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THREE YEARS LATER, MINNESOTA'S PREDOMINANT PURPOSE ANALYSIS IS STILL UNCLEAR

By William Paterson

In December 2021, the Minnesota Supreme Court issued its decision in *In re Polaris*, 967 N.W.2d 397 (Minn. 2021). The headline takeaway from the decision was that Minnesota officially adopted the predominant purpose test—if the predominant purpose of a document is to provide legal advice, then it is protected from disclosure, whereas if the predominant purpose is instead to provide business advice, then the document is not protected from disclosure. While the headline takeaway was clear, it was unclear how courts would analyze whether a document was intended to predominantly provide legal or business advice. Three and a half years later, the analysis is still unclear.

As Justice Anderson highlighted in his dissent in the Polaris decision, "the flaw in the court's analysis becomes obvious. It fails to meaningfully articulate what 'business advice' and 'legal advice' mean. The court provides factors to look at but fails to provide guidance as to what a district court should look for." 967 N.W.2d at 414.

Interestingly, there are only a handful of subsequent cases available that analyze the issue at all. Based on the scarce availability and the lack of higher court guidance as highlighted by Justice Anderson, the subsequent analysis has not provided much direction either.

The one thing Minnesota courts agree on is that this analysis, like all privilege analysis, is a fact intensive inquiry. *See Energy Pol'y Advocs. v. Ellison*, 980 N.W.2d 146, 156 (Minn. 2022) ("Application of the attorney-client privilege is a fact-intensive inquiry . . . ."). As a result, one common theme from courts analyzing the predominant purpose of a document is that the parties have not provided them with enough facts to conduct the analysis. *See, e.g., Kraft v. Essentia Health, Innovis Health, LLC*, 2024 WL 4685607, at *3 (D.N.D. July 10, 2024), report and recommendation adopted in part sub nom. *Kraft v. Essentia Health*, 2024 WL 4685402 (D.N.D. Oct. 7, 2024) ("After reviewing a number of documents, the Special Master advised the parties that insufficient detail had been provided regarding the communications with the third-party consultants in order to determine the functional equivalency and predominant purpose inquiries.").

Other than the fact-intensive nature of the analysis, however, there is still little guidance on what constitutes legal advice versus business advice. As just one example, while communications with attorneys are presumptively privileged, the predominant purpose of documents created at the direction of an attorney may not be. *See Kobluk v. Univ. of Minnesota*, 574 N.W.2d 436, 442 (Minn. 1998) ("[A] matter committed to a professional legal adviser is *prima facie so committed for the sake of the legal advice* . . . ." (quoting Wigmore, § 2296 at 567)); *see also Shuster v. Precision Transport Co., LLC*, 2024 WL 4002499, at *2 (Minn. Dist. Ct. July 17, 2024) ("Though . . . counsel states that the 'incident report package', which includes the incident report, was prepared at his direction, this does not sufficiently prove that the original "incident report" **(David Nardi's Report)** was.").

Until additional Minnesota courts weigh in on this analysis, the determination of legal advice versus business advice will likely remain unclear. Even still, because it is such a fact-intensive inquiry, and because every case is obviously different, the analysis may never be clear.

At this point, without sufficient guidance, for attorneys claiming a document is privileged, all they can do is simply advise their clients of the issues and be prepared to address—with sufficient facts—why the purpose of a document is to provide legal advice.

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