

2022 WL 1837734 (U.S.) (Appellate Petition, Motion and Filing)  
Supreme Court of the United States.

In re Grand JURY.

No. 21-1397.

June 1, 2022.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

**Brief of Amicus Curiae California Lawyers Association in Support of the Petition for Writ of Certiorari**

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**\*I CORPORATE DISCLOSURE STATEMENT**

Under Supreme Court Rule 29.6, Amicus Curiae, the California Lawyers Association certifies that it is a nonprofit organization with no corporate parents or stockholders.

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**\*1 BRIEF OF THE CALIFORNIA LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI**

The California Lawyers Association (“CLA”) respectfully submits this brief as amicus curiae in support of Petitioner, a law firm.<sup>1</sup>

### **INTEREST OF *AMICUS CURIAE***

The CLA is a nonprofit professional association operating under [Section 501\(c\)\(6\) of the Internal Revenue Code](#). The CLA has approximately 72,000 members; it is one of the largest statewide voluntary bar associations in the United States. CLA's members include lawyers in private practice, in-house counsel, government lawyers, judges and other judicial officers, law professors and other academic professionals, and others affiliated with the legal profession who are not lawyers, although almost all of CLA's members are lawyers.

CLA's mission is promoting excellence, diversity, and inclusion in the legal profession and fairness in the administration of justice and the rule of law. CLA is engaged in a broad range of activities, including advocating on behalf of the legal profession before the legislative, executive, and judicial branches; providing continuing legal education and other training for <sup>\*2</sup> lawyers; and partnering with lawyers, judges, affinity bar associations, local bar associations, and members of the community to promote diversity, equity, inclusion, and access to justice. CLA has the below eighteen sections that focus on specific areas of subject matter expertise.

- \* Antitrust and Unfair Competition Law
- \* Business Law
- \* Criminal Law
- \* Environmental Law
- \* Family Law
- \* Intellectual Property Law
- \* International Law and Immigration
- \* Labor and Employment Law
- \* Law Practice Management and Technology
- \* Litigation
- \* New Lawyers
- \* Public Law
- \* Privacy Law
- \* Real Property Law
- \* Solo and Small Firm
- \* Taxation

\* Trusts and Estates

\* Workers' Compensation

The CLA has several CLA-wide committees that deal with issues relevant to multiple practice areas and the legal profession as a whole, such as the Ethics Committee, which addresses opinions and rules impacting attorney-ethics and professionalism, often relating to confidential client information and the attorney-client privilege.

**\*3** This amicus brief is submitted by the CLA but does not necessarily reflect the views of all members of the CLA, including those who are government employees.

As California's state Supreme Court aptly observed, "The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for [over] 400 years." *Mitchell v. Superior Ct.*, 37 Cal.3d 591, 599 (1984). "While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions." *Id.* at 600, fn. omitted.

The Ninth Circuit's opinion not only narrows this privilege, it conflicts with opinions filed by both the D.C. Circuit and the Seventh Circuit. The CLA urges this Court to grant certiorari to protect this sacrosanct tenant of the legal profession and resolve the conflict in the circuit courts. The CLA has an interest in ensuring there are uniform and clear rules regarding whether a communication is privileged, especially when those rules substantially affect a broad spectrum of attorneys in many practice disciplines.

#### **\*4 SUMMARY OF THE ARGUMENT**

There is a three-way split in circuit courts regarding when a dual-purpose communication, a communication between a lawyer and client that has both legal and nonlegal purposes, is covered by the attorney-client privilege. This split has caused great confusion among clients and lawyers as to whether their communications are privileged. In *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022), the United States Court of Appeals for the Ninth Circuit articulated a test to determine if the attorney-client privilege applies to dual-purpose communications that requires the court to evaluate and balance all of the purposes for the communication. The Ninth Circuit determined that a communication that has a purpose in addition to providing legal advice is privileged only when the *most significant purpose* is legal; if the legal purpose is not the most significant purpose, the communication is not privileged. *See id.* at 1091-92 (emphasis added).

The Seventh and D.C. Circuits have articulated disparate and irreconcilable tests from that of the Ninth Circuit, resulting in a split among circuits that causes confusion and will hinder the open and candid discourse between attorneys and their clients. In the D.C. Circuit, a dual-purpose communication is privileged if it has a *significant legal purpose*. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (emphasis added). In the Seventh Circuit, a dual-purpose communication is *never* privileged. **\*5** *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) (emphasis added). This Court should grant the Petition for a Writ of Certiorari to reconcile the conflict.

The test that provides the most clarity and protection to the attorney-client privilege is the D.C. Circuit's "primary purpose" test, as set forth in *Kellogg*, holding that the privilege applies if "obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." *Kellogg*, 756 F.3d at 760.

This issue has widespread significance, affecting attorneys in nearly every conceivable area of practice. Thus, while the issue in this case is presented in the context of a tax attorney providing advice to a client, the same privilege issue confronts attorneys advising clients regarding countless other areas of law. For example, insurance, health, environmental, real property,

entertainment, and intellectual property, to name just a few, are legal specialties where the advice given often has both legal and nonlegal purposes. The issue must be resolved by this Court.

## \*6 ARGUMENT

### **I. This Court Should Grant Certiorari to Resolve the Split Among Circuits and Provide Clear Guidance for Attorneys and Clients Concerning the Application of the Attorney-Client Privilege to Dual-Purpose Communications.**

The attorney-client privilege protects confidential communications between attorneys and clients that are made for the purpose of providing legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Nonlegal advice, often referred to as business advice, is not afforded such protection. However, attorneys often have multiple roles when advising a client: that of lawyer, counselor, therapist, business advisor, financial advisor, and confidant. It is in these situations when the attorney is fulfilling more than one role where the lines between what constitutes legal advice and nonlegal advice, termed dual-purpose communications, may become blurred.

A core evidentiary protection afforded to clients, the attorney-client privilege needs to be clearly defined in a manner “to encourage full and frank communication between attorneys and their clients.” *Id.* It is essential that attorneys know the boundaries of the privilege to ensure confidential communications retain that status. Clients likewise need to know when they can communicate freely and candidly with their counsel to ensure they are receiving competent and informed legal advice. This Court has recognized that “[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney \*7 following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.” *Fisher v. United States*, 425 U.S. 391, 403 (1976). The Seventh, Ninth, and D.C. Circuits have divergent and irreconcilable tests for determining when the attorney-client privilege applies to dual-purpose communications, and many other circuits have yet to define that landscape.

In *In re Grand Jury*, the Ninth Circuit opined that in order to determine whether the attorney-client privilege applies to dual-purpose communications, courts must examine both the legal and nonlegal purpose of the communication and determine which one is more predominate. 23 F.4th at 1091-93. If the nonlegal purpose is found to outweigh the legal purpose, then the communication is not privileged and is subject to disclosure. *Id.* at 1091.

The D.C. Circuit's test, on the other hand, requires courts to evaluate the legal purpose behind a communication and determine whether it is significant. Under this test, there is no balancing as required by the Ninth Circuit. As first held in *Kellogg*, if the court finds the legal purpose to have been a significant factor motivating the communication, it is privileged. 756 F.3d at 760. Under the D.C. Circuit's test, the court need not compare the significance of any contemporaneous nonlegal communications. *Id.* at 759-60. Thus, the D.C. Circuit applies the privilege to communications that the Ninth Circuit would not protect.

\*8 The Seventh Circuit has articulated a test that diverges from both the Ninth and D.C. Circuits. The court in *Frederick* held that the privilege does *not* apply to communications that serve both legal and nonlegal purposes. 182 F.3d at 501 (emphasis added). There is no requirement to determine significance, and the mere fact that the document contains nonlegal information renders the privilege inapplicable. *Id.* While *Frederick* concerned a document created to prepare an income tax return and for use in litigation, the ultimate application of the holding could apply to non-tax dual-purpose communications. *See id.*

While tax attorneys undoubtedly have a clear interest in the applicable test to determine the protections afforded dual-purpose attorney-client communications, the impact of the disparate holdings in the circuit courts has universal application to all practices of law. For example, business law attorneys who advise clients on legal strategies in mergers and acquisitions, environmental law attorneys who advise clients on best practices under a myriad of federal and state environmental laws, bankruptcy attorneys who advise clients on corporate restructuring under Chapter 11, and general practitioners who assist clients in establishing a small business are all providing what could be deemed both legal and nonlegal advice to clients. In today's varied legal world,

no practice specialty is immune to the inconsistent application of the privilege to dual-purpose communications that currently exists.

Equally concerning is the fact that legal practices are becoming more national as technology and <sup>\*9</sup> innovation progress. Attorneys and clients with interests in multiple circuits will be presented with either conflicting privilege standards regarding attorney-client communications or a lack of settled authority. One test that applies to all dual-purpose communications is necessary to ensure uniformity and protection of the sanctity of the attorney-client privilege. For these reasons, this Court should grant the Petition for a Writ of Certiorari in *In re Grand Jury*.

## II. *Amicus Curiae* Supports Adoption of the *Kellogg* Test and the “A Primary Purpose” Standard.

The facts in *In re Grand Jury* concern the application of the attorney-client privilege to communications between tax attorneys and their clients. 23 F.4th at 1090. Tax attorneys routinely advise clients about the likely tax consequences of proposed actions and how to structure transactions to achieve both compliant and favorable tax consequences. This is *legal* advice and should be privileged. See 1 Paul R. Rice, Attorney-Client Privilege in the U.S., §§ 7:11, 7:25 (2020). The Ninth and Seventh Circuit tests jeopardize this protection.

As discussed above, the scope of the attorney-client privilege when applied to dual-purpose communications is not confined to tax attorneys. To the contrary, it applies broadly to attorneys in all legal practice areas. An attorney's advice can touch on a multitude of issues and the advice may serve multiple purposes. Attorneys from all practice areas are presented with transactions and disputes that require <sup>\*10</sup> both legal and nonlegal advice and there needs to be one uniform test to determine the scope of the privilege. In *Kellogg*, then-D.C. Circuit Judge Kavanaugh provided an available framework for addressing complex and dynamic advice provided by an attorney to a client. 756 F.3d 754. That test, which “boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication,” best fits with the evolving landscape of the legal profession and promotes the open discourse the attorney-client privilege was designed to protect. *Id.* at 760; accord *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267-68 (D.C. Cir. 2018).

The balancing of significance under the Ninth Circuit test creates uncertainty that will quell the open discourse between client and attorney. Clients need assurances that their communications with their attorneys are not subject to later disclosure. Absent that protection, important details about a matter may often be withheld, thereby impeding or even denying attorneys' ability to properly advise, represent, and advocate for their clients.

Similarly, attorneys need clear guidance on what is protected before communicating with a client. The Ninth Circuit's *ex post facto* analysis is unacceptable and frustrates attorneys' ability to freely counsel their clients. An attorney may ultimately be forced to decline representation on matters with both legal and nonlegal aspects due to the risk of having certain communications disclosed.

<sup>\*11</sup> The Seventh Circuit's test, while conclusive, is anathema to the purpose underlying the attorney-client privilege, which is one of the longest standing and most widely recognized privileges of American law. *Mitchell*, 37 Cal.3d at 599. The Seventh Circuit's test ultimately requires an attorney to separate out each communication into what may be considered legal and nonlegal advice. In many instances, this would be impossible, not to mention burdensome and impractical. Attorneys need to be able to freely communicate with their clients without the additional burden of parsing out each legal and nonlegal element.

This Court should expressly adopt the *Kellogg* standard as the appropriate test to apply to dual-purpose communications to ensure that the legal advice attorneys routinely provide to their clients remains privileged. By focusing on “a primary purpose,” the Court will continue to safeguard full and frank communications between attorney and client and ensure there is a legitimate legal purpose behind the communication.

**\*12 CONCLUSION**

The split in circuits on when the attorney-client privilege applies to dual-purpose communications, a significant issue impacting the practice of law in all specialties, warrants the Court grant the Petition for Writ of Certiorari. Uniformity in the application of the attorney-client privilege to dual-purpose communications is imperative. The Court should adopt Justice Kavanaugh's *Kellogg* test, which strikes the appropriate balance for dual-purpose communications.

Respectfully submitted,

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**Footnotes**

- <sup>1</sup> Notice pursuant to Sup. Ct. R. 37.2(a) was given to all parties, all parties consented to the CLA filing this amicus brief, no party or counsel for a party helped to draft this brief, and this brief was funded solely by the CLA. Sup. Ct. R. 37.6.