privileged unless they are for the purpose of obtaining or providing legal advice. Where communications are motivated by mixed business and legal purposes, courts apply some form of the “primary purpose” test to determine which communications deserve protection.<sup>[5]</sup> The narrow application of the test requires the court to determine whether *the* primary or predominant purpose of a communication was to seek or provide legal advice or instead to further business interests. In this case, the district court applied the narrow test to Petitioner's dual-purpose communications and granted part of the government's motion to compel.<sup>[6]</sup>

### The Primary Purpose Test – Broader Approach

A broader approach to the primary purpose test was established by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.* (“KBR I”).<sup>[7]</sup> In a decision authored by then Judge Kavanaugh, the court explained that it is not correct for a court to presume that a communication can have only one primary purpose, or for a court to find “*the* one primary purpose in cases where a given communication plainly has multiple purposes.”<sup>[8]</sup> “[T]he primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose . . . and a business purpose[.]”<sup>[9]</sup> Indeed, trying to determine the one primary purpose “can be an inherently impossible task.”<sup>[10]</sup> The court held that the “clearer, more precise, and more predictable” test is: “[w]as obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?”<sup>[11]</sup> In KBR I, the company hired outside counsel to conduct an internal investigation in response to allegations that the company had defrauded the government. The investigation was motivated by significant legal and business purposes. As a significant purpose of the investigation was

to provide legal advice, pursuant to *U.S. v. Upjohn*,<sup>[12]</sup> interviews of employees conducted during the investigation were privileged.

Just a month before being nominated to the U.S. Supreme Court, then Judge Kavanaugh authored a second decision applying the broader “a significant purpose” test. In *Federal Trade Commission v. Boehringer Ingelheim Pharm., Inc.*,<sup>[13]</sup> the FTC subpoenaed documents created by company employees at the request of the company’s general counsel, and communications between general counsel and company executives regarding possible settlement. The court found that the communications had a legal purpose: to help the company comply with antitrust laws and negotiate a legal settlement. The communications also had a business purpose: to help the company negotiate a settlement on favorable financial terms. Applying the KBR I test, the court held that the communications were privileged.

### **Petitioner’s Appeal**

The district court rejected Petitioner’s argument that the dual-purpose tax-related communications were sufficiently motivated by a legal purpose to be deemed privileged. The court upheld privilege only where Petitioner demonstrated that *the* primary purpose of a communication was to obtain or provide legal advice. The court ordered Petitioner to produce dual-purpose communications that did not meet this strict test. In violation of the court’s order, Petitioner continued to withhold the documents and the court held Petitioner in contempt.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, Petitioner argued that the district court erred by failing to apply the KBR I “a primary purpose” test.<sup>[14]</sup> The appellate court acknowledged the reasoning in KBR I but saw no need to adopt the reasoning in this case. The court noted that no sister circuits had adopted the D.C. Circuit approach; KBR I was decided in the specific context of a corporate internal investigation and its reasoning did not apply with equal force in tax cases; and the KBR I test would make a difference in the outcome of privilege analysis only in truly close cases, for example where the legal purpose was just as important as a non-legal purpose.<sup>[15]</sup> Where the district court did not clearly err in finding that *the* predominant purpose of the disputed communications was not to obtain legal advice, the communications did not fall within the narrow universe where the KBR I test would change the outcome of the privilege analysis.<sup>[16]</sup>

### **Petition for a Writ of Certiorari**

In its successful Petition, Petitioner argued that applying the KBR I test would have been dispositive in favor of privilege in this case and that the issue is now ripe for a ruling by the U.S. Supreme Court. First, Petitioner argued there is a three-way split among the D.C. Circuit, the Ninth Circuit, and the Seventh Circuit,<sup>[17]</sup> which should be resolved to provide a uniform approach to dual-purpose communications. The U.S. Supreme Court has made it clear that, to be effective, the attorney-client privilege must be predictable.<sup>[18]</sup> If application of the privilege is uncertain, a client’s willingness to speak frankly with counsel may be chilled. In Petitioner’s view, the Ninth Circuit test is “difficult, if not impossible, to apply,” and “creates intolerable uncertainty in attorney-client privilege determinations.”<sup>[19]</sup> Adopting the broader approach would bring more predictability in matters governed by federal common law and could encourage states to adopt a similar approach.<sup>[20]</sup>

Second, the question presented is critical to the legal profession and to the public. The issue goes beyond the work of tax attorneys. Communications with in-house counsel regularly mix legal and business concerns.

### **A Rare Opportunity for the Court**

This case presents a rare opportunity for the Court to issue a ruling on a significant privilege issue. Although privilege questions arise frequently, opportunities for appellate review of privilege decisions are rare. As a result of the Court’s decision in *Mohawk Indus. v. Carpenter*,<sup>[21]</sup> federal appellate court

rulings on significant privilege issues are rare, because parties may not take immediate appeals of adverse privilege rulings. Some litigants may be able to take an interlocutory appeal or try to meet the high bar to obtain mandamus review, but those approaches are discretionary and reserved for unusual cases.<sup>[22]</sup> A party can also take an immediate appeal from a criminal contempt order, as Petitioner has here. However, most parties are unwilling to take the risks involved in such a drastic step in order to perfect their right to challenge adverse privilege rulings prior to a final appealable judgment. As most cases settle before judgment, most adverse privilege rulings go unreviewed by the appellate courts. Petitioner prevailed in convincing the Court that it should take this opportunity to consider a significant privilege question that broadly affects the daily practice of law.

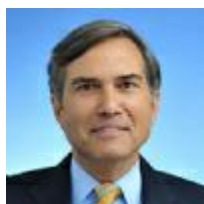
### **Potential Implications for Communications with In-House Counsel**

If the Court adopts the broad “a primary purpose” test, it may expand the scope of the attorney-client privilege significantly for communications with in-house counsel.

The issue of mixed legal and business purposes arises regularly in the context of communications with in-house counsel.<sup>[23]</sup> The fact that in-house counsel often plays both legal and business roles has led some courts to apply heightened scrutiny to in-house counsel communications. Courts explain that, while they do not intend to weaken the privilege for in-house counsel, they are mindful that corporate clients could attempt to hide mountains of otherwise discoverable information behind a veil of secrecy by using in-house legal departments as conduits for otherwise unprivileged information.<sup>[24]</sup> In-house counsel must make a “clear showing” that they were acting in a legal capacity as to communications withheld on grounds of privilege.<sup>[25]</sup> In many cases, this has required in-house counsel to demonstrate that *the* primary purpose of a communication was legal rather than business. If the Court adopts the KBR I standard, it may expand the scope of mixed purpose in-house counsel communications that will be deemed within the privilege, even where the communications were also made for significant business purposes.

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[1] The decision that will be reviewed is *In re Grand Jury*, 23 F.4th 1088 (11th Cir. 2022), amending and superseding *In re Grand Jury*, 13 F.4th 710 (9th Cir. 2021).

[2] Pet. 4.

[3] *Id.*

[4] Pet. 5.

[5] DAVID M. GREENWALD, MICHELE L. SLACHETKA, *Testimonial Privileges*, §§ 1:50-1:51 (West 2021).

[6] The district court held that advice about what to claim on tax returns or other tax-related legal advice may be privileged only where the primary purpose of the communication was to obtain or provide legal advice. Br. for the United States in Opp. To Pet.

[7] 756 F.3d 754 (D.C. Cir. 2014).

[8] *Id.* at 760.

[9] *Id.* at 759.

[10] *Id.*

[11] *Id.* at 760.

[12] 449 U.S. 383, 101 S.Ct. 677 (1981).

[13] 892 F.3d 1264 (D.C. Cir. 2018).

[14] Petitioner also argued that the district court should have applied the “because of” test to establish the primary purpose of a communication. The appellate court rejected that test, explaining that it properly applies to work product protections, but if applied to the attorney-client privilege “it would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny” in future litigation. 23 F.4th at 1093-1094.

[15] 23 F.4th at 1094-1095.

[16] *Id.* at 1095.

[17] *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) (court applied very narrow approach in a case involving counsel that acted in dual capacities as counsel and tax preparer).

[18] Pet. 19.

[19] *Id.*

[20] *Id.*

[21] 558 U.S. 100 (2009).

[22] Pet. 28.

[23] See *Testimonial Privileges*, § 1:51

[24] *Id.*, § 1:51 n.2.

[25] *Id.*, § 1:51 n.3.