IN RE GRAND JURY

NINTH CIRCUIT OFFERS GUIDANCE ON PRIVILEGE TEST FOR DUAL-PURPOSE COMMUNICATIONS

Recent Case: In re Grand Jury, 23 F.4th 1088 (9th Cir. 2021)

The Ninth Circuit Court of Appeals recently held that dual-purpose communications, or communications made with more than one purpose, must satisfy the "primary purpose" test in order for privilege properly to attach. Yet in 2014, the D.C. Circuit adopted a different test for dual purpose communications, asking whether "a"—not "the"—primary purpose of the communication is to give or receive legal advice. The Ninth Circuit did not explicitly reject the logic of the D.C. Circuit, and instead declined the opportunity to draw the precise contours of the privilege standard as applied to dual purpose communications. Looking forward, it is likely that other circuits may grapple with the proper inquiry for privilege and the logic of the D.C. Circuit's standard.

INTRODUCTION

To what degree should attorney-client privilege protect dual-purpose communications? As businesses grow in size and complexity, their attorneys often serve as both lawyers and businesspersons. This phenomenon has given rise to dual-purpose communications, or communications with "more than one purpose."[1] These dual-purpose communications have proved slippery for courts to fit into existing privilege jurisprudence.[2] The Ninth

[1] *In re* Grand Jury, 23 F.4th 1088, 1091 (9th Cir. 2021) (referring to dual-purpose tax documents in United States v. Sanmina Corp., 968 F.3d 1107, 1118 (9th Cir. 2020)).

[2] *See, e.g.*, GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING 2022 SUPPLEMENT § 10.07.8 (Wolters Kluwer 4th ed. 2021–22) ("One common problem that arises, most often when privilege claims are made by in-house counsel, is whether particular communications were made in connection with business rather than legal advice.").

Circuit recently confronted an intra-circuit split on the proper standard for assessing privilege claims for dual-purpose communications. The court squarely rejected a broad test in favor of a narrower inquiry.[3] Some district courts hewed to the more focused "primary purpose" test, which looked to the primary reason of a communication.[4] Other district courts assessed claims of privilege under the broader "because of" standard, which inquired into the causal connection animating the creation of a document.[5] The "because of" test, which applies to the work product doctrine, "'does not consider whether litigation was a primary or secondary motive behind the creation of a document.' It instead 'considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation.'"[6] Thus, the "because of" inquiry is much broader than the primary purpose test.[7]

The Ninth Circuit determined that the "primary purpose" test governs, underscoring the distinction between work product and attorney-client privilege.[8] However, although the court rejected the "because of" test for attorney-client privilege, it punted on the precise standard[9] to assess dual-purpose communications—leaving businesses in the dark as to which documents may properly be withheld under a privilege assertion.

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3 *See In re* Grand Jury, 23 F.4th at 1094 ("[W]e reject Appellants' invitation to extend the 'because of' test to the attorney-client privilege context, and hold that the 'primary purpose' test applies to dual-purpose communications.").

4 *See id.* at 1091 ("Under the 'primary purpose' test, courts look at whether the primary purpose of the document is to give or receive legal advice, as opposed to business or tax advice.") (citing *In re* County of Erie, 473 F.3d 413, 420 (2d Cir. 2007)).

5 *Id.* at 1092.

6 *Id.* (citation omitted).

7 *Id.*

8 *Id.* at 1092 ("We hold that the primary purpose test applies to attorney-client privilege claims for dual-purpose communications."). In arriving at its conclusion, the court distinguished work product and attorney-client privilege in part by exploring the goals for which each privilege is tailored. It noted that "the work-product doctrine upholds the fairness of the adversarial process by allowing litigators to creatively develop legal theories and strategies—without their adversaries invoking the discovery process to pry into the litigators' minds and free-ride off them." *Id.* at 1093 (citing Allen v. Chi. Transit Auth., 198 F.R.D. 495, 500 (N.D. Ill. 2001)). On the other hand, attorney-client privilege is not meant to address the adversarial process but rather "encourages 'full and frank communication between attorneys and their clients.'" *Id.* at 1093 (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

9 The court declined the opportunity to adopt the "a primary standard" test for attorney-client privilege with respect to dual-purpose communications. As the court explained by reference to *In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014), the "a primary purpose" test asks whether "obtaining or providing legal advice [was] a primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 1094. The court therefore left "[o]pen [w]hether the '[a] [p]rimary [p]urpose [t]est [s]hould [a]pply." *Id.* On the other hand, "the primary purpose" inquiry asks the court to identify the "'predominant' purpose" of the communication. *Id.*

I
BACKGROUND

Attorney-client privilege protects certain communications between a client and her lawyer—specifically, communications in which the client seeks legal advice—from compelled disclosure in the course of litigation.[10] In federal courts, Rule 501 of the Federal Rules of Evidence[11] cognizes the privilege that was developed under federal common law.[12] In order to invoke the privilege successfully and shield a communication from disclosure, one generally must demonstrate: "(1) a communication, (2) that was made by the client to a lawyer, (3) that was made in confidence, and (4) that was made for the purpose of obtaining professional legal advice (or services relating thereto)."[13] Generally, those communications that satisfy all four elements may be withheld from compelled disclosure on the ground that the privilege cloaks the communications in protection.[14]

On the other hand, work product privilege protects disclosure of documents prepared by an attorney in "anticipation of litigation."[15] Originally articulated in the seminal Supreme Court case *Hickman v. Taylor*,[16] work product privilege trains attorneys' and the court's perspective on the attorney's actions in the face of litigation (or the threat of litigation).[17] Today, Rule 26(b)(3) of the Federal Rules of Civil Procedure also sets the standard for work product privilege.[18]

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[10] *See, e.g.*, United States v. Samnina Corp., 968 F.3d 1107, 1116 (9th Cir. 2020) ("The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice.") (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); HAZARD, HODES, & JARVIS, *supra* note 2, § 10.07.8 ("In order for attorney-client privilege to apply, the communication between attorney and client (or their respective representatives), must be in aid of the attorney's provision of legal advice to the client—it must be about a legal matter, in other words.").

[11] Rule 501 requires that common law determines assertions of privilege unless the U.S. Constitution, a federal statute, or rules promulgated by the Supreme Court dictate otherwise. *See* FED. R. EVID. 501. However, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." *Id.*

[12] ELLEN S. POGDOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL 387 (4th ed. 2009). In the Ninth Circuit, the attorney-client privilege is articulated by a functionally equivalent "eight-part test: (1) Where legal advice . . . is sought (2) from a professional legal advisor . . . , (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are . . . protected (7) from disclosure . . . , (8) unless the protection be waived." *Sanmina Corp.*, 968 F.3d at 1116 (citing United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010)).

[13] POGDOR & ISRAEL, *supra* note 12, at 389.

[14] *See id.* at 389–90 (noting that the privilege "block[s] the disclosure of the protected communications . . .").

[15] *See id.* at 426.

[16] 329 U.S. 495 (1947).

[17] *See* POGDOR & ISRAEL, *supra* note 12, at 427–29 (establishing *Hickman* standards and describing Federal Rule 26(b)(3) as having "substantially incorporated" these standards).

[18] *See id.* at 430 (describing how Rule 26(b)(3) incorporates Hickman and "sets forth a standard as to the showing needed to overcome work product protection"). *See also* FED. R. CIV. PROC. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are

Attorney-client and work product privilege are distinct privileges justified on distinct grounds and focused on distinct inquiries.[19] In most instances, these doctrines are straightforward to apply. However, a communication created by an attorney with more than one purpose in mind—a so-called dual-purpose communication—implicates thorny issues. These dual-purpose communications are often made by an attorney "wear[ing] dual hats, serving as both lawyer and a trusted business advisor."[20] Consequently, dual-purpose communications have grown more relevant over the years, in light of the "increasingly complex regulatory landscape"[21] implicating the services of attorneys who may offer both legal and business advice.

The tax context, for instance, is rife with opportunities for privilege issues relating to dual-purpose communications.[22] These issues in the tax context emerge because corporations may consult attorneys for myriad advice, and although there is an attorney-client privilege, there is no "accountant-client" privilege.[23] Thus, courts must ensure that documents withheld from disclosure on ground of privilege meet the requirements for attorney-client privilege. As the *In re Grand Jury* court noted, "attorney-client privilege might apply to legal advice about what to claim on a tax return, even if it does not apply to the numbers themselves."[24] However, privilege protects only certain communications; it will not apply to run-of-the-mill tax information relayed from client to attorney or memorialized by the attorney as part of standard tax practice.[25] In the context of standard tax information, there would be no valid claim of privilege as justification for withholding the communications.[26] Courts have not articulated a standard for assessing privilege claims of dual-purpose communications.[27]

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prepared in anticipation of litigation or for trial by or for another party or its representative . . . .").

19 *See supra* note 8 (noting distinct goals toward which attorney-client and work product privilege are respectively tailored).

20 *In re* Grand Jury, 23 F.4th 1088, 1090 (9th Cir. 2021).

21 *Id.*

22 "[S]ome communications might have more than one purpose, especially 'in the tax law context, where an attorney's advice may integrally involve both legal and non-legal analyses.'" *Id.* at 1091 (citing Sanmina Corp., 968 F.3d 1107, 1118 (9th Cir. 2020)).

23 In contrast, "normal tax return preparation assistance—even coming from lawyers—is generally not privileged, and courts should be careful to not accidentially create an accountant's privilege where none is supposed to exist." *Id.* at 1095 n.5.

24 *Id.* at 1092 n.2.

25 *Id.* at 1091 ("Generally, communications related to an attorney's preparation of tax returns are not covered by attorney-client privilege. So, for example, 'a client may communicate the figures from his W-2 form to an attorney while litigation is in progress, but this information certainly is not privileged.'" (quoting United States v. Abrahams, 905 F.2d 1276, 1283–84 (9th Cir. 1990), *rev'd on other grounds by* United States v. Jose, 131 F.3d 1325 (9th Cir. 1997)) (citing Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954)).

26 *Id.*

27 *See id.* at 1090 ("Our court, however, has yet to articulate a consistent standard for determining when the attorney-client privilege applies to dual-purpose communications that

A. Facts Underlying the Recent Ninth Circuit Decision

In *In re Grand Jury*, a California federal grand jury sought information relating to the owner of a company, who was the target of a criminal investigation.[28] Seeking specific communications, the grand jury issued subpoenas to the appellants: the individual's company and law firm. The appellants complied with some of the requests but refused to produce certain requested tax-related documents citing work product and attorney-client privilege.[29] When the district court granted in part the government's motion to compel production,[30] the appellants continued to assert both privileges and refused to produce the withheld documents. The refusal ultimately landed the appellants in contempt, prompting the appeal to decide the appropriate standard for assessing attorney-client privilege with respect to dual-purpose communications.[31] The Ninth Circuit granted the motion.[32]

A year earlier, the Ninth Circuit declined an opportunity to decide this question. In *United States v. Sanmina Corp. & Subsidiaries*,[33] the court heard a dispute concerning privilege claims with respect to dual-purpose tax communications.[34] The *Sanmina* court chronicled the intra-circuit split on the question of the proper test to apply,[35] but it ultimately declined to resolve the split given that the facts of the case did not demand a clear standard.[36] However, the open question once again materialized before the court on appeal in *In re Grand Jury*.

On appeal in *In re Grand Jury*, the government argued in favor of the

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implicate both legal and business concerns.").

28 *See id.* at 1090–91 (describing background facts giving rise to privilege assertion).

29 *See id*.

30 In granting the government's motion to compel production, "the district court explained that these documents were either not protected by any privilege or were discoverable under the crime-fraud exception." *Id.* at 1090. Discussion of the crime-fraud exception and its bearing on the issues in *In re Grand Jury* is beyond the scope of this piece. The Ninth Circuit disposed of the assertion of the crime-fraud exception "in a concurrently filed, sealed memorandum disposition." *Id.* at 1090 n.1.

31 *See id.* at 1091 (noting findings of contempt and appellants' appeal). The court focused on the standard for attorney-client privilege for dual-purpose documents. Work product asks whether the document was created in anticipation of litigation and often relies on the "because of" test explored infra note 41, and it does not protect documents where there has been a showing of "substantial need" by the adversary. Thus, because work product privilege applies to documents created in the face of litigation, work product privilege for dual-purpose communications is uninteresting. FED. R. CIV. PROC. 26(b)(3).

32 *See id.* (granting appeal under 28 U.S.C. § 1291).

33 968 F.3d 1107 (9th Cir. 2020).

34 *See id.* at 1118–19, 1118 n.5 (describing the communications as "dual purpose" and weighing possible proper standards).

35 *See id.* at 1118 n.5 (illustrating the Ninth Circuit intra-circuit split by pointing to four district courts which applied the "primary purpose" test and two other courts which applied the "because of" test in an attorney-client privilege claim).

36 *See id.* at 1118–19 ("Notwithstanding this intra-circuit split, however, we need not decide the issue on the facts of this case.").

"primary purpose" test to narrow the privilege rule, which would promote greater opportunities for compelled disclosure. As the Ninth Circuit explained: "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. . . . The natural implication of this inquiry is that a dual-purpose communication can only have a single 'primary' purpose."[37] In fact, the government sought to narrow substantially the protection offered by decrees of privilege, "suggest[ing] that dual-purpose communications in the tax advice context can *never* be privileged."[38] However, the court disposed of this contention in a footnote as inapposite with Ninth Circuit case law, citing to a case in which the Ninth Circuit neither resoundingly accepted the privilege claim of a dual-purpose tax advice communication nor rejected the possibility outright that privilege may apply under certain circumstances.[39] But while the court rejected the government's argument that tax-related dual-purpose communications can never be privileged, the court endorsed the government's "primary purpose" argument, holding that the primary purpose test governs. [40]

On the other hand, the appellants sought adoption of the broadest possible privilege standard—the "because of" test traditionally applied to work product privilege.[41] The "because of" test proposed by appellants:

> does not consider whether litigation was a primary or secondary motive behind the creation of a document. It instead 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.[42]

However, the Ninth Circuit declined to adopt the "because of" test, finding unpersuasive appellants' arguments to use the work product "because of" test for whether attorney-client privilege applies for dual-purpose communications.[43] Specifically, the court proceeded in three steps. First, the court concluded that the dispute was governed by the applicable attorney-client privilege standard for dual-purpose communications—not

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37 *In re* Grand Jury, 23 F.4th 1088, 1091 (9th Cir. 2021).

38 *Id.* at 1092 n.2 (emphasis added).

39 *See id.* (determining that relevant case law does not support the government's contention that dual-purpose tax-related documents are never privileged) (citing United States v. Abrahams, 905 F.2d 1276, 1284 (9th Cir. 1990), *rev'd on other grounds by* United States v. Jose, 131 F.3d 1325 (9th Cir. 1997)).

40 *See id.* at 1092.

41 *See id.* at 1093 (setting forth appellants' argument).

42 *Id.* at 1091–92 (emphasis added) (internal quotation marks omitted).

43 *See id.* at 1093 ("Appellants assert . . . that we should . . . borrow the test from the work-product doctrine when a communication has a dual purpose . . . . But . . . [a]ppellants offer no persuasive reason to abandon the common-law rule [with respect to privilege claims for dual-purpose communications.]").

work product.[44] Second, the court rejected the "because of" test for attorney-client privilege and held that the primary purpose standard is the proper test.[45] Third, the court explored the D.C. Circuit's *Kellogg* test but ultimately declined the opportunity to endorse that standard.[46] Thus, in rejecting the "because of" test and affirming the lower court's finding of contempt, the court explained that attorney-client privilege focused on "the purpose of the communication, not its relation to anticipated litigation,"[47] thereby underscoring the distinction between work product and attorney-client privilege.

B. Rationale of the Ninth Circuit's Decision

The Ninth Circuit correctly homes in on the distinction between attorney-client and work product privilege. The two privileges, although complementary, serve distinct purposes and trace distinct historical developments along separate threads of the common law. The court explains the goal of work product privilege as preservation of "a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries."[48] On the other hand, the sanctity of the relationship between a client and her attorney animates the attorney-client privilege.[49] In fact, "the attorney-client privilege encourages 'full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice.'"[50]

The Ninth Circuit, however, did not tether its rationale only to the importance of maintaining a clear demarcation between two privileges imported and developed from common law. It also considered the practical realities. In explaining its holding that the work product "because of" standard does not govern attorney-client privilege disputes, the Ninth Circuit considered the incentive structure for attorneys and firms that would inevitably develop in reaction to adoption of a "because of" standard governing attorney-client privilege assertions involving dual-purpose communications. The court explained that the "because of" test, if applied to attorney-client privilege, "would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating

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44 *Id.* at 1091 (finding that the attorney-client privilege is the only privilege applicable in this case).

45 *See id.* at 1094.

46 *See id.* For a discussion of the D.C. Circuit's *Kellog* test, see *infra* Section I.C.

47 *Id.* at 1093.

48 *Id.* (citing United States v. Adlman, 134 F.3d 1194, 1196 (2d. Cir. 1998)).

49 *Id.* (stating that the attorney-client privilege is concerned with "providing a sanctuary for candid communication about any legal matter, not just impending litigation.").

50 *Id.* (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

themselves from scrutiny in any future litigation,"[51] and it expressed concern that applying the test in the attorney-client privilege context "might harm our adversarial system if parties try to withhold key documents as privileged by claiming that they were created 'because of' litigation concerns."[52]

Finally, the panel considered the governing standard in other circuits for assertions of attorney-client privilege of dual-purpose communications. Of those which have confronted the issue, sister circuits generally have declined to import the "because of" standard into attorney-client privilege inquiries for dual-purpose communications.[53] However, while the Ninth Circuit merely rejected the "because of" standard and left open the exact contours of the primary purpose test, the D.C. Circuit has provided more granular guidance.[54]

C. The D.C. Circuit's Kellogg *Test*

Nearly a decade ago, the D.C. Circuit set forth its "*a* primary purpose" standard.[55] Confronted with a privilege dispute centered on whether certain documents produced by attorneys in the course of an internal investigation for a defense contractor constituted "legal advice"[56] or "unprivileged business records,"[57] the district court reviewed the disputed documents *in camera*[58] and "determined that the attorney-client privilege protection did not apply because . . . [the defendant] had not shown that 'the communication would not have been made 'but for' the fact that legal advice was sought.'"[59] The defendant maintained its privilege claim over the dual-purpose communications and sought mandamus relief at the D.C. Circuit.[60]

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[51] *Id.* Privilege standards powerfully influence the manner in which organizations choose to conduct business, and organizations react to incentive structures. For instance, in March 2022, the Department of Justice moved to compel Google, LLC, to disclose certain documents alleged to have been improperly cloaked in attorney-client privilege through the inclusion of attorneys on run-of-the-mill business matters. *See generally* Plaintiffs' Motion to Sanction Google and Compel Disclosure of Documents Unjustifiably Claimed by Google as Attorney-Client Privileged, United States v. Google, LLC, No. 1:20-cv-03010 (filed Mar. 21, 2022), https://www.abajournal.com/files/US_v._Google_3_.21.22_sanctions_motion_.pdf [https://perma.cc/47GU-ZPCJ].

[52] *In re* Grand Jury, 23 F.4th at 1093.

[53] *See id.* at 1094 ("[M]ost, if not all, of our sister circuits that have addressed this issue have opted for some version of the 'primary purpose' test instead of the 'because of' test.").

[54] *See generally In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

[55] *See id.* at 759–60 (describing "a primary purpose test" and its justification).

[56] *Id.* at 756.

[57] *Id.*

[58] *In camera* review refers to nonpublic "examination of materials." *See, e.g.*, *In Camera Definition*, LAW INSIDER, https://www.lawinsider.com/dictionary/in-camera-review [https://perma.cc/TF4N-G3G6] (last accessed June 13, 2022).

[59] *Kellogg*, 756 F.3d at 756.

[60] The D.C. Circuit court heard this mandamus petition—an interlocutory order—because "the District Court's privilege ruling constituted legal error" and also was an "error of the kind that justifies mandamus" under 28 U.S.C. § 1651. *Id.* at 756–57. As the court explained, "[m]andamus

In an opinion penned by then-Judge Kavanaugh, the *Kellogg* court found that the district court had applied an incorrect standard—the "but for" test—in its determination that the defendant may not withhold the documents under a claim of attorney-client privilege.[61] The district court correctly cited the primary purpose test but erroneously described the test as a "but-for" inquiry.[62] The Circuit Court rejected the District Court's application of the primary purpose test[63] and took the opportunity to clarify precisely the proper standard:

> [T]rying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A *and* B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes.[64]

Thus, the *Kellogg* court soundly rejected "*the* primary purpose" standard as the appropriate test in questions of attorney-client privilege claims for dual-purpose communications. Instead, the D.C. Circuit explained that the following inquiry governs: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?"[65]

Despite careful treatment of the issue and a seemingly unambiguous standard offered by the *Kellogg* court, commentators remain skeptical of *Kellogg*'s legacy: "[W]hether *Kellogg* represents a broad and significant development in attorney-client privilege remains to be seen."[66] On the other hand, the *Kellogg* "a primary purpose test" standard has gained traction in a handful of district courts.[67] And the D.C. Circuit continues to apply this

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is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Id.* at 760 (quoting Cheney v. U.S. Dist. Ct. for the Dist. of Columbia, 542 U.S. 367, 380 (2004)).

61 *See id.* at 759 (noting the District Court correctly set forth the "primary purpose" test, but "then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made 'but for' the fact that legal advice was sought").

62 *See id.* (noting that the lower court started its privilege inquiry "by reciting the 'primary purpose' test [for dual-purpose communications] . . . . [T]he District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made 'but for' the fact that legal advice was sought").

63 *See id.* (noting the lower court's error in asking the "but-for" inquiry to apply the primary purpose test).

64 *Id.* at 759–60 (second emphasis added).

65 *Id.* at 760.

66 HAZARD, HODES, & JARVIS, *supra* note 2, § 10–07.08. Although the D.C. Circuit decided *Kellogg* eight years ago, no other circuit has yet adopted the "a primary purpose" standard. *Id.* Circuits may continue to narrow *Kellogg* to its facts, as the Ninth Circuit did by distinguishing tax-related dual-purpose communications from those communications created as part of an internal investigation. *In re* Grand Jury, 23 F.4th 1088, 1094–95 (9th Cir. 2021)

67 *See, e.g.*, *In re* Grand Jury, 23 F.4th at 1095 n.4 (listing cases, e.g., in the Southern District

standard in its assessment of attorney-client privilege for dual-purpose communications.[68]

The Ninth Circuit declined the opportunity to adopt the *Kellogg* test—despite appellants' arguments in *In re Grand Jury*: Appellants argued in the alternative that, should the court decline to adopt the "because of" test, the *Kellogg* "a primary purpose" test should govern."[69] The Ninth Circuit side-stepped the issue.[70] Although the court recognized the "merits of the reasoning in *Kellogg*" and indicated that it may be inclined to adopt the *Kellogg* test in a future dispute, it declined "to adopt or apply the *Kellogg* formulation of the primary-purpose test here."[71] Implying that the context in which dual-purpose communications are created is a dimension of the court's focus, the Ninth Circuit distinguished *Kellogg* on the ground that it was formulated in light of corporate internal investigations, not tax-related documents as in *In re Grand Jury*.[72] The Ninth Circuit may have sought to find a way to confine *Kellogg* to its facts in order to avoid the more corporate-friendly "a primary purpose" test for attorney-client privilege for dual-purpose communications. On the other hand, internal investigations are often an element of a corporate compliance program, and perhaps both the *In re Grand Jury* and the *Kellogg* court sought not to undermine future compliance efforts, and therefore treat differently on the margins dual-purpose communications generated in a corporate compliance-centered context.

II
IMPLICATIONS OF THE RULING

Where does this holding leave law firms and business organizations? Although the *In re Grand Jury* court did not endorse the more corporate-friendly "a primary purpose" standard, those firms and organizations subject to the Ninth Circuit's jurisdiction will benefit from the clear rejection of the "because of" test in the context of attorney-client privilege for dual-purpose

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of New York, the District of Maryland, and the Eastern District of Michigan, as instances in which the *Kellogg* test was adopted).

68 *See, e.g.*, FTC v. Boehringer Ingelheim Pharms., Inc., 892 F.3d 1264, 1267–68 (D.C. Cir. 2018) (applying the *Kellogg* test to a dual-purpose communication, asking "whether obtaining or providing legal advice was *one of* the significant purposes of the communications at issue," and, upon an affirmative finding, holding that the documents were protected by attorney-client privilege).

69 *See In re Grand Jury*, 23 F.4th, at 1094.

70 The court in a section header noted, "We Leave Open Whether the 'A Primary Purpose Test' Should Apply." *See id.* Later decisions have endorsed the idea that the *In re Grand Jury* court avoided the issue. *See, e.g.*, Meta Platforms v. Brandtotal Ltd., No. 20-cv-07182, 2022, U.S. Dist. LEXIS 4820, at *4–5 (N.D. Cal. Jan. 10, 2022) (noting that for dual-purpose communications, "the Ninth Circuit has declined to resolve whether legal advice must be 'the primary purpose' or merely 'a primary purpose'"). *See also supra* notes 60–65 and accompanying text.

71 *In re Grand Jury*, 23 F.4th at 1094–95.

72 *See id.* ("We also recognize that *Kellogg* dealt with the very specific context of corporate internal investigations, and its reasoning does not apply with equal force in the tax context.").

communications.

In any event, both in-house and outside counsel should consider taking steps to designate the purpose for which documents meant to protect attorney-client privilege are created to inoculate against potential future document requests. As some commentators have suggested:

> Regardless of how the purpose line is drawn by a court in any particular case, . . . attorneys and their clients may be able to influence—although perhaps not wholly control—the availability of the privilege by creating a record indicating why communications are occurring, or by segregating communications in aid of legal advice from those involving non-legal advice.[73]

Thus, critical examination by attorneys of existing processes may be warranted to protect client interests.

In re Grand Jury has implications beyond the tax-law context. District courts in the Ninth Circuit already have relied on *In re Grand Jury* in order to determine the validity of assertions of privilege in other contexts. In an employment discrimination dispute, a magistrate judge for the District of Oregon conducted an *in camera* review of two email documents withheld by defendants on grounds of attorney-client privilege.[74] Applying the "primary purpose test" as set forth in *In re Grand Jury*,[75] the magistrate determined that "the primary purpose of the communication was to receive legal advice from an attorney employed with reference to that attorney's knowledge and discretion in the law"[76] and concluded the documents were properly withheld on ground of attorney-client privilege.[77]

Interestingly, and perhaps hinting at the degree to which the recent decision clarified the proper standard for assessment of privilege claims, at least one district court in the Ninth Circuit cited to *In re Grand Jury* for its explication of the "because of" standard in the work product context.[78] There, and unlike the *In re Grand Jury* court, the Arizona District Court faced a straightforward, single-purpose communication allegedly protected by work product privilege. The Arizona District Court framed the "because of" standard as an emanation of the *In re Grand Jury* decision, and the court applied this test to the communication in question to find that contested

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73 HAZARD, HODES, & JARVIS, *supra* note 2.

74 *See* Walker v. Shangri-La Corp., No. 6:20-cv-01577, 2022 U.S. Dist. LEXIS 16293, at *4 (D. Or. Jan. 28, 2022).

75 *See id.* at *3–4 (applying the *In re Grand Jury* formulation of the "primary purpose" standard).

76 *Id.* at *4.

77 *See id.* (finding upon application of the primary purpose test that "any discoverable content in the two e-mail documents is protected from disclosure under the attorney-client privilege").

78 Discovery Land Co. LLC v. Berkley Ins. Co., No. CV-20-01541-PHX, 2022 U.S. Dist. LEXIS 11604 (D. Ariz. Jan. 21, 2022). It is possible that the Arizona District Court misconstrued *In re Grand Jury*, given that it did not cite to the "primary purpose" standard as set forth in *In re Grand Jury* in its treatment of attorney-client privilege in the same decision.

documents were protected by work product privilege.[79]

It remains possible that the Ninth Circuit will adopt the *Kellogg* test in a future dispute for which the difference between "a primary purpose" and "the primary purpose" carries weight. But the *In re Grand Jury* court explained that it was not obligated to consider the *Kellogg* test fully "[b]ecause the district court did not clearly err in finding that *the* predominate purpose of the disputed communications was not to obtain legal advice, [and therefore] they do not fall within the narrow universe where the *Kellogg* test would change the outcome of the privilege analysis."[80] In other words, the Ninth Circuit was not "persuaded that the facts here require us to reach the *Kellogg* question."[81] In fact, the court signaled its openness to adopting the *Kellogg* test—at least under circumstances closely mirroring those present in *Kellogg*, and for litigants for whom the difference in privilege application between "a primary purpose" and "the primary purpose" is meaningful.[82] Compounding the potential for a future dispute to force the Ninth Circuit to rule decisively on the issue, district courts in the circuit continue to acknowledge that the precise standard remains an open question.[83]

However, although a dispute in which a party argues in favor of the *Kellogg* standard likely will emerge in the Ninth Circuit, whether the Ninth Circuit will adopt the test remains murky. The *Kellogg* "a primary purpose" test has failed to gain traction since its 2014 promulgation, suggesting that sister circuits may be reluctant to embrace the broader *Kellogg* standard for attorney-client privilege for dual-purpose communications.[84] Moreover, many state courts have expressly endorsed "the primary purpose" standard.[85] And the Ninth Circuit's incremental rulings in the space of dual-purpose

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79 *See id.* at *15–16 ("To determine whether a document qualifies for protection under the work-product protection, the Ninth Circuit has adopted a broad 'because of' test." (citing *In re Grand Jury*, 23 F.4th 1095 (9th Cir. 2021))).

80 *In re* Grand Jury, 23 F.4th 1088, 1095 (9th Cir. 2021).

81 *Id.* at 1094.

82 *Id.* at 1094–95 (noting that the *Kellogg* test "would save courts the trouble of having to identify a predominate purpose among two (or more) potentially equal purposes," and explaining that "the universe of documents in which the *Kellogg* test would make a difference is limited").

83 *See, e.g.*, Meta Platforms v. Brandtotal Ltd., No. 20-cv-07182, 2022 U.S. Dist. LEXIS 4820, at *4–5 (N.D. Cal. Jan. 10, 2022) ("If a communication serves more than one purpose, the Ninth Circuit has declined to resolve whether legal advice must be 'the primary purpose' or merely 'a primary purpose.'"); Walker v. Shangri-La Corp., No. 6:20-cv-01577, 2022 U.S. Dist. LEXIS 16293, at *3 (noting that the *In re Grand Jury* court "declined to resolve whether its primary purpose test requires legal advice to 'be *the* primary purpose or merely *a* primary purpose'").

84 *See, e.g.*, *In re Grand Jury*, 23 F.4th at 1094 n.3 (citing Alomari v. Ohio Dep't of Pub. Safety, 626 F. App'x 558, 572–73 (6th Cir. 2015)) (applying the primary purpose test and not mentioning *Kellogg*).

85 *See, e.g.*, *In re* Polaris, Inc, 967 N.W.2d 397, 408 n.1 (Minn. 2021) (citing cases from other state courts in support**)** ("Because we apply the attorney-client privilege narrowly, we agree with the overwhelming majority of state courts that have adopted the predominant purpose test and conclude that legal advice must be *the* primary purpose of the communication.").

communications hint at a reluctance to embrace fully the *Kellogg* test.[86] Thus, given general reluctance by courts to adopt the "a primary purpose" standard, *Kellogg* remains an outlier. Courts may be motivated to retain the primary purpose standard in order to avoid a corporate-friendly approach to attorney-client privilege. Moreover, as noted, the role of a compliance program may have cut in favor of the business organization in *Kellogg* in a way that does not easily extend to other contexts.

CONCLUSION

The Ninth Circuit's *In re Grand Jury* holding clarified the intra-circuit split left open by the court a year prior in its *Sanmina* opinion. The *In re Grand Jury* court expressly rejected importing the "because of" standard from the work product context into the assessment of claims of attorney-client privilege for dual-purpose communications. Instead, the Ninth Circuit asserted that the "primary purpose" test governs. But questions still linger as to the precise test that may be applied in future disputes. In the case of a dual-purpose document formed with two equal purposes, what standard will apply? Will the Ninth Circuit ultimately join the D.C. Circuit in adopting the *Kellogg* "a primary purpose" framework? Or instead, will the court reject *Kellogg* explicitly, or implicitly by choosing to characterize one of the purposes as "*the* primary purpose"? The court's signaling in *In re Grand Jury*—and the lower courts' amplification—of the existing open issue of adoption of the *Kellogg* test could not be clearer. The Ninth Circuit will likely confront this issue once again and have another opportunity to clarify its stance on the *Kellogg* test.

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[86] *See, e.g.*, United States v. Sanmina Corp., 968 F.3d 1107, 1118–19 (9th Cir. 2020) (declining to decide the issue of proper standard in dual-purpose communications context); *In re Grand Jury*, 23 F.4th at 1094 (declining at this time to decide whether to embrace the *Kellogg* test).