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Ninth Circuit Adopts Two New Attorney-Client Privilege Standards for Corporate Counsel

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U.S. v. Graf, ___F.3d___, 2010 WL 2671813 (2010)

Brief Summary
Adopting two new standards in the circuit, the U.S. Court of Appeals for the Ninth Circuit held that a company's attorney-client privilege encompasses attorney communications with outside consultants who are "functional employees." The court also held that employees, in order to establish a personal attorney-client privilege jointly held with the company, must establish five factors, including the fact that the attorney chose to represent them despite the risk of a conflict, and that the representation did not concern the company's general affairs.

Complete Summary
Defendant founded a health insurance company. He positioned himself as a consultant rather than an employee, officer or director because he had been banned from health insurance work in California. He was later indicted for his role in the company's fraudulent activities. The company waived its attorney-client privilege, and the company's attorneys testified against defendant. Defendant was convicted. He appealed arguing that because he was a third-party consultant his discussions with the attorneys did not fall within the corporation's attorney-client privilege, and that he had been personally represented by the testifying attorneys and therefore held a joint attorney-client privilege with the company.

The Ninth Circuit affirmed the conviction. The court first adopted, from the Eighth Circuit, the principle that the corporate attorney-client privilege extends to an attorney's discussions with a company's outside consultants who are functionally equivalent to employees. The court held that defendant was a functional employee because, *inter alia*, he was the company's primary agent in communications with corporate counsel.

The court then adopted the Third Circuit's test (which had been adopted in several other circuits as well) for determining when an employee holds a joint privilege with an employer. Namely, employees seeking to assert

such a privilege must establish five factors:

> **First**, they must show they approached counsel for the purpose of seeking legal advice. **Second**, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. **Third**, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. **Fourth**, they must prove that their conversations with counsel were confidential. And **fifth**, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

The court held that defendant failed to meet this burden based on, among other things, the fact that the company's outside attorneys had testified or declared that they had never represented defendant personally, and that defendant had never personally paid attorney fees. Regarding the company's general counsel, who had represented defendant personally both before and after being general counsel, the court held that defendant failed to establish an attorney-client privilege because he did not present evidence that he sought personal legal advice during the period when the attorney was acting as general counsel.

Significance of Opinion

This holding allows corporate attorneys to communicate freely with certain of their clients' outside consultants, at least insofar as the communication otherwise would be privileged, and provided that the consultant is the functional equivalent of a company employee.

This decision also puts the onus squarely on the individual to overcome a working assumption that the attorney-client privilege on matters affecting the company belongs to the company and not to the individual, and that the individual's subjective expectations do not control.

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