

Supreme Court Declined to Decide Scope of Attorney-Client Privilege over Dual-Purpose Communications

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Introduction. In *In re Grand Jury*, No. 21-1397, the Supreme Court declined the opportunity to clarify the scope of protections afforded to attorney-client communications. The Court had originally granted certiorari and heard oral argument to decide the governing standard under federal law for when communications that contain both legal and business advice are protected from disclosure by the attorney-client privilege. Two weeks after hearing oral argument, however, the Court dismissed the writ of certiorari as improvidently granted, leaving counsel and clients with uncertainty as to the scope of protections given to these dual-purpose communications.

Background. *In re Grand Jury* concerned an unnamed client who sought and received advice from an unnamed law firm concerning, among other things, certain tax issues in connection with the client's expatriation from the United States. The client later became the subject of a criminal investigation, and the grand jury served a subpoena seeking documents related to the law firm's advice. The client and law firm refused to produce a subset of documents on the grounds that the purpose of such communications was both legal (*e.g.*, advice on how to comply with the tax code) and non-legal (*e.g.*, procedural instructions on how to file a tax return) in nature and therefore the communications were protected by the attorney-client privilege.

The issue before the Court, therefore, concerned *dual-purpose* communications—*i.e.*, communications in which the business and legal nature of the advice are inextricably intertwined. The case did not involve documents and communications where the legal and non-legal advice are readily severable, such that redactions may be applied to maintain the confidentiality of the legal advice while permitting the business advice to be disclosed.

The district court applied the long-standing “primary purpose test”—which protects communications between lawyers and clients whose primary purpose is the facilitation of legal advice—and ordered that the subject documents be produced. After reviewing the documents *in camera*, the district court concluded that the *primary* or *predominant* purpose of the communications was not to provide or obtain legal advice but rather was to assist the client in preparing tax returns. As such, the district court held that the

communications were not covered by the attorney-client privilege. When the law firm still refused to produce the documents, the district court held the law firm in contempt. On appeal, the Ninth Circuit applied its interpretation of the “primary purpose test,” which required production of the documents at issue, and affirmed the order holding the law firm in contempt. The Supreme Court granted the law firm’s petition for a writ of certiorari and heard oral argument on January 9. On January 23, however, the Court dismissed the writ of certiorari as improvidently granted. Thus, the Ninth Circuit’s interpretation of the “primary purpose test” stands and controls the outcome of this case.

The Parties’ Arguments. Before the Supreme Court, the law firm argued that the Court should jettison the “primary purpose test” in favor of a “significant purpose test,” under which federal courts would protect as privileged any attorney-client communication where legal advice is one of the significant purposes behind the communication—even if some other, non-legal, purpose was more significant. While the difference between the two tests may appear semantic at first blush, the “significant purpose test” arguably would expand the reach of the attorney-client privilege to encompass dual-purpose communications that, today, do not receive protection from disclosure in some courts.

The law firm advanced several arguments in favor of the “significant purpose test.” First, that standard would more easily facilitate full and frank communication between attorney and client, as both parties would not have to worry that communications that have both legal and business purposes—as many communications do—would be discoverable. This is partially why several industry groups, including the American Bar Association, filed amicus briefs in favor of adopting the “significant purpose test.” Second, the law firm argued that it is too difficult for courts to determine the single “primary” purpose of a communication, which results in uncertainty in the law, and that the “significant purpose test” would be easier to administer.

In response, the government argued that upholding the “primary purpose test” would maintain the status quo and be less disruptive. Although some courts apply a relaxed version of the primary purpose test or follow the “significant purpose test,” many other courts follow the traditional version of the “primary purpose test.” The government argued that there is no evidence that judges have a hard time determining the primary or predominant purpose of attorney-client communications. The government further argued that determining whether obtaining or providing legal advice was the “significant” purpose of an attorney-client communication would be just as difficult as determining whether it was the primary one, if not more so. The government also warned that adopting the “significant purpose test” would lead to an impermissible expansion of attorney-client privilege, wherein any time a lawyer is simply copied on an email or otherwise incidentally included on a communication, the entire

communication would be deemed privileged because there will almost always be at least some arguable legal purpose to having the lawyer present.

As the Supreme Court declined to decide the issue, the basic rules remain unchanged and counsel will likely continue to argue about the proper scope of privilege over dual-purpose communications.

Key Takeaways

- The Supreme Court declined to decide the governing federal standard for when communications involving both business and legal advice are protected by the attorney-client privilege.
- This leaves counsel to fight about the proper scope of protections afforded to these dual-purposes communications, given the uncertainty in the law.
- Nevertheless, this case demonstrates that privilege rules vary among states and between state and federal jurisdictions, and therefore corporate counsel should endeavor to understand the contours of the “primary purpose test” and other standards concerning attorney-client privilege over dual-purpose communications in the relevant jurisdictions where they conduct business, as corporate counsel engage in these types of communications on a near-daily basis.



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