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SECOND CIRCUIT REVIEW

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'Predominant Purpose' Test Used in Privilege Claim Cases

In this month's column we discuss *In re The County of Erie*,[1] a notable decision issued earlier this month by the U.S. Court of Appeals for the Second Circuit addressing an issue of first impression: the scope of the attorney-client privilege in the context of communications between a government lawyer and a public official.

The court also addressed the vexing issue of how appropriately to evaluate the "purpose" of a communication between an attorney and client, in making a privilege determination.

In a unanimous opinion by Chief Judge Dennis Jacobs, joined by Judges Richard J. Cardamone and Roger J. Miner, the Court of Appeals ruled that a communication between government counsel and a public official concerning a government policy may be privileged when the "predominant purpose" of the communication is to assess the legality of a policy, propose alternative policies, and discuss the implementation of those alternative policies. The panel further observed that, in assessing whether the purpose of an attorney-client communication is to render or obtain legal advice, the court must evaluate whether such advice was the "predominant purpose" of the communication. In so holding, the court rejected its own prior dicta suggesting that the rendering or securing of legal advice must have been the "sole purpose" of the communication.

Background and Procedural History

The *Erie* plaintiffs filed a 42 USC §1983 class action suit against the County of Erie and various law enforcement and correctional officials (together, the county) in the U.S. District Court for the Western District of New York. The complaint alleges that defendants had an unconstitutional policy of invasively strip-searching all detainees entering the Erie County Holding Center or Erie County Correctional Facility, without regard to individualized suspicion or offense, in violation of the Fourth Amendment.

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During discovery, the county withheld production of certain e-mails between an assistant county attorney and county officials, claiming that they were privileged attorney-client communications. These e-mails "reviewed the law concerning strip searches of detainees, assessed the county's current search policy, recommended alternative policies, and monitored the implementation of these policy changes."[2]

After plaintiffs moved to compel production of the e-mails, a Magistrate Judge inspected them in camera. The Magistrate Judge ruled that the e-mails were not privileged because they "ventured beyond merely rendering legal advice and analysis into the realm of policy making and administration" and because "[n]o legal advice is rendered apart from policy recommendations."[3] The Magistrate Judge ordered the county to produce the e-mails. When the county objected, the district court examined the e-mails in camera as well. Reviewing the Magistrate Judge's order under a "clearly erroneous" standard, the district court overruled the county's objections and directed it to produce the e-mails.

Second Circuit Decision

The county filed a petition for a writ of mandamus with the Second Circuit, requesting the district court to vacate the order compelling production. The Court of Appeals granted the writ, vacating the district court order and ordering the district court to take such steps as to protect the confidentiality of the e-mails.

The Second Circuit first addressed justiciability issues. It noted that pretrial discovery orders involving privilege claims ordinarily are not reviewable on interlocutory appeal, and that using mandamus to circumvent this rule is disfavored. The court noted, however, that mandamus is an appropriate means of reviewing discovery orders that threaten privilege, where "(A) the petition raises an important issue of first impression; (B) the privilege will be lost if review must await final judgment; and (C) immediate resolution will avoid the development of discovery practices or doctrine that undermine the privilege."[4]

The Second Circuit ruled that the county met all three prongs of the mandamus test. First, its petition raised an important issue of first impression: are communications between government lawyers and public officials privileged, where those communications assess the legality of a policy and propose alternative policies?[5] Second, the court found that the county's privilege would be lost if appellate review awaited final judgment. The court rejected plaintiffs' argument that the issue was moot because the contested e-mails were already in their possession; the court found that the privilege still could be "vindicated" by preventing the use of the e-mails during further discovery (including depositions and pretrial motions) and at trial.[6] Third, the court, stressing the "potentially broad applicability and influence" of this issue, found that delaying resolution of the privilege issue risks "unsettl[ing] and undermin[ing] the governmental attorney-client privilege,"

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because "[a]n uncertain privilege is little better than no privilege."[7]

The court then examined the competing values accommodated by the attorney-client privilege, which are particularly significant in the governmental context. The privilege encourages full and frank communications and "candid legal advice," which benefit the official receiving the advice. The privilege also "furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business"; this benefits the public by promoting officials' observance of the law.[8] These virtues notwithstanding, the privilege also operates to shield relevant information from discovery, and therefore must be construed narrowly.

A party invoking the attorney-client privilege must establish (1) a communication between an attorney and client that (2) was intended to be—and that was—kept confidential, and that (3) was made for the purpose of obtaining or providing legal advice. The *Erie* case hinged on the third prong of this test. Previous dicta had indicated, in the context of corporate attorney-client communications, that the privilege is limited to attorney-client communications made "solely" for the purpose of obtaining or receiving legal advice. Rejecting such a test, the court stated that the correct test should evaluate whether a communication's "predominant purpose" is to obtain or receive legal advice.

The court's "predominant purpose" standard is a pragmatic one, taking into account the reality that lawyers tend not only to provide "legal" advice, but also frequently "follow-through by facilitation, encouragement and monitoring."[9] A "complete lawyer," said the court, may explain how his or her legal advice can be implemented, the risks or costs of such implementation, any alternative courses of action, "what other persons are doing or thinking about the matter," and "the collateral benefits or costs in terms of expense, politics, insurance, commerce, morals, and appearances."[10] But "[s]o long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it," and the predominant purpose "cannot be ascertained by quantification or classification of one passage or another"; instead, "it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer."[11]

The court rejected the county's assertion that insofar as the Erie County Charter limits the assistant county attorney's authority to "legal adviser" with no policy-making authority, the assistant's communications could only have conveyed (privileged) legal advice. Attorneys are consulted in many capacities, including as policy advisers, and "[a] lawyer's lack of formal authority to formulate, approve or enact policy does not actually prevent the rendering of [nonprivileged] policy advice to officials who do possess that authority."[12] It is the county's objective in seeking the attorney's advice (i.e., determining its obligations under the Fourth Amendment, as opposed to determining how to save money or please voters), and not the attorney's official role, that informs the "predominant purpose" test.

'In re The County of Erie' provides much-needed clarity to an area of the law with little precedent and of great moment: the scope of the attorney-client privilege as applied to government counsel.

Turning to the 10 e-mails at issue, the court found that the e-mails addressed six broad issues: whether the county's search policy complies with the Fourth Amendment; the county's and its officials' potential liability for enforcement of the policy; possible alternative search policies; implementing and funding those alternative policies; maintenance of records concerning the original policy; and evaluation of the county's progress in implementing an alternative policy. The Magistrate Judge reasoned that the communications-in-question went beyond rendering legal analysis by proposing changes to the existing policy and offering guidance on implementing a new policy—and thus were not privileged.

The Court of Appeals rejected the Magistrate Judge's view of "legal advice" as overly narrow and against the public's interest. It is in the public's interest that policy-making public officials, particularly those responsible for law enforcement and corrections policies, seek out and receive "fully informed legal advice" in the course of formulating policy. And "[w]hen a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—*is* legal advice."[13]

Applying these observations, the court ruled that each of the 10 e-mails was privileged. Each e-mail was sent for the predominant purpose of giving or receiving legal advice, not general policy advice. Each e-mail contained a lawyer's Fourth Amendment analysis of the county's corrections policies, and guidance for creating and implementing alternative (and legally compliant) policies.

The court therefore granted the county's writ of mandamus, vacated the district court's order compelling production and directed the district court to enter an order protecting the confidentiality of the e-mails. The court also remanded the case to the district court to determine whether defendants waived the attorney-client privilege nevertheless, through distribution of the e-mails.

Conclusion

The court's decision in *In re The County of Erie* provides much-needed clarity to an area of the law with little precedent and of great moment: the scope of the attorney-client privilege as applied to government counsel, and more generally. The court made clear that, for privilege purposes, a government attorney's "legal advice" is not limited to checking whether a policy complies with the law; it may include concomitant advice on alternative policies and the implementation of those policies. The court also rejected its prior suggestion that the "sole purpose" of an attorney's communication must involve the rendering or securing of legal advice for that communication to be privileged; instead, the court adopted the more flexible and more pragmatic "predominant purpose" test for evaluating attorney-client communications. This decision provides helpful guidance to all attorneys, particularly those who play dual legal and nonlegal roles, in assessing whether their communications with clients are privileged.

1. __F3d__, 2007 WL 12024 (2d Cir. Jan. 3, 2007).
2. Id. at *1.
3. Id. at *2.
4. Id. at *2, citing *Chase Manhattan Bank, N.A. v. Turner & Newall PLC*, 964 F2d 159, 163 (2d Cir. 1991); *In re Long Island Lighting Co.*, 129 F3d 268, 270 (2d Cir. 1997). The court rejected the county's argument that satisfying any one prong is sufficient.
5. Id.
6. Id.
7. Id. at *3.
8. Id. at *4, quoting *In re Grand Jury Investigation*, 399 F3d 527, 534 (2d Cir. 2005).
9. Id. at *5.
10. Id.
11. Id.
12. Id. at *6.
13. Id. at *7 (emphasis added).