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In the News

‘Dual Purpose’ Communications, the Attorney-Client Privilege, and the ‘Primary Purpose’ Test in Texas: SCOTUS Punts, But Does Texas? How do Texas courts deal with such “dual purpose communications”?

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The attorney-client privilege is meant to protect from disclosure confidential communications between attorneys and their clients concerning legal advice. It allows Americans to fully understand and benefit from the law, without necessarily being attorneys. A “dual purpose communication” is essentially one between an attorney and her client made for purpose of receiving or providing legal advice, as well as non-legal advice. Sometimes such “dual purpose communications” attract motions to compel when withheld by a party in discovery proceedings based on privilege.

In a case styled *In Re Grand Jury*, the Ninth Circuit Court of Appeals held “that the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications.” *In re Grand Jury*, 23 F.4th 1088, 1092 (9th Cir. 2021). On certiorari, the Supreme Court was about to decide whether a communication involving both legal and non-legal advice is protected by the attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication (*i.e.*, *not* the “primary purpose”). However, on Jan. 23, 2023, the Supreme Court punted on deciding the issue when it dismissed the appeal because certiorari was “improvidently granted.” *In re Grand Jury*, No. 21-1397, 2023 WL 349990 (Mem), at *1 (U.S. Jan. 23, 2023). Nonetheless, for Texas practitioners, the widely followed Supreme Court proceedings do bring to the fore the question: How do Texas courts deal with such “dual purpose communications”? This article examines that issue.

SCOTUS Punts on Deciding the Federal Standard

On Oct. 3, 2022, the U.S. Supreme Court granted a petition for writ of certiorari filed by a law firm specializing in international tax issues. The decision was anticipated to have ramifications beyond the realm of privileged communications solely concerning tax advice. Accordingly, this closely watched case styled *In Re Grand Jury* drew the attention of multiple organizations that filed amicus briefs, including by the American Bar Association, the Federation of Defense & Corporate Counsel, Lawyers for Civil Justice, the U.S. Chamber of Commerce, and the Association of Professional Responsibility Lawyers.

In Re Grand Jury Proceedings In The District Court

The underlying case involves grand jury subpoenas of a company and a law firm requesting documents/communications relating to a criminal investigation. The target of the investigation is the owner of the company as well as a client of the law firm. Some of the law firm’s communications with the client at issue were made for the dual purpose of providing legal advice about tax consequences *and* to facilitate preparation of the client’s tax returns.

In response to the subpoenas, the law firm and the company withheld certain documents containing both legal and non-legal advice—often called “dual-purpose communications”—on the basis of the attorney-client privilege and the work product doctrine. The government filed a motion to compel production of the withheld documents, which the U.S. District Court for the Central District of California granted in part. In those orders, the district court explained that these documents were either not protected by any privilege or were discoverable under the crime-fraud exception. In sum, as relevant to

this article, the district court distinguished between communications made "for the primary purpose" of receiving or providing legal advice, and "communications where the primary or predominate purpose was about the procedural aspects of the preparation of [the client's] tax return[s]." The district court ordered the production of communications where the "primary or predominate purpose" was non-legal. Although it found that portions of several documents contained communications "only about tax return preparation, which is not protected by the attorney-client privilege", it allowed the redaction of "[o]ther portions of those [same] documents" that concerned "tax-related legal advice." When the company and the law firm refused to produce the documents, the district court held them in contempt—but stayed its contempt sanction to allow the law firm to appeal.

The Ninth Circuit Court Of Appeals Proceedings

In affirming the district court's decision, the Ninth Circuit held "that the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications."

The court rejected the government's argument, based in part on Seventh Circuit authority, "that dual-purpose communications in the tax advice context can never be privileged." *In re Grand Jury*, 23 F.4th at 1092; *see id.* at 1092 n. 2 ("The government suggests that dual-purpose communications in the tax advice context can never be privileged, but we reject that argument. … *But see United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) ('Put differently, a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged… .')."). Moreover, the Court recognized that the D.C. Circuit had applied a test that assesses whether obtaining or providing legal advice was "one of the significant purposes of the communication," rather than *the* primary purpose of the communication. *In re Grand Jury*, 23 F.4th at 1094 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). Nevertheless, it held: "We see the merits of the reasoning [for the "one of the significant purposes" test] in *Kellogg.* But we see no need to adopt that reasoning in this case." *Id.,* 23 F.4th at 1094-95 (citations omitted) (footnotes omitted).

Thus, the Ninth Circuit affirmed the district court's decision to hold the company and the law firm in contempt. *Id.* at 1095.

The SCOTUS Proceedings

On April 5, 2022, a "Petitioner" (whose name was redacted) filed a Petition for a Writ of Certiorari with the Supreme Court. The question presented by the petitioner was: "Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication."

On Oct. 3, 2022, the Supreme court granted the petition. Despite receiving substantial attention by the legal community and the filing of numerous amicus briefs, the Supreme Court dismissed the appeal on Jan. 23, 2023, after oral argument, because certiorari was "improvidently granted." *In re Grand Jury*, 2023 WL 349990 (Mem.), at *1.

Texas Courts and the 'Primary Purpose' Test

Initially, it is important to note that Federal Rule of Evidence 501 provides that the "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," unless otherwise provided by the U.S. Constitution, a federal statute, or Supreme Court rule. Nonetheless, Federal Rule of Evidence 501 expressly states that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Moreover, when the evidence that is the subject of an asserted privilege is relevant to federal claims raised in a federal action, courts usually hold that federal law governs the privilege. *See, e.g., In re E.E.O.C.*, 207 F. App'x 426, 431 (5th Cir. 2006) ("With respect to the attorney-client privilege, we note that because this case concerns the adjudication of federal rights, the federal common law of attorney-client privilege applies."); *In re Sanchez Energy Corp.*, No. 19-34508, 2022 WL 17586713, at *1 (Bkrtcy. S.D. Tex. Dec. 12, 2022) ("Federal common law of privilege applies to a mix of federal and state law claims."); *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 560

(S.D.N.Y. 1986) ("When evidence that is the subject of an asserted privilege is relevant to both federal and state law claims, the courts have consistently held that federal law governs the privilege."). This appears to be the reason the courts in *In re Grand Jury* applied "federal" law to the attorney-client privilege issue.

For the purposes of the following discussion, this article assumes that only state law claims are being made (in a Texas state proceeding), the evidence that is subject to the asserted privilege is relevant to those state law claims, and there is no assertion of the work product exemption or any waiver of (or other exemption to) the privilege—which topics are beyond the scope of this article. The Texas Supreme Court has not directly addressed whether "dual purposes communications" are privileged based on a "primary purpose" or "one of the significant purposes" tests discussed in the Ninth Circuit and D.C. Circuit, respectively, much less the more Draconian approach taken in the Seventh Circuit. Nonetheless, a brief review of pertinent law suggests that Texas courts do not apply the "primary purpose" test.

The Texas Supreme Court: The Attorney-Client Privilege Extends To The Entire Communication, Including Facts Contained Therein

In Texas, the attorney-client privilege protects confidential communications between a client and attorney, including their representatives, made for the purpose of facilitating the rendition of professional legal services to the client. *See* Tex. R. Evid. 503(b); *see also In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) ("Confidential communications between client and counsel made to facilitate legal services are generally insulated from disclosure." (citing *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex.1996)). In *Huie*, the Texas Supreme Court held that "the privilege extends to the entire communication, including facts contained therein… ." 922 S.W.2d 920, 923 (Tex. 1996) ("While the privilege extends to the entire communication, including facts contained therein, *see GAF Corp. v. Caldwell,* 839 S.W.2d 149, 151 (Tex. App.—Houston [14th Dist.] 1992, [no pet.]); 1 STEVEN GOODE ET. AL, TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL, § 503.5 n. 15 (1993), a person cannot cloak a material fact with the privilege merely by communicating it to an attorney. *See, e.g., National Tank Co. v. Brotherton,* 851 S.W.2d 193, 199 (Tex.1993).").

Texas Law Has Eschewed The "Primary Purpose" Test

Various Texas courts have held that the "subject of the information communicated confidentially between the attorney and client is of no concern in determining whether the privilege is applicable to the documents". *See, e.g.*, *In re Rescue Concepts, Inc.*, 556 S.W.3d 331, 345 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (quoting *GAF Corp.*, 839 S.W.2d at 151); *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.—El Paso 2006, pet. denied) ("The subject matter of the information communicated is irrelevant when determining whether the privilege applies."); *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 589 (Tex. App.—Dallas 1994, no writ) (same). Rather, the focus of the determination is whether the documents constituted a communication between an attorney and client under Texas Rule of Evidence 503(b), *i.e.,* whether they were communications that were (1) not intended to be disclosed to third parties and (2) made for the purpose of facilitating the rendition of professional legal services. *Id.* (citing, *e.g.*, *In re Fairway Methanol LLC*, 515 S.W.3d 480, 487 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *GAF Corp.*, 839 S.W.2d at 151).

Although some Texas courts have considered "subject matter" when determining privilege assertions, it has usually concerned whether an employee's communications were made at the direction of an attorney and the subject matter of the communication upon which the attorney's advice is sought is within the scope of his/her employment. *See, e.g., In re Fairway Methanol LLC*, 515 S.W.3d at 487; *see also In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 226 n.3 (Tex. 2004). Otherwise, Texas courts have held the subject of the communication is irrelevant because such an inquiry has no basis in Rule 503. *See, e.g.*, *In re Rescue Concepts, Inc.*, 556 S.W.3d at 345 ("Rather [than examining the subject of the communication], we must determine whether the documents constituted a communication between an attorney and client under Rule 503(b)."); *GAF Corp.*, 839 S.W.2d at 151 ("The rule itself makes no such limitation."); *see also Galveston Cnty., Texas v. Quiroga*, No. 14-18-00648-CV, 2020 WL 62504, at *5 (Tex. App.—Houston [14th Dist.] Jan. 7, 2020, no pet.) ("The scope of the attorney-client privilege is defined by the Texas Rules of Evidence. *See* Tex. R. Evid. 503."); *State*

v. DeAngelis, 116 S.W.3d 396, 403–04 (Tex. App.—El Paso 2003, no pet.) (“The scope of the attorney-client privilege is defined by the rules of evidence. Tex. R. Evid. 503.”).

Accordingly, Texas courts have eschewed the “primary purpose” test. For example, in *In re Fairway Methanol LLC*, the Fourteenth District Houston Court of Appeals rejected the plaintiffs’ argument (based on federal case law) that for a communication to be protected by the attorney-client privilege, it must be for the primary purpose of soliciting legal advice. 515 S.W.3d at 487, 489; *accord In re Rescue Concepts, Inc.*, 556 S.W.3d at 345 (citing *In re Fairway Methanol LLC*, 515 S.W.3d at 489). In that regard, the court noted that plaintiffs failed to cite any Texas authority applying the “primary purpose rule” and that the cited federal decisions were not binding. *In re Fairway Methanol LLC*, 515 S.W.3d at 489. The court held that “the language of Rule 503(b) does not require that the *primary* purpose of the communication be to facilitate the rendition of legal services; it only requires that the communication be made to facilitate the rendition of legal services.” *Id.* at 489; *accord In re Rescue Concepts, Inc.*, 556 S.W.3d at 345; *see also Crider, Inc. v. Silgan Containers LLC*, No. 3:21-CV-1047-M, 2023 WL 479094, at *10 (N.D. Tex. Jan. 13, 2023) (“Consistent with this law regarding communications between a client and its agents, ‘the language of [Texas Rule of Evidence] 503(b) does not require that the primary purpose of the communication be to facilitate the rendition of legal services; it only requires that the communication be made to facilitate the rendition of legal services.’ *In re Fairway Methanol LLC*, 515 S.W.3d 480, 489 (Tex. App.–Hous. [14th Dist.] 2017, [no pet.]); *accord In re Rescue Concepts, Inc.*, 556 S.W.3d 331, 345 (Tex. App.–Hous. [1st Dist.] 2017, [pet. denied]).”); *cf. In re Mid-Century Ins. Co.*, 549 S.W.3d 730, 734 (Tex. App.—Waco 2017, no pet.) (“[T]he language of Rule 192.5 does not require that the sole or primary purpose of the material or communication be for preparing for litigation.”).

Of note, in the 2017 *Primerica Life Ins. Co.* case, a federal court in the Western District of Texas relied on *Huie* for the proposition that Texas law requires that the primary purpose of the communication be for providing legal services. *See Primerica Life Ins. Co. v. Gross*, No. A-15-CV-759-DAE, 2017 WL 9325505, at *1 (W.D. Tex. Aug. 10, 2017). But *Huie* did not use the phrase “primary purpose”; instead, it recites Texas Rule of Evidence 503, *i.e.*, a communication is privileged if it is “‘made for the purpose of facilitating the rendition of professional legal services to the client… .’” 922 S.W.2d at 923. Moreover, the *Primerica* court did not cite *In re Fairway Methanol LLC* or *In re Rescue Concepts, Inc*. In addition, in 2023, a federal court in the Northern District of Texas—quoting *In re Fairway Methanol LLC* and citing *In re Rescue Concepts, Inc.*—held: “Consistent with this law regarding communications between a client and its agents, ‘the language of [Texas Rule of Evidence] 503(b) does not require that the primary purpose of the communication be to facilitate the rendition of legal services; it only requires that the communication be made to facilitate the rendition of legal services.’” *Crider*, 2023 WL 479094, at *10. And, in any event, it is not clear that the “primary purpose” test was actually applied in *Primerica*. Instead, the court held that “three documents reflect communications between an attorney and client for the purpose of providing or obtaining legal advice or services.” 2017 WL 9325505, at *2.

Furthermore, even courts in other states have recently recognized Texas’s position on the “primary purpose” test. *See, e.g.*, *Orchestrate HR, Inc. v. Blue Cross and Blue Shield of Kansas, Inc.*, No. 19-cv-4007-HLT-TJJ, 2020 WL 7626536, at *2 (D. Kan. Dec. 22, 2020) (applying Texas law, stating: “‘Once it is established that a document contains a confidential communication, the privilege extends to the entire document, and not merely the specific portions relating to legal advice, opinions, or mental analysis.’ And [quoting *In re Fairway Methanol LLC*] the Texas Supreme Court has **eschewed** interpreting Rule 503(b) to require ‘that the primary purpose of the communication be to facilitate the rendition of legal services; it only requires that the communication be made to facilitate the rendition of legal services.’”) (emphasis added, other footnotes and citations omitted)); *In re Polaris, Inc.*, 967 N.W.2d 397, 407 (Minn. 2021) (distinguishing Texas law: “*But see In re Fairway Methanol LLC*, … (holding that communications made to facilitate the rendition of legal services are privileged, regardless of the primary purpose of the communication).”).

Practice Pointers

In Texas, if opposing counsel has moved to compel a “dual purpose communication” properly identified on your privilege log as an attorney-client privileged:

- Carefully examine and submit admissible evidence establishing the elements required by Texas Rule of Evidence 503 to support withholding the document.
- Consider various forms of evidence to support the privilege assertion, including: an affidavit or declaration by the client and/or outside counsel (including the individuals included in the communication); the applicable engagement agreement; and any applicable confidentiality agreements (or policies) and/or allied litigant agreements.
- Consider whether submitting the documents at issue for an *in camera* inspection by the court is also useful (and strategically sound), required, or necessary (sometimes, the court itself will request to see the documents at issue *in camera* before ruling)—and whether to highlight or redact what is clearly privileged legal advice, just in case the court decides to “split the baby” in its ruling.

Moreover, if you see the court veering away from the proper legal determination, request a stay of any required production pending a decision pursuant to an immediate appeal/mandamus.

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