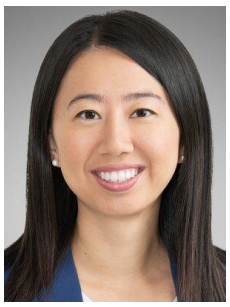
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Navigating Privilege Law Patchwork In Dual-Purpose Comms

By **Sarah Stanfel and Phoebe Yu** (January 20, 2026, 4:39 PM EST)


Sarah Stanfel


Phoebe Yu

Nearly three years after the U.S. Supreme Court declined to resolve a circuit split in In re: Grand Jury, the scope of the attorney-client privilege for dual-purpose legal and business communications remains unsettled across federal courts.

Following the U.S. Court of Appeals for the District of Columbia Circuit's 2014 decision in In re: Kellogg Brown & Root Inc., and the Supreme Court's 2023 decision in In re: Grand Jury to dismiss a certiorari petition from a U.S. Court of Appeals for the Ninth Circuit case as improvidently granted, courts have continued to diverge in their approach. Some have embraced the D.C. Circuit's adoption of the "significant purpose" test, while others continue to apply variations of the "primary purpose" test used by the Ninth Circuit.

More recently, the U.S. Court of Appeals for the Sixth Circuit tackled privilege protections over materials created during the course of internal investigations at FirstEnergy Corp.[1]

In In re: FirstEnergy Corp. Securities Litigation, the U.S. District Court for the Southern District of Ohio, following Sixth Circuit precedent, considered "whether the predominant purpose of the communication [was] to render or solicit legal advice."[2] In affirming the special master's order to compel production of certain investigation materials, the trial court held that the materials were not protected by attorney-client privilege or the work-product doctrine because FirstEnergy conducted the internal investigations for business purposes, rather than for the purpose of rendering legal advice.[3]

The Sixth Circuit disagreed and vacated the production order in October, finding that FirstEnergy and its board clearly sought legal advice in conducting the investigation.[4] In November, it refused to reconsider its order and denied a request for rehearing en banc.

This article walks through a circuit-by-circuit analysis on the state of the law for dual-purpose communications across all federal circuits. We highlight recent district court decisions that shed light on how appellate courts may think about this issue.

This evolving landscape has implications not only for internal investigations, but also for regulatory compliance and litigation strategy, as practitioners grapple with privilege issues in complex, multijurisdictional matters.

Courts' Approaches to Dual-Purpose Communications

Communications often serve more than one function — legal advice is frequently intertwined with business strategy, regulatory compliance or public relations advice. These dual-purpose or multipurpose communications raise a critical question: When is a communication protected by the attorney-client privilege?

When dealing with communications that serve both legal and nonlegal purposes, courts have analyzed whether the attorney-client privilege applies under two key frameworks: the primary-purpose test and the significant-purpose test.

Under the primary-purpose test, for privilege to apply, courts require that the main or predominant purpose of the communication is providing or receiving legal advice.[5] In contrast, the significant-purpose test asks whether a significant purpose of the communication is legal — thus, a communication can be privileged even if it has dual legal and nonlegal purposes.[6]

Supreme Court Wades In, Backs Out

In 2022, the Supreme Court had an opportunity to weigh in on the privilege status of dual-purpose communications after it **granted** a cert petition, teeing up the debate in In re: Grand Jury.[7] The petition came after the Ninth Circuit embraced the primary-purpose test for attorney-client privilege claims involving dual-purpose communications.[8]

The case arose after a company and its law firm — both of which were unnamed in court proceedings — refused on privilege grounds to produce documents and communications in response to a grand jury subpoena.

The Ninth Circuit agreed with the U.S. District Court for the Central District of California, which concluded that the communications at issue were not privileged because their primary purpose was tax advice rather than legal advice.[9]

The Ninth Circuit held that the "'primary purpose' test applies to dual-purpose communications."[10] The court stated that the "natural implication of this [primary purpose] inquiry is that a dual-purpose communication can only have a single 'primary' purpose."[11]

The Ninth Circuit then analyzed the issues using the primary-purpose test, but specifically left open whether to adopt the significant purpose test — i.e., "a primary purpose test" — or "the primary purpose" test because the outcome would have been the same under either test.[12]

In doing so, the Ninth Circuit's approach differed from the D.C. Circuit's significant-purpose approach in In re: Kellogg Brown & Root.[13]

In Kellogg, a 2014 case involving employee communications made during KBR's internal investigation into allegations of fraud, the D.C. Circuit recognized the difficulty of "trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example)," noting it "can be an inherently impossible task."[14]

The D.C. Circuit instead articulated the test as: "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?"[15]

While the Supreme Court had the opportunity to clarify whether the more flexible significant-purpose test from the D.C. Circuit should apply nationwide, the court, after hearing oral arguments in January 2023, dismissed the case as improvidently granted and declined to issue a ruling on the merits. The court did not provide a written explanation for the dismissal.

As a result, the circuit split remains unresolved, and courts continue to apply differing privilege standards for purposes of dual-purpose communications, leaving practitioners to navigate a fragmented legal landscape with no uniform rule.

The Current Landscape

Though the only circuit court to explicitly embrace the significant-purpose test has been the D.C. Circuit,[16] some district courts within the First, Second, Third, Fourth and Eleventh Circuits have signaled at least some willingness to embrace Kellogg's reasoning.[17]

For example, in 2024, the U.S. District Court for the District of Massachusetts in In re: TelexFree Securities Litigation addressed a privilege dispute over materials and communications arising out of an internal investigation.

As part of its analysis that found certain investigation-related communications to be privileged, the court used language encompassing both the primary-purpose and significant-purpose tests, quoting precedent:

[A]s long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely because it also dealt with matters that might more fairly be characterized as business matters. ... "In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply."[18]

This is one data point signaling a potential growing trend in which district courts are building more flexibility into their analysis of dual-purpose communications, perhaps implicitly acknowledging the "impossible task" of identifying the single purpose of a communication, as recognized by Kellogg.

The U.S. District Courts for the Eastern District of Pennsylvania, District of Maryland and Middle District of Florida have similarly signaled adoption of the significant-purpose test, absent binding circuit precedent in their respective circuits.[19]

In 2023, for instance, the U.S. District Court for the Middle District of Florida in U.S. v. Lee Memorial Health System and Cape Memorial Hospital Inc. characterized the Kellogg approach as "a more practical test," stating that it "[found] the reasoning in Kellogg persuasive."[20]

That case involved a hospital's internal audit report related to an internal investigation concerning compliance with federal regulations regarding its physicians' compensation. The Middle District of Florida held that communications made as a part of an investigation in which "legal compliance was at least one significant purpose" were protected by the attorney-client privilege.[21]

However, not all courts have embraced Kellogg. The U.S. Courts of Appeals for the Fifth, Sixth and Ninth Circuits have adhered to the traditional framework, and continue to apply the primary-purpose or "predominant purpose" analysis.[22] In analyzing dual-purpose communications, these courts ask whether "the primary purpose [was to] secur[e] either a legal opinion or legal services, or assistance in

some legal proceeding," as articulated by the Fifth Circuit in its 2017 decision in Equal Employment Opportunity Commission v. BDO USA LLP.[23]

Notably, in applying this test, the Ninth Circuit stated in Greer v. County of San Diego last year that under the "current formulation of the test, 'a dual-purpose communication can only have'" one primary purpose.[24]

While neither the U.S. Court of Appeals for the Eighth Circuit nor the U.S. Court of Appeals for the Tenth Circuit has any binding appellate precedent, district courts within these circuits have generally followed some formulation of the primary-purpose test.[25]

For example, the U.S. District Court for the Northern District of Oklahoma explained in its 2010 decision in Lindley v. Life Investors Insurance Co. of America that where "the legal and business purposes of the communication are inextricably intertwined, the entire communication is privileged only if the legal purpose outweighs the business purpose."[26]

The U.S. Court of Appeals for the Seventh Circuit stands as a partial outlier. In U.S. v. Frederick,[27] the Seventh Circuit held in 1999 that a dual-purpose document created for use in preparing tax returns and in litigation was not privileged, emphasizing the difficulty of separating legal from nonlegal advice.[28]

Notably, this holding was confined to the tax context, and the U.S. District Court for the Northern District of Illinois has signaled openness to Kellogg's reasoning in nontax contexts, suggesting the potential for broader application.[29]

It is important to recognize, however, that the line between tax advice and legal advice is often blurred. Not all tax advice is mere accountancy, and tax guidance can carry the same legal implications as other forms of counsel. Thus, privilege protections may apply.[30]

For example, tax law advice provided by tax lawyers can be covered by the privilege.[31] Similarly, Section 7525 of the Internal Revenue Code extends a privilege akin to the attorney-client privilege to certain tax advice communications with federally authorized tax practitioners.[32] It does not cure the problem of dual-purpose communications, though — where the primary purpose of a communication is return preparation or accounting, the privilege does not apply.[33]

Further, as the U.S. Court of Appeals for the Second Circuit held in its 1961 decision in U.S. v. Kovel,[34] a client's communications with an accountant hired by an attorney may be protected by the attorney-client privilege where the communications are in the furtherance of the provision of legal services by the attorney.[35]

In these circumstances, courts will scrutinize whether (1) the consultant was engaged by counsel for the purpose of facilitating legal advice, (2) the scope of the engagement is appropriately limited, and (3) the distribution of materials remains consistent with that scope. Otherwise, the privilege can be lost.[36]

Conclusion

When is a communication protected by the attorney-client privilege? For now, the answer is largely: "It depends." The existing patchwork of federal common-law jurisprudence on dual-purpose communications will continue to be the reality for the foreseeable future — at least until a more appropriate case can serve as the vehicle for the Supreme Court to resolve the circuit split.

The resulting uncertainty has significant implications, as courts' differing approaches can determine whether sensitive internal documents are shielded or exposed in litigation and regulatory proceedings. For example, could the courts' different approaches to privilege influence litigation strategy, and potentially motivate parties to engage in forum shopping to seek jurisdictions that offer stronger protections for sensitive internal documents? Only time will tell.

For legal teams conducting internal investigations or managing regulatory and litigation risks across multiple jurisdictions, understanding the privilege framework in each jurisdiction is essential for managing risk. Practitioners are well advised to closely monitor trial court developments in the circuits that have yet to speak on this issue as privilege challenges continue to bubble up.

Communications involving both legal and business advice should be carefully structured to maximize protection, tailored to the standard in each jurisdiction. Practitioners might consider ensuring that communications combining legal and business advice clearly emphasize that their primary purpose is to obtain or provide legal guidance.

Further, when possible, it may be helpful to separate legal content from business discussions, restrict circulation to individuals with a legitimate need for the legal information and apply confidentiality labels.

Sarah Stanfel is an associate and Phoebe Yu is a partner at Covington & Burling LLP.

[1] In re FirstEnergy Corp., 154 F.4th 431 (6th Cir. 2025).

[2] In re FirstEnergy Corp. Sec. Litig., No. 2:20-CV-03785-ALM-KAJ, 2024 WL 1984802, at *10 (S.D. Ohio May 6, 2024).

[3] Id. at *11-12.

[4] FirstEnergy, 154 F.4th at 437-38.

[5] See, e.g., In re Grand Jury, 23 F.4th 1088, 1092 (9th Cir. 2021).

[6] In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014).

[7] In re Grand Jury, No. 21-1397, petition for cert. filed (U.S. Apr. 11, 2022), cert. dismissed as improvidently granted, 598 U.S. ___ (2023).

[8] 23 F.4th 1088 at 1092.

[9] Id. at 1090. However, as discussed below, there are instances in which tax advice can indeed also constitute legal advice (e.g., when lawyers provide advice regarding the application of tax law).

[10] Id. at 1094.

[11] Id. at 1091.

[12] Id. at 1094-95.

[13] 756 F.3d at 754.

[14] Id. at 759.

[15] Id. at 760.

[16] 756 F.3d at 754.

[17] United States ex rel. Wollman v. Mass. Gen. Hosp., Inc., 475 F. Supp. 3d 45, 63–64 (D. Mass. 2020); See also In re TelexFree Sec. Litig., No. 4:14-MD-2566-NMG, 2024 WL 4843750, at *4 (D. Mass. Nov. 20, 2024); Aetna Inc. v. Mednax, Inc., No. 18-CV-02217-WB, 2019 WL 6467349, at *1 (E.D. Pa. Dec. 2, 2019); In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig., No. 1:17-MD-2775, 2019 WL 2330863, at *2 (D. Md. May 31, 2019); see also Singleton v. Mazhari, No. 1:22-CV-2554-GLR, 2025 WL 2736530, at *7 (D. Md. Sep. 25, 2025); United States v. Lee Mem'l Health Sys. & Cape Mem'l Hosp., Inc., No. 2:14-CV-437-SPC-NPM, 2023 WL 7391680, at *5 (M.D. Fla. Jan. 13, 2023); Ramb v. Paramatma, No. 2:19-CV-21-RWS, 2021 WL 5038756, at *3 (N.D. Ga. Sep. 22, 2021); In re Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015).

[18] 2024 WL 4843750, at *4 (internal citations and quotations omitted) (quoting United States ex. rel. Wollman, 475 F. Supp. 3d at 63 and In re Kellogg Brown & Root, 756 F.3d at 760).

[19] 2019 WL 6467349, at *1; 2025 WL 2736530, at *7; 2023 WL 7391680, at *5.

[20] 2023 WL 7391680, at *5-7.

[21] Id.

[22] Alomari v. Ohio Dep't of Pub. Safety, 626 F. App'x 558, 570 (6th Cir. 2015); Greer v. Cnty. of S.D., 127 F.4th 1216, 1224 (9th Cir. 2025); United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997); Gremillion v. BP Expl. & Prod., Inc., No. CV 22-3209, 2025 WL 1040841, at *1 (E.D. La. Apr. 8, 2025).

[23] 876 F.3d 690, 695-96 (5th Cir. 2017) (noting that "where there is a mixed discussion of business and legal advice, courts should consider the 'context . . . key,'" and "seek[] to glean the 'manifest purpose' of the communication"); see also In re Boeing Co., No. 21-40190, 2021 WL 3233504, at *1 (5th Cir. July 29, 2021).

[24] 127 F.4th 1216, 1224 (9th Cir. 2025) (quoting In re Grand Jury, 23 F.4th at 1091). Notably, the Ninth Circuit in Greer specifically declined to evaluate whether to adopt the Kellogg standard, which may indicate that the issue is not yet settled. See id. at 1224 n.6 ("By failing to raise the issue properly in a timely manner in the district court, the County waived or forfeited its argument that we should adopt the test set forth in In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).").

[25] See, e.g., Marziale v. Correct Care Sols. LLC, No. 5:18-CV-86-DPM-BD, 2020 WL 13421180, at *1 (E.D. Ark. Sep. 23, 2020) (including parenthetical quoting the language: "Because in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication's primary purpose is to gain or provide legal advice."); Williams v. Sprint/United Mgmt. Co., 245 F.R.D. 660, 670 (D. Kan. 2007) ("[T]he privilege does not apply where legal advice does not predominate the communication or where legal advice is merely incidental to business advice.").

[26] Lindley v. Life Invs. Ins. Co. of Am., 267 F.R.D. 382, 392 (N.D. Okla. 2010).

[27] United States v. Frederick,182 F.3d 496, 501 (7th Cir. 1999).

[28] Id. at 501-02.

[29] Smith-Brown v. Ulta Beauty, Inc., No. 18 C 610, 2019 WL 2644243, at *3 (N.D. Ill. June 27, 2019) ("The Court finds [KBR's] analysis persuasive. Thus, defendants must show that 'obtaining or providing legal advice was one of the significant purposes of the [contested documents]' to invoke the attorney client privilege for them.").

[30] See United States v. Sanmina Corp., 968 F.3d 1107, 1118 (9th Cir. 2020) ("Communications made for such a 'dual purpose' are not uncommon in the tax law context, where an attorney's advice may integrally involve both legal and non-legal analyses.").

[31] See id.

[32] 26 U.S.C. § 7525.

[33] United States v. Frederick,182 F.3d 496, 501-02 (7th Cir. 1999).

[34] 296 F.2d 918 (2d Cir. 1961).

[35] Id. at 922-23.

[36] See, e.g., id.; Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002).