



Ninth Circuit's 'Primary Purpose' Test Governs for Dual-Purpose Attorney-Client Communications

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The U.S. Supreme Court dismissed a petition for writ of certiorari to review a decision of the U.S. Court of Appeals for the Ninth Circuit addressing the scope of the attorney-client privilege.

In this case, the U.S. District Court for the Central District of California had held an unidentified company and law firm in contempt for their refusal to comply with subpoenas in a criminal investigation. Relying on the attorney-client privilege, the company and law firm withheld certain communications claiming that they involved both tax and legal advice. The court ruled that such dual-purpose communications were not protected by the attorney-client privilege. The court reasoned that the “primary purpose” of those communications was to obtain non-legal tax advice. The company and law firm appealed the ruling to the Ninth Circuit, on the ground that the district court should have relied on a broader “because of” test instead of the “primary purpose” test to determine whether the attorney-client privilege covered the communications at issue.

The attorney-client privilege protects from disclosure confidential communications made between attorneys and clients for the purpose of giving or obtaining legal advice. Communications related to an attorney’s preparation of tax returns, on the other hand, are generally not covered by the privilege. However, communications often involve both legal and non-legal advice, as is frequently the case in tax law contexts, and in such circumstances, district courts in the Ninth Circuit have historically applied one of two tests to determine whether those communications are covered by the privilege: (1) the “primary-purpose” test or (2) the “because-of” test.

Under the more narrow “primary-purpose” test, courts consider whether the primary motive behind the communication was to render or solicit legal advice. If the primary purpose of the communication was

related to something else, such as business or tax advice, then the attorney-client privilege does not protect the communication. In contrast, the “because-of” test—which typically applies in the context of the attorney-work product doctrine—does not weigh the primary or secondary motives of the communications. Rather, it affords protection to documents that were created “because of” anticipated litigation and that would not exist in substantially similar form “but for” said anticipation.

Prior to this case, district courts in the Ninth Circuit were split on which test to apply for attorney-client privilege claims. Here, the Ninth Circuit ultimately affirmed the holding of the district court, concluding that while the “because-of” test is appropriately applied in an attorney work product context, the “primary-purpose” test applies when assessing the applicability of the attorney-client privilege to dual-purpose communications.

In its opinion, the Ninth Circuit distinguished the application of the attorney-client privilege from that of the more narrow attorney work product doctrine, noting the distinct policy interests protected by each privilege. The Ninth Circuit explained that to protect fairness of the litigation process, the attorney work product doctrine applies during discovery to shield the attorneys’ legal theories and strategies from their clients’ adversaries. Conversely, the attorney-client privilege aims to promote a more broad public interest in the administration of justice by encouraging candid communications between attorneys and clients concerning any legal matter, not just impending litigation. The Ninth Circuit posited that applying the “because-of” test in an attorney-client communications context would create perverse incentives for attorneys to include tidbits of legal advice in all business-related communications as a basis for withholding them during future litigation.

In response to the Ninth Circuit’s opinion, the company and law firm filed a petition for writ of certiorari with the U.S Supreme Court. While the Supreme Court originally granted the petition, after hearing the parties’ oral arguments the Supreme Court dismissed the petition “as improvidently granted,” leaving in place the Ninth Circuit’s holding that the “primary-purpose” test applies in the Ninth Circuit when assessing the applicability of the attorney-client privilege to dual-purpose communications.