

Supreme Court Evaluates Scope of Attorney-Client Privilege for Dual-Purpose Communications

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On January 9, 2023, the US Supreme Court heard oral argument in the matter of *In re Grand Jury*, No. 21-1397, which asked the Court to determine whether “dual-purpose” communications involving both legal and business advice are protected by attorney-client privilege. Although the Court’s decision would have had significant consequences in particular to the daily work of in-house counsel, and other lawyers, who regularly engage in business and legal communications that cannot be easily parsed out from each other, the Court changed course and declined to resolve the case leaving the question to lower courts.

“A Primary Purpose” or “Significant Purpose” Test

The heart of the case was whether the Supreme Court would adopt a “primary purpose” test or a “significant purpose” test when evaluating dual-purpose communications. The Petitioner asked the Supreme Court to adopt the “significant purpose” test and overturn the commonly used “primary purpose” test, arguing that the latter requires courts to rank a dual-purpose communication’s purpose, which he called “an inherently impossible exercise.” The “significant purpose” test, on the other hand, would require a mere “genuine” legal purpose, which would provide predictability among the courts and promote open and frank communications between clients and their counsel

Conversely, the Respondent urged the Court to uphold the Ninth Circuit’s “primary purpose” test, arguing that a “primary purpose” test did not necessarily require courts to ascertain a primary purpose; instead, to the extent a non-legal primary purpose of a dual-purpose communication is discernable and the legal purpose was secondary or even equal in measure, the communication would be deemed privileged.

Implications of the Court’s Dismissal

Instead of resolving a much anticipated issue within the legal community, the Court dismissed *In re Grand Jury* stating that it shouldn’t have granted its review. The Court’s decision ultimately lets stand the Ninth Circuit “primary purpose” test—a commonly used test by many courts. The Court’s

decision has several implications on counsels and litigation: (1) counsel, especially in-house counsel, may try to silo their legal and non-legal advice complicating their ability to provide legal advice in the midst of complex business discussions; (2) discovery privilege reviews will continue to be time intensive for cases involving large volumes of dual-purpose communications; and (3) the practical applicability of the “primary purpose” test will continue to be questioned given the modern era of electronic communications and discovery.

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