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Attorney-client communications should be thoughtful, deliberate

On Jan. 23, the U.S. Supreme Court reversed its grant of certiorari in *In Re Grand Jury*, after oral argument, with an anti-climactic: “The writ of certiorari is dismissed as improvidently granted.”

The single sentence was an unceremonious end to an odd, circuitous journey through the federal common law understanding of attorney-client privilege.

The issue before the high court was whether a communication involving both legal and non-legal advice is protected by attorney-client privilege. In briefs, the petitioner argued that a communication is covered by the attorney-client privilege whenever a “significant purpose” of the communication was the giving or receiving of legal advice.

The respondent countered with the argument adopted by the 9th U.S. Circuit Court of Appeals and followed by many federal jurisdictions that the primary purpose of the communication governs in assessing attorney-client privilege for dual-purpose communications.

In oral argument, however, both petitioner and respondent jettisoned arguments advanced in their briefs and

prayed for relief unmoored from the common law: Petitioner’s “significant purpose test” quickly devolved into an “any bona fide legal issue” test, no matter how ancillary to the overall communication.

Justice Samuel Alito challenged the shifting argument in questioning the petitioner’s counsel, Los Angeles lawyer Daniel B. Levin.

Alito to petitioner: “You’ve changed your position? You’re not really arguing for a significant purpose; you’re arguing for any legitimate purpose?”

Petitioner: “No, I don’t — I don’t think — I think that that’s — I mean, I guess what I would say is I don’t think that’s how I read — I read our position as saying, if it’s legitimate and bona fide, it would qualify as significant.”

Petitioner finally got around to arguing that any thread of legal advice cloaks the entire communication in privilege. Such a doctrine would have created an incentive to drop a hint of legal advice in every client communication.

The respondent, represented by Masha G. Hansford, assistant to the U.S. Solicitor General, staggered from “primary purpose” to

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any “significant purpose,” even if that strand of motive was not precisely “primary.”

Justice Neil Gorsuch questioned Hansford.

Gorsuch to respondent: “Tell me what I’m missing here, all right? I — I read the briefs. I — I thought Petitioner was arguing for a significant purpose test or a primary. There are variations on that. But perhaps a percentage less than 50. Now I learn The Petitioner wants any legitimate purpose. Okay. Got it. Then you get up, and I thought you were going to argue for a primary purpose test because that’s what the briefs said. Instead, now I hear a significant purpose, 60/40 might do, the 40 percent could be good enough in response to the Chief Justice. So, can we all agree it’s significant purpose?”

Amid all the sound and fury, there was no mention of

the necessity for attorneys to exert discipline over their communications.

Oral argument presented attorney-client communications as just naturally occurring in a jumbled form of social messaging, business advice and legal opinion with no apparent agency. The picture emerging was of client communications leaping out of attorneys’ minds, fully formed like Athena from the head of Zeus, *ex nihilo*, without forethought or deliberation.

In a Title VII or Americans with Disabilities Act context, particularly for house counsel, wearing too many hats and mixing too many messages in a single communication can be fatal to a case. Communicating as legal counsel, family friend, workout buddy and part-time business adviser in a single communication is professionally sloppy and just bad practice. When an attorney is performing an HR function and investigating (and responding to) a request for an accommodation under the ADA or Title VII, everything done or said in furtherance of that investigation, within the interactive process, is discoverable.


These communications will be parsed and examined before a trier of fact should the investigation become the centerpiece of a trial — with the investigator a key witness in the case.

I have seen a trial court, in this very context, ask plaintiff and defense counsel to define the in-house employment lawyer's relationship to the employer as investigator of the requested accommodation and as counsel to the client on employment matters in anticipation of litigation.

How those discrete functions overlap (if at all) in the case becomes fundamental to the issue of privilege.

It is a thorny issue to come up in the middle of a trial. Nor is the Attorney

tions by the attorney investigating an employee's complaint of gender discrimina-



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Registration & Disciplinary Commission going to magically appear and provide an advisory opinion on the matter.

In these pages, the Chicago Daily Law Bulletin recently wrote about a case in which a defendant employer attempted to assert attorney-client privilege over communica-

tion and proffering that same attorney as a trial witness for the employer. (“Lawyer ordered to turn over notes, emails to opposing counsel,” Law Bulletin, Jan. 5, 2023.)

This surreal stab at having your cake and eating it too was doomed to failure.

While efficiency is the idol before which law firms automatically kneel, we should consider slowing down client communications in a more deliberate and thoughtful process. “What issue am I addressing in this communication and in what capacity?”

For now, the “primary purpose” test of a multi-purpose communication remains alive and well in federal common law. Justice Elena Kagan’s jurisprudential gem may have carried the day: “I’m wondering if you would just comment on, you know, the ancient legal principle, if it ain’t broke, don’t fix it?”