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Primary or Significant? The Impact of the Supreme Court's Decision to Not Review Attorney-Client Privilege In Dual Purpose Communications

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Introduction

At some point in their careers, most in-house counsel will be asked about the application of the attorney-client privilege or work on matters in which they will have to become familiar and comfortable with the application of attorney-client privilege in the corporate setting. Thus, when the Supreme Court of the United States agreed to hear *In re Grand Jury*, 598 U.S. ____ (2023) (No. 21-1397), a case which contemplated how the attorney-client privilege applies to “dual-purpose” communications that contain both legal and business advice, in-house counsel were likely standing by with bated breath.

Although oral argument occurred on January 9, 2023, on January 23, 2023, the Supreme Court dismissed the case, ordering *per curiam*, “The writ of certiorari is dismissed as improvidently granted.” We will never know how the Supreme Court would have ruled. Consequently, there remains a circuit split in which some courts—like those in the Second, Fifth, Sixth, and Ninth Circuits—apply the “primary purpose” test while others—like in the D.C. Circuit—apply the “significant purpose” test to dual-purpose communications. Accordingly, in-house counsel and the law firms that support them are left in a state of uncertainty. Nonetheless, there are several potential takeaways that can be gleaned from *In re Grand Jury*.

Background

In re Grand Jury concerned an unnamed law firm specializing in international tax issues that was served with a grand jury-issued subpoena related to a criminal investigation, and which then withheld certain dual-purpose documents containing both legal and business tax advice, citing privilege as a shield. Following the district court's endorsement of the government's motion to compel the withheld documents, the district court held the law firm in contempt, explaining that “certain dual-purpose communications were not privileged because the ‘primary purpose’ of the documents was to obtain tax advice, not legal advice.” See *In re Grand Jury*, 23 F.4th 1088, 1090 (9th Cir. 2021). As a result, the law firm requested that the Ninth Circuit go beyond the “primary purpose” test, in which “courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice The natural implication of this inquiry is that a dual-purpose communication

can only have a single ‘primary’ purpose.” *Id.* at 1091. The Ninth Circuit affirmed the district court’s decision and upheld the “primary purpose” test. *Id.* at 1090.

On appeal, the law firm asked the Supreme Court to adopt the broader “significant purpose” test, where legal advice can be just “one of the significant purposes of the communication.” See *id.* at 1094 (citing *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)). After initially having granted certiorari, the Supreme Court changed course and declined to take up the issue.

Potential Takeaways

Given that the Supreme Court dismissed the case without explanation and the circuit split remains, litigation and discovery fights will likely continue in lower courts over the scope of the application of attorney-client privilege for dual-purpose communications.

While there are multiple jurisdictional issues that may affect the application of the “primary purpose” test in practice, in-house counsel in jurisdictions that use this standard should be mindful of how privileged communications are prepared and disseminated. This is especially true for counsel that may lack a background in litigation.

Communications that include both legal and business advice should make the legal purpose clear on the face of the document, and if possible, signal that the communication is being prepared for the primary purpose of rendering or seeking legal advice. Ideally, if the content of certain communications becomes more and more legal in nature, a separate email chain should be utilized and labeled with the appropriate privilege and confidential designations.

Moreover, in-house counsel should be mindful of the recipients of dual-purpose communications. Broad dissemination of communications that contain legal and business advice to those interested in the business-related contents or beyond the privilege control group could undermine the “primary” purpose of the legal advice and render the communication non-privileged.

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