

SUPREME COURT DECLINES TO CONSIDER PRIVILEGE STANDARD



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On January 9, 2023, the U.S. Supreme Court heard oral argument in *In re Grand Jury*, which addressed a circuit court split over the proper test to determine attorney-client privilege protection for communications that have inextricably intertwined legal and business purposes. Two weeks later, on January 23, in a development that undoubtedly came as a surprise to many in-house and outside counsel, the Court without comment dismissed the case on the basis that certiorari was improvidently granted, thereby missing a rare opportunity to address and clarify an important privilege issue.

The circuits are split regarding the appropriate test to apply in determining whether a dual-purpose communication (i.e., one with inseparable legal and business purposes) should be protected as privileged. The options are the “primary purpose” test (which is the majority rule in federal and state courts), the “significant legal purpose” test adopted by the D.C. Circuit in opinions authored by then-Judge Kavanaugh, or some other test.

Why did the Court dismiss the case? Likely contributing to its decision, oral arguments did not go particularly well for either side. The petitioner, which had sought adoption of the D.C. Circuit’s test, appeared to advocate for a less moderate standard, arguing that the appropriate test should not be about the relative significance of the legal purpose, but whether there was any bona fide, legitimate, or meaningful legal purpose. Justices commented that this was a change of position and that the petitioner’s new position was a lesser threshold than “significant.” 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.”

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 had argued that even though courts may say they are applying the primary purpose test, they actually only look for any legal purpose. Moreover, the government acknowledged that where competing legal and non-legal purposes are equal, the entire communication is privileged. Additionally, justices pointed out that cases involving disputes over actual dual-purpose communications are relatively rare. The Court also may have determined, as the government argued at the certiorari stage, that this case was a poor vehicle for the development of a broadly applicable privilege standard because it arose in the tax context. Alternatively, the Court may simply have failed to reach a consensus.

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Because the Supreme Court did not resolve the issue, litigants must continue to consider competing privilege tests for dual-purpose communications. Good privilege “hygiene” will continue to be important to ensure that communications with counsel for purposes of legal advice are protected. Organizations could, for example, emphasize the 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 outside of dual-purpose communications, these practical steps are important to protect communications genuinely made for purposes of legal advice.

A more in-depth analysis of the Court’s dismissal will appear in *Legaltech News* on February 7, 2023.

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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