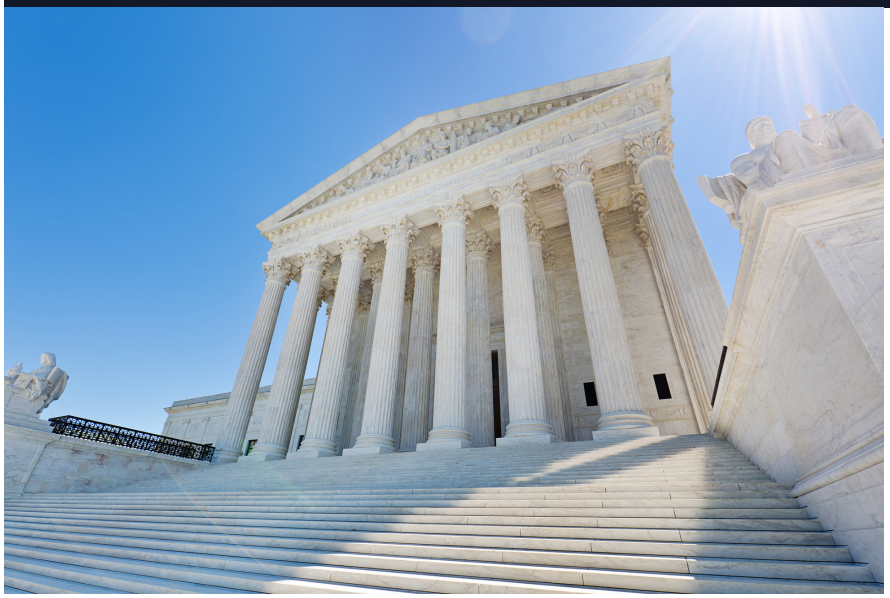
BARNES & THORNBURG LLP



ALERTS

Considerations For In-House Counsel In Wake Of U.S. Supreme Court's Refusal To Address Privileged Treatment Of Dual-Purpose Communications

January 26, 2023

Highlights

The Supreme Court has abandoned its review of a tax law firm's privilege case meant to address how the attorney-client privilege applies to dual-purpose communications

This decision means the applicable standard will continue to vary by jurisdiction and remain fact-dependent

The Court's refusal to intervene potentially has critical implications for how in-house and outside counsel communicate with their clients and any non-attorney advisors or consultants

Earlier this month, the U.S. Supreme Court heard arguments in a case involving a law firm specializing in international tax issues, including the practice of advising clients on the tax consequences of expatriation, raising the alarm regarding whether it would issue an opinion impacting how the attorney-client privilege should apply to "dual-purpose communications" or communications between attorneys and clients that discuss both legal and non-legal business advice. On Jan. 23, the Court threw out the case with a one line per curiam opinion, noting: "The writ of

RELATED PEOPLE

John E. Kelly
Partner, Healthcare Department and Healthcare Industry Practice Chair
Washington, D.C., New York

P 202-831-6731
F 202-289-1330
JKelly@btlaw.com

Jacquelyn Papish
Partner
Washington, D.C.

P 202-831-6732
F 202-289-1330
Jackie.Papish@btlaw.com

Scott Hulsey
Partner
Washington, D.C., Atlanta

P 202-831-6736
F 202-289-1330
Scott.Hulsey@btlaw.com

Erin C. Steele
Associate
Washington, D.C.

P 202-408-6932
F 202-289-1330
ESteele@btlaw.com

certiorari is dismissed as improvidently granted."

Primary Purpose or Not in Determining Application of Privilege

The case stemmed from a federal district court's application of the attorney-client privilege to documents prepared by a tax law firm and one of its in-house accountants on behalf of a client implicated in a criminal investigation. At issue was whether courts should consider the "primary purpose" of dual-purpose communications in determining whether the privilege applies or instead whether it was sufficient that legal advice was at least one of the purposes of the communication, even if not primary, in deciding the privilege's applicability. The law firm refused to produce the documents pursuant to the court's order and was held in civil contempt. In affirming the district court, the Ninth Circuit noted that a communication can often have more than one purpose and agreed with the majority of jurisdictions that where that is the case, the court should look at the "primary purpose" of the communication to determine whether the attorney-client privilege applies.

On petition to the Supreme Court, the law firm argued the Court should have applied instead the test articulated in *In re Kellog Brown & Root, Inc.*, a 2014 D.C. Circuit opinion authored by Justice Kavanaugh, in which the court rejected the argument that the primary purpose test should govern on the basis that it can be impossible to find a single primary purpose for a communication motivated by two or more overlapping purposes. The Court articulated a different test, by which the attorney-client privilege should apply if obtaining or providing legal advice was a primary purpose rather than the primary purpose.

Implications for In-House Counsel

By abandoning its review of the case, the Supreme Court has left open the question of when the attorney-client privilege will be applied in cases involving dual-purpose communications. This refusal to intervene potentially has critical implications for how in-house and outside counsel communicate with their clients. Attorneys for corporations, non-profits and other organizations often need to keep business considerations in mind when rendering legal advice to their clients. Clients routinely seek legal advice for both legal and business reasons, often over a wide variety of digital channels, such as Zoom, Slack, Microsoft Teams, email and text message. In addition, clients and attorneys frequently work with non-attorney advisors and consultants to discuss the legal and business implications of various decisions. This is particularly true in heavily regulated industries. All of these factors greatly increase the prevalence of dual-purpose communications between attorneys and their clients.

Considerations for In-House Counsel Going Forward

In the absence of a resolution of this issue by the Supreme Court, companies that are based in or have operations in the U.S., or those whose reach extends across U.S. jurisdictional lines (which includes most companies today), must give consideration to the possibility that the more permissive test will be applied in disputes. That is, companies should assume any future reviewing court will apply the primary purpose test in

RELATED PRACTICE AREAS

Appeals and Critical Motions
Commercial Litigation
Litigation
Trial and Global Disputes
White Collar and Investigations

RELATED INDUSTRIES

Healthcare

resolving privilege disputes, making it more likely that communications will not be protected but instead open to discovery and use at trial. Further, considering how difficult it may be for courts to determine the primary purpose of a communication, companies should brace for the possibility that courts will err on the side of disclosure. So against this backdrop, how might in-house counsel consider responding?

1. **Involve attorneys in critical legal communications.** Companies may contend that communications outside the purview of company counsel nevertheless are protected because they are occurring at the direction of company counsel or somehow are otherwise being conveyed in connection with legal services. For example, communication between a company and investigations vendor, which has been retained at the direction of outside counsel, may cover substantive communications that later could be used against the company.

   While in-house counsel cannot be expected to participate in every communication, they should plan to join calls of sufficient importance, especially those which could create exposure if later discovered and used. Further, when communications occur over email or devices, attorneys should be included in the communications to maximize any future finding of privilege.

2. **Structure communications to protect privilege.** Calls and email communications should be conducted with the requisite formalities to help ensure the application of privilege. For oral communications, attorneys should state at the outset that the purpose of the call is to provide legal advice and that the communications should treated confidentially. Counsel should memorialize these communications contemporaneously in written notes. These same ideas should be included in communications that occur in writing.

3. **Prepare employee guidance and training about handling communications.** Employees should be instructed about the company's expectations about the treatment of discussions relating to legal matters and the consequences of failing to handle them properly. Counsel might consider requiring employees to either involve attorneys, or else consult attorneys where a question of doing so exists, and memorialize the requirements in guidance and training materials.

4. **Restrict communications outside of email, telephone, and audio and video Conferencing.** Companies already should be on high alert about the perils of company communications occurring over applications, like WhatsApp or Signal, used on hand-held devices. The SEC, DOJ and other government regulators have recently exhibited great interest in these types of communications and are cracking down on banks, financial companies, healthcare-related

entities and others that fail properly to preserve company related communications. The privilege issue provides an additional impetus to handle these types of communications with care. The less formal and more quickly communications are prepared and sent, the greater the risk that employees will breach the sort of guardrails discussed above. Companies are at a place where they likely already are considering the risks of such communications and how to handle. Privilege concerns should be added to the mix – if not top of mind.

For more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work or John Kelly at 202-831-6731 or john.kelly@btlaw.com, Jacquelyn Papish at 202-831-6732 or jackie.papish@btlaw.com, Scott Hulsey at 202-831-6736 or scott.hulsey@btlaw.com, or Erin Steele at 202-408-6932 or erin.steele@btlaw.com.