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Justices Leave Questions Open On Dual-Purpose Atty Advice

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In-house counsel, tax attorneys and litigators alike were disappointed by the U.S. Supreme Court's recent decision to dismiss the appeal of In re: Grand Jury on grounds that certiorari was improvidently granted.

The dispute involved the proper test to decide when the attorney-client privilege protects communications when a lawyer's advice has multiple purposes. After dismissal, practitioners are left asking: What exactly did the court do? Why? And what now?

What's behind the DIG?

The Supreme Court's dismissal of the appeal as improvidently granted — or DIG — is not unprecedented, even in an era where when it hears fewer and fewer cases per term. The court DIGs around 2% of cases before it. A DIG has the same impact as if certiorari was never granted.[1]

Although the court did not explain the reasons for dismissal, the justices' comments and questions during oral argument offer clues about the court's hesitation to render an opinion in this particular case, including the following.

The facts of the case turned out not to present a suitable opportunity to review the attorney-client privilege tests.

The court explains the grounds for a DIG about half of the time.[2] A common reason is that facts came to light while briefing and arguing the case that were unavailable to the court in the certiorari stage.[3]

Here, the petition for certiorari stated the issue as "[w]hether a communication involving both legal and non-legal advice is protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication."

In contrast, during oral argument, Justice Sonia Sotomayor noted that the 54 documents at issue involved communications between the client and an accountant employed by the law firm, and not an attorney. This key factual distinction may have been a factor in the court deciding the case was not an ideal vehicle for deciding the test for attorney-client privilege over dual-purpose communications.

The court was skeptical about whether there was a meaningful difference between the competing dual purpose tests in practice.

A majority of federal circuits apply the primary purpose test that the petitioner advocated against. At oral argument, the petitioner agreed that the difference between the primary purpose test and the substantial purpose test, as applied by in practice by district courts, was minimal, if any.

The petitioner's counsel said that in most states, "when you look at their case law, they may say primary [purpose], but then they focus in on, is there a legal purpose or not?"

This remark drew a quick response from Justice Ketanji Brown Jackson:

> [I]f they're actually doing it, then it isn't a big change. You can't have it both ways. You just said I think this is going to make a difference, and now you're saying no, it's not because they're already doing it in the way that we're asking you to adopt.

Justice Elena Kagan invoked "[the] ancient legal principle, if it ain't broke, don't fix it." These comments conveyed a sentiment that the legal issue presented to the court was not as significant as it initially appeared, based on the certiorari briefs.

The justices questioned whether the primary purpose test really chills attorney-client communications.

The petitioner's primary policy argument was that the primary purpose test used by the U.S. Court of Appeals for the Ninth Circuit will chill communications between clients and attorneys. Justice Kagan was dubious of this concern:

> [T]here's no particular evidence of confusion, nor is there any particular evidence of chill. Why would there be chill? Because, by definition, if there is a primary purpose that's non-legal driving the communication, somebody will make that communication because they have a non-legal primary purpose to do so.

Justice Kagan went on to state that it was a "big ask" for the court to modify a majority standard across the circuit courts.

District courts have not expressed significant difficulty applying the attorney-client privilege to dual-purpose communications.

Justices Jackson and Sotomayor observed that few district courts have expressed difficulty reviewing complicated or extensive documents for privilege, and rarely end up unable to determine whether a dual-purpose communication is privileged.

In the case at hand, the parties agreed that the district court was able to make redaction, and did not get stuck trying to determine privilege for an allegedly dual-purpose communication. As Justice Sotomayor pointed out:

> This particular judge, I think, was meticulous in separating out documents. As you said, this judge picked out sentences and redacted them. This judge upheld your objections to a number of disclosures based on points that you raise with respect to the legal nature of the communication. So I don't see how judges are having the hard time you're talking about.

These comments reflect the court's decision that the facts of the case were not the proper vehicle for review.

In sum, while we cannot know the complete rationale as to why the court dismissed the appeal, it was possible to see this result coming from Justice Amy Coney Barrett's final question to the respondent:

> So do you think that, in terms of what an opinion would look like if we rule in your favor, it might say something like, just to be clear, it is primary purpose, it's not significant purpose, we're not going to say really anything about what it means because we're just going to let courts continue to do what they do? Because we can't really say tie goes to the runner, right, when the burden is on the person invoking the privilege? We can't get into this whole put a percentage on it for the reasons that we've already talked about. So maybe it's best to say nothing?

What's the go-forward for practitioners?

After the Supreme Court's dismissal, the federal circuits remain split on the appropriate test to determine attorney-client privilege for dual-purpose communications. The Second, Fourth, Fifth, Sixth, Eighth, Ninth and D.C. Circuits apply a version of the primary purpose test, which remains valid law within those circuits.[4]

The D.C. Circuit's significant purpose test remains applicable to disputes within that circuit.[5] The remaining circuits have yet to publish opinions on the appropriate test. And disputes in state court, or those governed by state law pursuant to Federal Rule of Evidence 501, remain subject to the dual-purpose test adopted by each applicable state.

This hodgepodge of tests means practitioners must be aware of the jurisdictional standard that could apply to their clients' disputes. Practitioners also should follow the law's evolution in this area.

For instance, the Ninth Circuit's opinion in In re: Grand Jury expressly left open whether the circuit might adopt a test more like the D.C. Circuit's 2015 opinion in In re: Kellogg Brown & Root Inc., noting: "We see the merits of the reasoning in Kellogg. But we see no need to adopt that reasoning in this case."[6]

Meanwhile, practitioners should exercise caution, evaluate, and potentially adjust their protocols for creating communications, ideally avoiding communications that combine both legal and nonlegal purposes whenever possible. If In re: Grand Jury has accomplished one thing, it is to bring additional — and for the unprepared unwelcome — attention to this facet

of the attorney-client privilege.

It remains to be seen what policies government agencies will adopt on seeking documents based on the Ninth Circuit's opinion.

Parties seeking privileged communications will likely do their best to exploit dual purpose limits and undermine claims of privilege, by characterizing attorney communications as primarily motivated by unprotected, nonlegal purposes. The edge of the privilege in this context remains blurry, and it will take the courts to tell us where the line lies.

Attorneys providing tax advice should pay particular attention to this developing area of law. In re: Grand Jury gained significant attention in part because it involved advice regarding the consequences of the client's anticipated expatriation under the U.S. tax code.

Courts — including the Ninth Circuit, in its In re: Grand Jury opinion — have indicated that the attorney-client privilege does not apply to communications that involve "services …typically rendered by an accountant," such as the preparation of an income tax return.[7]

Numerous amicus briefs in the In re: Grand Jury appeal emphasized the complexity of the U.S. tax code, and that nearly all legal advice provided to a client will inevitably be reflected on their tax return in one manner or another.[8]

Chief Justice John Roberts highlighted the blurry line for tax return preparation with the following example:

> How would you handle a case where an accountant sits down and goes through it, it's a very complicated form, and the accountant says, I want to have a lawyer look at this, and they bring in Lawyer X, and Lawyer X says, you know, I am the world's expert in this area, I've been doing this for 40 years; in my view, this is all very good, except these three items, you know, they're kind of iffy, and I think you should probably not make — make those; everything else is good, here you go, sends a bill for $200,000. … Is that accessible because it's looking at the actual numbers and participating in the preparation of the form? Is the entire thing privileged, or can the prosecutors get that communication?

Another challenging area for separating out legal versus nonlegal purposes is corporate internal investigations. It was an internal investigation that prompted the D.C. Circuit to render its significant purpose test in Kellogg. What type of advice falls within the bounds of protection in these contexts can be very difficult to ascertain, and it will take courts to define the boundary with more precision.

The Supreme Court's dismissal of In re: Grand Jury does not mean the justices believe that the issue does not warrant review. When the right case comes along, the justices may decide to take up the debate over what test should apply.

Until that time, in the wake of In re: Grand Jury, practitioners must navigate inconsistent tests across the country, increased attention brought by In re: Grand Jury to the vulnerability of the attorney-client privilege in dual-purpose situations, and the unpredictability of evolving case law.

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[1] See Michael E. Solimine & Rafael Gely, The Supreme Court and the DIG: An Empirical and Institutional Analysis, 2005 Wis. L. Rev. 1421 (2005).

[2] Id.

[3] Id.

[4] Pritchard v. County of Erie, 473 F.3d 413, 420 (2d Cir. 2007); Better Gov't Bureau Inc. v. McGraw, 106 F.3d 582, 602 n.10 (4th Cir. 1997); Taylor Lohmeyer Law Firm PLLC v. U.S., 957 F.3d 505, 510 (5th Cir. 2020); Alomari v. Ohio Dep't of Pub. Safety, 626 Fed. Appx. 558, 570 (6th Cir. 2015); Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 601 (8th Cir. 1977); In re: Spalding Sports Worldwide Inc., 203 F.3d 800, 805 (Fed. Cir. 2000).

[5] In re: Kellogg Brown & Root Inc., 756 F.3d 754 (D.C. Cir. 2014).

[6] In re: Grand Jury, 23 F.4th 1088, 1094 (9th Cir. 2022).

[7] In re: Grand Jury, 23 F.4th at 1095 n.5 ("We are aware, for example, that normal tax return preparation assistance — even coming from lawyers — is generally not privileged, and courts should be careful to not accidentally create an accountant's privilege where none is supposed to exist"); In re Shapiro, 381 F.Supp. 21, 22 (N.D. Ill. 1974); see also U.S. v. Frederick, 182 F.3d 496 (7th Cir. 1999).

[8] In re: Grand Jury, amicus brief of American Bar Association, Nov. 23, 2022, https://www.supremecourt.gov/DocketPDF/21/21-1397/247455/20221123154104131_21-1397acAmericanBarAssociation.pdf.
