

SUPREMES BURY PRIVILEGE CASE AFTER ORAL ARGUMENT



Gareth T. Evans



Ana M. Cabassa-Torres



Daniel J. Zagoren

In a development that no doubt came as a surprise to the many in-house and outside counsel following the case because it involves the attorney-client privilege, the Supreme Court on January 23 dismissed *In re Grand Jury* following oral argument. It did so on the grounds that certiorari was improvidently granted (often referred to as a “DIG”). Consistent with its usual practice, the Court did not explain its rationale for the DIG. What transpired during oral arguments, however, may offer some insight.

The Court had the rare opportunity to provide guidance on an important privilege issue—the appropriate test for determining whether the attorney-client privilege protects “dual-purpose” communications (i.e., those that have inextricably intertwined business and legal purposes).

The alternatives were the primary purpose test that the district court and the Ninth Circuit applied, the significant legal purpose test adopted by the D.C. Circuit, or some other test. In addition to the parties’ briefs, thirteen *amici* submitted briefs advocating for adoption of the significant legal purpose test over the primary purpose test.

Oral Argument

Perhaps demonstrating how difficult the application of the attorney-client privilege to dual-purpose communications can be, the justices’ questioning of both parties reflected a lack of clarity regarding the showing required by the D.C. Circuit’s significant legal purpose test and skepticism about whether to adopt the test. The justices also observed that both sides in the oral argument changed their positions from those in their briefs.

For example, in response to questions about how to evaluate whether a legal purpose is significant, the petitioner argued that it was not about the relative significance of the legal purpose, but rather whether there was *any* bona fide, legitimate, or meaningful legal purpose, which the justices noted was a lesser threshold than “significant.” Later, in its argument, the government appeared to express support for the significant legal purpose test but backtracked when asked if it intended to make that concession. At one point, Justice Gorsuch commented, “I am really confused now.”

Some of the justices also pointed to trial courts’ experience applying the primary purpose test and noted a lack of evidence that it had chilled the attorney-client privilege as the petitioner argued it would. The petitioner responded that while courts purport to apply the primary purpose test, they often only look to see whether there is any legal purpose. Relatedly, some justices observed that district courts have significant experience

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determining whether communications are privileged and make judgment calls without the need for mathematical precision. They also expressed skepticism regarding the frequency with which legal and non-legal advice cannot be separated.

Perhaps portending the DIG, Justice Kagan asked the petitioner, “I’m wondering if you would just comment on, you know, the ancient legal principle, if it ain’t broke, don’t fix it?”

Why Didn’t the Court Resolve this Case?

Because the Court did not explain why it dismissed the case, we are left to speculate.

The Court may have concluded there is no meaningful dispute because the justices perceived that the competing tests, as applied, generally result in the same outcome. The petitioner argued that even though courts may say they are applying the primary purpose test, they are actually only looking for any legal purpose. Moreover, the government acknowledged that where competing legal and non-legal purposes are equal, the entire communication is privileged.

The Court may also have determined that the universe of cases in which there is a genuine dispute requiring additional guidance regarding dual-purpose communications is very small because legal content usually can be separated and redacted. Some of the justices pointed out that cases involving

Finally, the Court may simply have been unable to reach a consensus and worried that a fractured opinion would do more harm than good.

Going Forward

Because the Supreme Court did not resolve the issue, and because it is not clear that application of the primary purpose and significant legal purpose tests will always yield the same result, litigants must continue to navigate competing tests to determine when the attorney-client privilege protects dual-purpose communications. Litigants should look to the applicable federal or state authority and be mindful that the same dual-purpose communication may be treated differently depending on the jurisdiction.

Good privilege “hygiene” will also continue to be important to ensure that communications with counsel for purposes of legal advice are protected. Because in-house counsel are deeply integrated into all aspects of the modern corporation and often provide non-legal advice, organizations should consider measures to ensure privileged communications do not lose their protection because they are part of a communication that also includes a discussion of related business considerations. Organizations could, for example, emphasize the

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importance of in-house counsel expressly labeling communications made for purposes of legal advice as “attorney-client privileged” and by keeping legal and non-legal communications in separate email strings.

Even if the Supreme Court had adopted a uniform test for determining whether a dual-purpose communication should be protected as privileged, it would not have addressed an arguably more pressing privilege issue—the difficulties and often enormous burden of redacting privileged portions of otherwise non-privileged email strings and then logging separately each email in the string containing a redaction. Might the Court address this issue in the future? We won’t hold our breath.

Jonathan Redgrave and Gareth Evans filed an amicus brief in support of the petitioner on behalf of Lawyers for Civil Justice.

For assistance with or additional information on this topic, please contact Gareth Evans at gevans@redgravellp.com.

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