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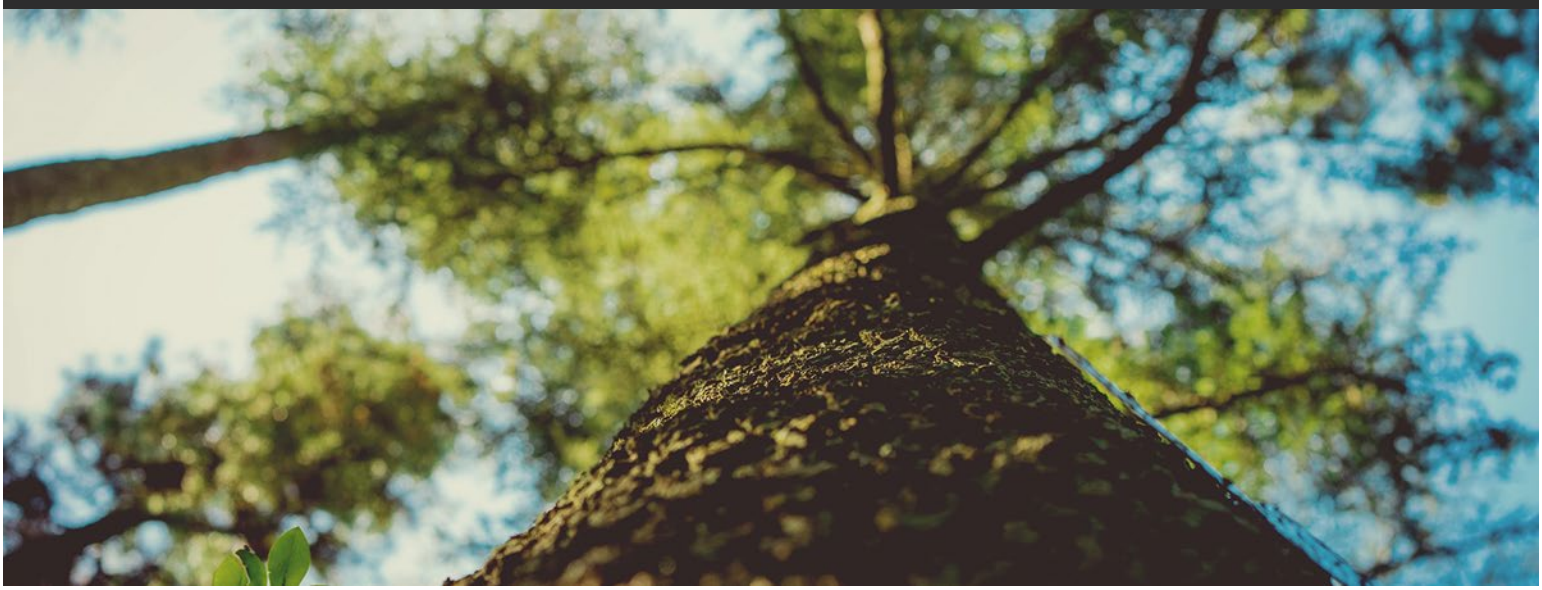
Uncertainty, No Guidance for Attorney-Client Privilege in Environmental Audits



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By David G. Mandelbaum | February 2, 2023 | The Legal Intelligencer

A few weeks ago, the U.S. Supreme Court heard argument in a tax case about attorney-client privilege. See *In re Grand Jury*, No. 21-1397 (U.S. arg. Jan. 9, 2023). The outcome would have potentially had a real impact on how environmental practitioners think about environmental audits, environmental management systems, and other circumstances in which an environmental professional and a lawyer cooperate to analyze a client's situation. But, perhaps because the oral argument so confused everyone, on Jan. 23, the court dismissed the case on the ground that certiorari had been improvidently granted. So now instead of guidance, we have uncertainty.

Federal Rule of Evidence 501 provides that unless a statute, the Constitution, or another federal rule is to the contrary, "the common law—as interpreted by U.S. courts in the light of reason and experience—governs a claim of privilege … ." However, in a civil case where state law provides the rule of decision, state law governs. Pennsylvania Rule of Evidence 501 preserves the common law of privilege in state court.

The attorney-client privilege is often misunderstood. It protects communications from compelled disclosure. That is, if Sally says or writes something to Roger that is privileged, neither Sally nor Roger nor anyone else may be compelled to repeat what she said or to produce what she wrote. The proponent of the

privilege—the person who wants to withhold a communication from discovery or testimony—has the burden of establishing the privilege. The privilege does not apply to any of the facts in those communications. That is, if Sally tells Roger that she saw drums of chemicals being off-loaded at the XYZ site and that communication is privileged, Sally cannot be compelled to testify that she told Roger about the drums. However, she can be asked directly whether she saw drums being off-loaded.

The communication must be from a client to a lawyer. When a client is an organization, and not a natural person, the individuals who count as the "client" for purposes of a communication extend beyond just the board of directors or the corporate officers. Recall that the Supreme Court rejected the "control group" test in *Upjohn v. United States*, 449 U.S. 383 (1981). Employees were questioned by a law firm doing an internal investigation over questionable foreign payments. "The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice," and so the statements they made to counsel conducting the investigation were privileged.

In the environmental context, a person in charge of some process with environmental consequences—a loading dock employee, pipeline operator, boiler operator—can be the "client" for purposes of the privilege when he or she communicates about what he or she does for the purpose of helping the organization obtain legal advice. A more difficult question arises when the person communicating is not communicating about something in the course of her duties. Sally might tell company counsel Roger about the drums, but she may have only seen the drums because she likes to eat her lunch outside. Sally herself works in Marketing and has nothing to do with drums. Is what she observed sufficiently in the scope of her duties to make her the "client" for purposes of what she says to Roger?

The communication must also be confidential. As soon as people other than the lawyer and the client participate, the privilege becomes more difficult to establish. The other people have to count as agents of the lawyer or as someone properly within the circle of confidentiality. If Roger conveys Sally's communication to a prospective purchaser of the facility or a public relations consultant, he weakens his claim to privilege over that communication. So too if Sally reports on what she saw in a big meeting with that purchaser and the PR consultant.

Environmental consultants conducting audits or testing fall in a gray area. If the consultant is acting as the functional equivalent of an employee of the client, perhaps the consultant's report to the lawyer (but not necessarily to the EHS director) is privileged. If the consultant is acting as an agent of the lawyer—like a nonlawyer investigator—a communication by the client to the consultant might be privileged. Do note that what the consultant in that agent-of-the-lawyer role learns independently by observation or sampling may be work-product, but it is not privileged because it is not a communication from the client to the lawyer. Items like laboratory reports of sampling results may be privileged, but the claim of privilege requires some attention to make out; the government will take the position that data are never privileged.

The communication must be for the purpose of obtaining legal advice. The privilege encourages clients to consult with lawyers so the clients can know what the law requires; otherwise, how could they comply? Further, the privilege allows lawyers to obtain a full description of the facts so they can offer nuanced legal advice. As a corollary, a lawyer can repeat back pertinent portions of what he or she learned from the client without waiving the privilege, provided that the communication back is to the client and confidential. That is why an internal investigation report to top management or the board can be privileged.

The Supreme Court case just argued had to do with circumstances in which a client communicates with the lawyer for multiple purposes. The client might have business questions and legal questions that are intertwined. Environmental audits, implementations of environmental management systems, ESG reviews,

and the like often fall in that category. Addressing noncompliance is a legal issue, but it is also a business issue for many.

Conventionally, courts require a communication to have a "primary" or "predominant" purpose of obtaining legal advice. However, if there is also a business purpose for the communication, a court adjudicating a privilege dispute must weigh the relative importance of the business and the legal purpose, and must do so well after the fact. *In re Grand Jury* dealt with advice on tax treatment of assets upon expatriation. Filling out the return is accounting, and not a legal purpose. Tax compliance and strategy is a legal purpose. The memoranda at issue arguably addressed both.

The petitioner, an unidentified law firm that had provided the advice, argued that any "significant" legal purpose would qualify the communications for the privilege. Under that rule, a court need not assess the relative weight of the legal and nonlegal motivations for the communications. Pressed at oral argument, the petitioner took the position that any bona fide legal purpose would count. Sitting a lawyer in a corner of a meeting or copying her on a memo would not result in a privilege, but even if the request for legal advice was only 25% of the motivation for the communication it would count. The court and the petitioner struggled with a situation in which the lawyer was invited to listen to a business conversation to issue-spot, so that is at best a risky strategy for establishing privilege.

By contrast, the United States began by arguing that the legal purpose had to be the single most important reason for the communication. Recognizing the difficulty of assessing relative importance in cases of close calls—60/40, for example—the Solicitor General suggested that courts often apply a rule that the "tie goes to the runner." That is, in close cases, there would be privilege. The court, however, found that inconsistent with the acknowledged rule that the proponent of privilege bears the burden of establishing all of its elements.

In the environmental context, courts seem clear that an internal investigation as the result of an order or a report of violations is a legal purpose when conducted by counsel. An ongoing environmental management system or an environmental audit for another purpose (such as reporting to the board or transactional due diligence) may be a more difficult case.

The Supreme Court was therefore going to have to struggle with the form of words it would have used in deciding *In re Grand Jury*. Indeed, the United States suggested that the court might not want to write very much at all. Instead, the court elected not to decide the case at all. So the courts are now split. In most jurisdictions, privilege only attaches when the "primary" or "predominant" purpose of a communication is to obtain legal advice. However, in theU.S. Court of Appeals for the Ninth Circuit, a "significant" purpose of obtaining legal advice, even if not predominant, suffices. So setting up consultant work and advising on environmental matters takes some care if one wishes to preserve the privilege.

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