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Uncertainty On Protection For Some Attorney-Client Communications

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As a general matter, communications between attorneys and their clients are "privileged," meaning they don't have to be handed over to the other side in litigation relating to the matters covered in the communications. That process of combing through and handing over (or refusing to hand over) documents is called discovery. Wars over discovery often consume tremendous time and effort in the early stages of major litigation.

The attorney-client privilege has been part of American law for centuries. It seeks to encourage clients to obtain legal advice as they go about their business.

In the last few decades, as complex litigation has exploded and with it the importance of the discovery process, a huge body of law has developed on the scope and limitations of the attorney-client privilege. As one theme in that body of law, the courts have often said the privilege applies only to communications whose "primary purpose" is for the attorney to provide legal advice. On the other hand, communications

that are merely about tax advice or business advice can't benefit from the privilege.

Many in the business and legal world believe the "primary purpose" test is too strict and jeopardizes the privacy of attorney-client communications that should remain private. Instead, those people favor a "significant purpose" test: as long as legal advice plays a significant role in the communication, it's privileged.

Federal courts had reached varying conclusions on these issues, perhaps applying varying tests. As a result, the United States Supreme Court agreed to hear a case that would have resolved these issues. The case, *In re Grand Jury*, involved an unnamed attorney who didn't want to hand over information from his or her files for a grand jury investigation. According to federal law in the Ninth Circuit (California and some other western states), if a communication relates to legal matters but also business or tax matters, the court needs to evaluate all the purposes of the communication, and then protect it only if the legal purpose is at least as significant as any nonlegal purpose.

In January 2023, the Supreme Court heard oral argument in the case, with a spirited discussion of what the law ought to be and whether existing law works adequately. Instead of deciding the case, though, the Supreme Court changed its mind about even hearing the case, and dismissed the order that had granted a Supreme Court hearing. That leaves the law where it was: somewhat muddled, but perhaps not so bad that the Supreme Court felt the need to do anything about it.

The federal courts in some parts of the country will continue to apply the "primary purpose" test. Others will apply the "significant purpose" test. Or maybe the two tests aren't all that different.

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In any case, attorneys and their clients should continue to watch out for "dual-purpose" business (or tax) and legal advice. If a communication contains both, one cannot assume it is protected just because it has some legal advice in it. Counsel may want to provide legal advice in communications that are separate from other forms of advice or communication. If counsel provides both types of advice in the same communication, even the legal advice should be written with an eye toward how it might look if it ever appeared in litigation.

Also, clients often think that if they include an attorney as a recipient of any email, then the email automatically qualifies for the attorney-client privilege. Actually, that is not true at all.

Joshua Stein

I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**