

Navigating Attorney-Client Privilege in Mixed-Purpose Communications

A Practical Guidance® Article by Yara AlHowar and Peter C. Buckley, Fox Rothschild LLP



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A recent U.S. Supreme Court case, *In re Grand Jury*, captured the attention of lawyers nationwide who hoped it would provide guidance on the application of attorney-client privilege to “mixed-purpose” communications between in-house counsel and their internal clients. Unfortunately, the Supreme Court dismissed certiorari without an explanation after hearing oral argument in January, leaving unresolved a split among federal circuit courts on the standard that applies to whether mixed communications are privileged.

The Fifth, Sixth and Ninth Circuits apply the “primary purpose” test, which protects lawyer-client communications only if the *primary purpose* of the communication was to obtain or provide legal advice. This test can be unpredictable and tricky to apply when a communication does not have a single primary purpose. In contrast, the D.C. Circuit extends the privilege to a communication if *one of its significant purposes* was to provide legal advice. The Supreme Court’s decision not to resolve the split leaves attorneys uncertain of which standard applies to mixed communications.

Best Practices for Mixed-Purpose Communications

Despite the lack of uniformity in tests across jurisdictions, in-house counsel should strive to cloak their communications under the primary purpose test, the more stringent standard. Communications privileged under the significant purpose test are protected under the primary purpose test, but not vice versa.

Here are some best practices that companies can adopt for communications seeking or giving legal advice:

- Educate clients and business teams about the distinction between business advice and legal advice and why, in view of this recent decision, the distinction matters.
- Use language that makes clear that the communication is primarily about a legal matter.
 - For example, use language such as “What are the legal implications of X” instead of “What are your thoughts on X?” or “Are we good to go on Y?”
 - Similarly, replies or follow-up communications can clarify the purpose of the communication (e.g., “Here’s my legal analysis on X”; “I did some legal research into Y”; “Thank you for providing the background on how X product/team operates – It helps inform the legal analysis on Z.”).
- Do not assume that merely cc’ing an attorney on an email will make it privileged. Rather, address the email directly to legal counsel. To whom the email is addressed does not determine whether the privilege applies, but addressing it to counsel, in connection with other factors, may weigh in favor of protecting the communication and demonstrate a primary legal purpose.

- Reduce the risk of privilege waivers by not forwarding sensitive communications beyond the legal team and those internal “clients” that need to receive it.
 - Add notations that signal a primary legal purpose, e.g., “attorney-client communication,” or “privileged and confidential.” Such notations are especially important for in-house counsel and could be included in the legal team’s signature block, when applicable.
- In the case of sensitive communications, do not commingle business and legal advice whenever possible, and make clear that such sensitive communications should not be forwarded without first checking with the attorney. Instead, address business and legal issues in separate emails. If business issues must be discussed in an email that gives legal advice, make clear that the business discussion is the context for the legal advice.

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Checklist

- [Attorney-Client Privilege Fundamentals Checklist \(Federal\)](#)

Yara AlHowar, Associate, Fox Rothschild LLP

A member of the firm’s national Litigation Department, Yara helps clients mitigate risk and resolve complex commercial disputes.

Immediately prior to joining Fox Rothschild, Yara was a judicial law clerk to the Honorable Lisa Worswick of the Washington State Court of Appeals, Division II. She was previously a summer associate at the firm.

During law school, Yara was a judicial extern to the Honorable G. Helen Whitener of the Washington State Supreme Court, a student attorney for the Moderate Means Program and a student attorney at the immigration clinic. She also served as executive editor of the *Seattle Journal for Social Justice* and was a member of the post-conviction appellate alliance.

Peter C. Buckley, Partner, Fox Rothschild LLP

Peter is an advocate, a legal problem-solver and a leader.

Whether defending an accused attorney, fighting class certification, or managing a corporate transaction, he provides clients with a no-nonsense, hands-on approach.

Peter is a lawyer’s lawyer. He counsels *AmLaw* 200 law firms on managing and avoiding risk and defends attorneys accused of malpractice, breach of fiduciary duty, and intentional misconduct. General counsel turn to him for straightforward advice and creative legal solutions when confronted with claims or trying to avoid them.

Peter understands the value of attorney-client relationships. He works to achieve pragmatic legal solutions to client disputes before they boil over to litigation. He knows the importance of a professional reputation. When litigation ensues, he uses his knowledge of malpractice law and professional ethics to vigorously defend his clients, often achieving dismissal or summary judgment as a result.* Peter appreciates the critical need for confidentiality and discretion when representing other professionals.

His practice focuses on securities litigation, shareholder/partnership disputes and real estate litigation. Peter has served as lead counsel for outside director defendants in a securities class action and achieved successful settlements on behalf of oppressed minority shareholders.*

Peter also understands the rapidly evolving world of litigation finance and serves as a key contact at the firm in that field. He uses his experience in legal ethics and commercial litigation to help clients seeking funding. He also represents the interests of funding companies in underwriting deals and advises them on the relevant ethical considerations.

The proud son of a New York State trial judge, Peter is no stranger to the courtroom and seeks out trial and appellate work whenever possible. His jury verdicts include success for both plaintiffs and defendants, and he has successfully appealed adverse decisions to the Third Circuit and Pennsylvania appellate courts.

Peter serves as outside general counsel to a number of small and medium sized businesses. Clients describe him as a “quick study” who understands their business and its objectives. He has managed several \$5+ million real estate transactions and the sale of a multi-state book of medical malpractice insurance policies.* Peter is as comfortable in the boardroom as he is in the courtroom.

Peter developed and implemented a piracy enforcement program for the exclusive distributor of premium sports content. He currently serves as Co-Chair of the firm’s Partnership Advancement Committee.

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