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Supreme Court leaves open a major risk to internal corporate communications

by Michael A. Morse, Esquire, CHC

It is commonplace for attorneys and compliance officers (particularly those who are also attorneys) to receive communications from clients that have more than one purpose. Take, for example, a doctor who calls a friend and the hospital's compliance officer to set up a dinner for their families. During that call, the doctor mentions that he is thinking about starting his own practice and asks the compliance officer if he believes it is a good idea. Later in the conversation, the doctor mentions to the compliance officer that one of her colleagues has a habit of looking into the records of other physicians' patients, and the doctor says she finds this "creepy." The doctor asks the compliance officer if he is obligated to report the colleague for a potential HIPAA violation. While you might assume the attorney–client privilege protects this conversation between the doctor and compliance officer/attorney, that assumption can easily be wrong.

This hypothetical situation raises the issue of "dual-purpose communications," which are communications between a lawyer and client that have both legal and nonlegal purposes. Dual-purpose communications occur routinely in businesses across the country, particularly in highly regulated areas such as healthcare compliance. Recent decisions by the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court have drawn into question how courts will determine whether dual-purpose communications are protected by the attorney–client privilege.

Courts have historically used one of two tests to analyze whether dual-purpose communications should be protected by the attorney–client privilege. First, under "the primary purpose" test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice. Second, the broader "a primary purpose" or "substantial purpose" test courts look at whether one primary purpose of the communication is to give or receive legal advice. This distinction, between whether legal advice was a primary purpose or **the** primary purpose, may appear semantic; however, it can have a game-changing impact on the free flow of information that is essential to compliance investigations and the work of in-house legal counsel.

Ninth Circuit Court adopts narrow *the* primary purpose test

In the case of *In re: Grand Jury*, a company and law firm were served grand jury subpoenas requesting documents and communications related to a criminal investigation, whose target was the company's owner and the law firm's client. The company and law firm produced some documents but withheld others, citing the attorney–client privilege and the work–product doctrine—the documents related to tax law and advice. The U.S. Department of Justice (DOJ) moved to compel production of the withheld documents. The district court granted the motion to compel in part, explaining that the documents at issue were either not protected by any privilege or

were discoverable under the crime–fraud exception. The company and law firm disagreed with them and continued to withhold the documents, resulting in them being held in contempt of court.

The company and law firm appealed to the Ninth Circuit Court of Appeals, arguing that the district court erred in relying on **the** primary purpose test. The appellants argued instead that the Court of Appeals should adopt a new “because of” test, which considers the totality of the circumstances and affords protection when it can fairly be 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 Court of Appeals affirmed the district court’s orders holding the company and law firm in contempt, reasoning that dual-purpose communications were not privileged because **the** primary purpose of the documents was to obtain tax advice, not legal advice.^[1]

The Court of Appeals based its decision on several factors. First, the court noted that attorney–client privilege generally does not cover communications related to an attorney’s preparation of tax returns. Second, the court reasoned that applying the broader “because of” test was based on the attorney work–product doctrine, which is animated by a different policy goal than the attorney–client privilege. The work–product doctrine upholds the fairness of the adversarial process by allowing litigators to develop legal theories and strategies without their adversary using the discovery process to obtain that information. By contrast, the attorney–client privilege encourages full and frank communication between attorneys and their clients and is not tied to pending or threatened litigation. Third, the court held that the “because of” test was prone to abuse because it would create incentive for companies to add layers of lawyers to every business decision in hopes of insulating themselves from future scrutiny. Fourth, the court determined that most, if not all, Courts of Appeals have opted for some version of the “primary purpose” test instead of the appellant’s “because of” test.

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