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# **CLAIMING PRIVILEGE & IMMUNITY CONSIDERATIONS FOR IN-HOUSE COUNSEL**



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# ATTORNEY-CLIENT PRIVILEGE

# Attorney-Client Privilege



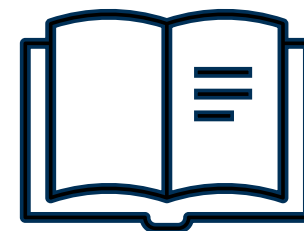
The **attorney-client privilege** protects from disclosure to third-parties:

- Confidential communications;
- Between an attorney and client; and
- Made for the purpose of obtaining or providing legal advice.

# Attorney-Client Privilege

## TEXAS RULE OF EVIDENCE 503

Codifies the “lawyer-client privilege”



## FEDERAL RULE OF EVIDENCE 501

In a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

# Attorney-Client Privilege

## TEXAS RULE OF EVIDENCE: WHO'S THE “LAWYER”?



**Rule 503(a)(3):** A “lawyer” is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation.

# Attorney-Client Privilege

When  
does it  
apply?  
Between...

client/client's representative & client's lawyer/lawyer's representative

client's lawyer & the lawyer's representative

client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action

client's representatives or between the client/client's representative

among lawyers/representatives & same client.

# Protected Communications: Attorney

In-house counsel and outside counsel, only when the lawyer is acting in his/her capacity as a lawyer, not in a business role.



**PRACTICE POINTER:** Just because a lawyer is present or copied on a communication does not mean the privilege automatically attaches.



# Protected Communications: Client

## Often fact-intensive determination:

- The company or a subset
- Some agents of the company and counsel
  - Job responsibilities require consultation with in-house or outside counsel on certain issues
  - Facilitate the transmission and technical interpretation of confidential information

# Protected Communications: Client

## Often fact-intensive determination:

- Employees at the company who are considered “need to know”; and
- Parties with whom client has a joint defense or common interest agreement.

# Protected Communications: Types

**Four types of communications generally entitled to protection:**

1. Client requests for legal advice;
  - The advice does not need to relate to litigation.
  - Business advice never qualifies as legal advice.
  - But what is business advice?

# Protected Communications: Types

## Four types of communications entitled to protection:

2. Client's disclosure of facts to their attorneys to enable attorneys to provide legal advice;
3. Requests by client's counsel for information it needs to formulate legal advice; and
4. Legal advice provided by client's counsel.

# Unprotected Communications: Types

The privilege protects the communication, *not* the underlying facts.

- Historical documents.
- Most uncommunicated corporate documents.
- Most uncommunicated lawyer documents.
- Lawyer-to-client communications not disclosing or based on client confidences.
- Communications motivated by *business rather than legal* concerns.

# Unprotected Communications

Not everyone associated with a company is a "client" for the purpose of privilege.



**PRACTICE POINTER:** Third-parties may have a substantial relationship with the company, but still are not protected. There must be a “client.”

# **ATTORNEY-CLIENT PRIVILEGE: DUAL-PURPOSE COMMUNICATIONS**

# Attorney-Client Privilege: Dual-Purpose Communications



## DUAL-PURPOSE COMMUNICATIONS

when a communication between an attorney and a client involves legal and non-legal (e.g., tax, business, other) advice



**PRACTICE POINTER:** Understand the “purpose” of the communication



# Attorney-Client Privilege: Dual-Purpose Communications

CIRCUIT	TEST APPLICABLE TO ASSERTION OF PRIVILEGE
<b>Second</b>	whether <b>the “predominant purpose</b> of the communication is to render or solicit legal advice”
<b>Fifth</b>	whether the communication was “for <b>the primary purpose</b> of securing either a legal opinion or legal services, or assistance in some legal proceeding.”
<b>Sixth</b>	whether <b>the “predominant purpose</b> of the communication is to render or solicit legal advice”
<b>Seventh</b>	<b>No privilege for mixed communications</b> (e.g., tax and legal advice)
<b>Ninth</b>	Applies only where <b>the “primary purpose”</b> of the communication is for counsel to give or receive legal rather than business or tax advice; <b>rejected “because of” test</b>
<b>D.C.</b>	“was obtaining or providing legal advice <b>a primary purpose</b> of the communication, meaning <b>one of the significant purposes</b> of the communication?”

# Attorney-Client Privilege: Dual-Purpose Communications

## Will the U.S. Supreme Court Provide Clarity?

Public Copy – Sealed Materials Redacted  
No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**

IN RE GRAND JURY

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

PETITION FOR A WRIT OF CERTIORARI

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# Attorney-Client Privilege: Dual-Purpose Communications

## Will the U.S. Supreme Court Provide Clarity?

### *In re Grand Jury*, U.S. Sup. Ct. No. 21-1397

- Appeal from Ninth Circuit, petitioner (whose identity is redacted) is a law firm *asking the justices to clarify the scope of attorney-client privilege when a communication with a client involves legal and non-legal advice*

# Attorney-Client Privilege: Dual-Purpose Communications

*In re Grand Jury*, U.S. Sup. Ct. No. 21-1397

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## **QUESTION PRESENTED**

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.

# Attorney-Client Privilege: Dual-Purpose Communications

## *In re Grand Jury*, U.S. Sup. Ct. No. 21-1397

Petitioner asserts a **three-way split** exists within the federal circuits

### REASONS FOR GRANTING THE PETITION

#### A. The Circuits Are Split Regarding The Question Presented.

There is now a three-way split among the circuits as to how to assess dual-purpose communications.

Although the Ninth Circuit purported to avoid deciding whether the D.C. Circuit's test for attorney-client privilege is correct, the law of the two circuits is irreconcilable. The D.C. Circuit directs courts to look to the legal purpose behind a communication and evaluate whether it is significant. It does not matter whether there is also a significant—or more significant—non-legal purpose. The Ninth Circuit, on the other hand, directs courts to compare the legal purpose to the non-legal purpose (or purposes) of a communication and assess which is more significant. If the legal purpose is more significant, then the communication is privileged; if the non-legal purpose is more significant, then it is not.

The Ninth Circuit purportedly declined to decide whether to adopt the D.C. Circuit approach, but the only question it left open was how to evaluate a communication with equally significant legal and non-legal purposes. But the D.C. Circuit does not apply a balancing test; in that circuit, courts look only at whether the legal purpose for a dual-purpose communication was significant. In short, the Ninth Circuit could avoid “reach[ing] the *Kellogg* question” only by misconstruing the D.C. Circuit's test. Pet. App. 11a.

The Seventh Circuit has taken yet another approach, at least in the context of tax law, concluding

# Attorney-Client Privilege: Dual-Purpose Communications

August 1, 2022:  
Respondent's Brief filed.

The United States disagrees.

## ARGUMENT

Petitioner renews its contention (Pet. 9-30) that the district court erred in finding that certain documents were subject to disclosure in whole or in part because they were not entirely privileged. The courts below correctly rejected the assertion of attorney-client privilege, and the court of appeals' decision does not implicate any conflict among the courts of appeals. The petition for a writ of certiorari should be denied.

No. 21-1397

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In the Supreme Court of the United States

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IN RE GRAND JURY

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# **ATTORNEY-IMMUNITY/LITIGATION PRIVILEGE**

# Attorney Immunity/Litigation Privilege

## The Judicial-Proceedings Privilege



Acts as an absolute privilege that covers “any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case.”



# Attorney Immunity/Litigation Privilege

## Attorney-Immunity Privilege

- Not merely the lawyer's version of the judicial-proceedings privilege, although there is considerable overlap
- Acts as a “comprehensive affirmative defense protecting attorneys from liability to non-clients”
- Generally applies when attorneys act in the uniquely lawyerly capacity of one who possesses “the office, professional training, skill, and authority of an attorney”

# Attorney-Immunity/Litigation Privilege— Statements to the Press or Social Media



# Attorney-Immunity/Litigation Privilege— Statements to the Press or Social Media

**IN THE SUPREME COURT OF TEXAS**

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No. 19-0036

=====

LANDRY’S, INC. AND HOUSTON AQUARIUM, INC., PETITIONERS,

V.

ANIMAL LEGAL DEFENSE FUND, CHERYL CONLEY,  
AND CARNEY ANNE NASSER, RESPONDENTS

=====

ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

=====

Argued February 2, 2021

JUSTICE BLACKLOCK delivered the opinion of the Court.  
JUSTICE GUZMAN, JUSTICE BUSBY, and JUSTICE HUDDLE did not participate in the decision.

# Attorney-Immunity/Litigation Privilege– Statements to the Press or Social Media

## *Landry's v. Animal League Defense Fund* (Tex. Sup. Ct. 2021)

Texas Supreme Court decision limited the protections for Texas attorneys and the attorney immunity privilege for statements made to the public or in the press by attorneys

- Held that press statements “are in no way part of a judicial proceeding or preparatory to one in any formal sense”
- Attorney immunity will not protect a lawyer when his or her “acts are entirely foreign to the duties of an attorney”

# ATTORNEY-IMMUNITY IN BUSINESS TRANSACTIONS

# Attorney-Immunity/Transactions

## *Haynes and Boone and Arthur Howard v. NFTD, et al., 631 S.W.3d 65 (Tex. 2021)*

- **ARGUMENT:** Transactional lawyers engaged in business for their clients should enjoy the same immunity from civil lawsuits as litigators
- **OPINION:** Lawyers are protected by attorney immunity from liability to third-parties for actions they take while representing their clients
  - The doctrine now applies *“in all adversarial contexts in which an attorney has duty to zealously and loyally represent a client, including a business—transactional context”* when the claim is based on the attorney’s legal representation of a client, the court said

# Attorney-Immunity Limitations

- Attorney immunity extends even “to an attorney's knowing participation in fraudulent activities on his client's behalf,” but “participation in ‘independently fraudulent activities’ is considered ‘foreign to the duties of an attorney’ and is not shielded from liability.”
- ***Landry's***: immunity applies only when the attorney's actions involve “the uniquely lawyerly capacity of one who possesses ‘the office, professional training, skill, and authority of an attorney.’”

# WORK PRODUCT DOCTRINE



# Work Product Doctrine

In Texas, “**work product**” is:

- material prepared or mental impressions developed in **anticipation of litigation** or **for trial** by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- a communication made **in anticipation of litigation** or **for trial** between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

# Work Product Doctrine

## What's protected? Core work product: attorney mental processes

- Attorney's or the attorney's representative's
  - mental impressions
  - opinions
  - conclusions or
  - legal theories

# Work Product Doctrine

## What's protected? “Other” work product:

- *Discoverable only upon a showing* that the party seeking discovery has **substantial need** of the materials in the preparation of the party's case and that the **party is unable without undue hardship** to obtain the substantial equivalent of the material by other means.

# Work Product Doctrine: Limits

What's not  
"work product"?

information discoverable  
under Rule 192.3  
concerning

experts

trial witnesses

witness statements and

contentions

trial exhibits ordered disclosed under Rule 166 or  
Rule 190.4

The following is  
discoverable:

the name, address, and telephone number of  
any potential party or any person with  
knowledge of relevant facts

any photograph or electronic image of underlying facts (a  
photograph of the accident scene) or a photograph or  
electronic image of any sort that a party intends to offer into  
evidence

any work product created under exception to the  
attorney-client privilege in Rule 503(d) of the Rules of  
Evidence.

# Attorney-Client Privilege v. Work Product Doctrine

Attorney-Client Privilege	Work Product Doctrine
Old	New
Broad application/ narrow creation	Narrow application/ broad creation
Absolute	Not absolute
Fragile	Not fragile
Communications (which can include documents)	Documents and communications
Protected under joint defense and common interest privilege	Protected under joint defense and common interest privilege
Motivated by legal rather than business concerns	Motivated by litigation or anticipated litigation

# **KEEPING A CLAIM OF PRIVILEGE: PRACTICAL CONSIDERATIONS**

# Waiver

The loss of protection from a document or communication that would otherwise be protected.

May apply to either a particular document or communication or to all documents and communication on a specific topic.

# Waiver: Types

**EXPRESS** – voluntary disclosure

- Intentional vs. Inadvertent

**IMPLIED** – provides a portion to support claims/defenses, gain an advantage

**SELECTIVE** – preserved except where compelled (e.g., gov't investigation)

- Not adopted by Texas federal or state courts



# Maintaining Privilege

- Segregate privileged communications
- Label privileged document
- Indicate legal advice is being sought
- Be aware of recipients
- Be purposeful with emails

# Maintaining Privilege

## Be purposeful with emails:

- Avoid humor – easily misconstrued
- Double-check if using auto-fill or “reply to all” features. Confirm email recipient lists
- Avoid stamps or headers claiming privilege when it is not
- Avoid copying lawyers on communications if only to potentially claim privilege
- Picture how an email will look if used as an exhibit

# Best Practices

## Help Your Employees Avoid THE DON'TS:

- Don't discuss legal issues in public
- Don't CC: or BCC: third-parties on otherwise privileged emails or other communications
- Don't forward email to third-parties
- Don't relate the information contained in a privileged email or show the email to third-parties
- If an employee does not need to know about the legal communication, do not copy them
- Don't include outsiders in otherwise privileged meetings

# Questions?



## Thank You