

## Privilege Analysis Following Dismissal of ‘In re Grand Jury’

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The attorney-client privilege protects confidential communications between attorneys and clients made in connection with the provision of legal advice. A recurring issue faced by litigants and courts is whether the attorney-client privilege applies to communications that involve legal and nonlegal advice that cannot be disentangled. This issue has proved especially problematic when an attorney is advising the client with respect to the preparation of tax returns.

Last year, when the Supreme Court granted certiorari in *In re Grand Jury*, No. 21-1397, it appeared ready to resolve a split among the circuit courts of appeals regarding the appropriate test for determining whether the privilege protects such “dual-purpose” communications. On Jan. 23, 2023, however, the court dismissed the writ of certiorari in *In re Grand Jury* as improvidently granted, disappointing practitioners who had hoped for clear guidance on the issue.

### ‘In re Grand Jury’

In *In re Grand Jury*, a law firm had advised a client regarding the tax consequences of the client’s expatriation. The law firm also prepared certain individual income tax returns, as well as the form used to certify compliance with expatriation tax requirements. In response to a grand jury subpoena, the law firm asserted the attorney-client privilege with respect to certain documents that contained both legal and tax advice. The district court granted the government’s motion to compel the production of the withheld documents and ultimately held the law firm in contempt.

On appeal, the U.S. Court of Appeals for the Ninth Circuit noted that “an attorney’s advice may integrally involve both legal and non-legal analyses.” *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. 2021) (quoting *United States v. Sanmina*, 968 F.3d 1107, 1118 (9th Cir. 2020)). Relying on its precedent applying the privilege “to legal advice about what to claim on a tax return, even if it does not apply to the numbers themselves,” the court rejected the government’s contention that “dual-purpose communications in the tax advice context can never be privileged,” (citing *United States v. Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990), overruled on other grounds by *United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997)).

The court then noted that district courts in the Ninth Circuit have applied two different tests for determining whether dual-purpose communications are privileged: the “because of” test and the “primary purpose” test. The court explained that the former test, which was borrowed from cases applying the work-product doctrine, does not attempt to prioritize the motives underlying the communication, but rather looks at the totality of circumstances to assess whether it was made “because of” the need to provide or receive legal advice. In rejecting the “because of” test, the Ninth Circuit concluded that



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the “attorney-client privilege and the work-product protection doctrine are animated by different policy goals” and that “the scope of the attorney-client privilege is defined by the purpose of the communication.”

The Ninth Circuit next addressed appellants’ argument that it should apply the “significant purpose” test adopted by the D.C. Circuit in *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014). In *Kellogg*, during discovery in a False Claims Act case, a plaintiff sought documents that had been prepared in connection with an internal investigation overseen by a defense contractor’s in-house counsel. The district court initially rejected the privilege assertion finding that the investigation had been “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.” *Barko v. Halliburton*, No. 1:05-CV-1276, 2014 WL 1016784, at \*3 (D.D.C. Mar. 6, 2014). In granting a petition for a writ of mandamus, however, the D.C. Circuit recognized that two overlapping purposes can exist and applied a “significant purpose” test, which asks whether “obtaining or providing legal advice [was] a primary purpose of the communication, meaning one of the significant purposes of the communication.” In rejecting the primary purpose test, the court concluded that “sensibly and properly applied, [it] cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other.”

In *In re Grand Jury*, the Ninth Circuit recognized “the merits of the reasoning in *Kellogg*,” since isolating a single primary purpose of a communication “can quickly become messy in practice” and create “trouble” for courts. Ultimately, however, the court found that the reasoning in *Kellogg* “does not apply with equal force to the tax context” since tax return preparation assistance “is generally not privileged” even when that assistance is provided by an attorney. In this regard, the Ninth Circuit noted that courts “should be careful to not accidentally create an accountant’s privilege where none is supposed to exist.” While leaving open the possibility that it might apply the *Kellogg* test in a different context, the Ninth Circuit noted that doing so “would only change the outcome of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a nonlegal purpose,” and concluded

that “because the district court did not clearly err in finding that the predominate purpose of the disputed communications was not to obtain legal advice, they do not fall within the narrow universe where the *Kellogg* test would change the outcome of the privilege analysis.”

### **Supreme Court Proceedings**

In April 2022, the law firm petitioned for a writ of certiorari, asking the Supreme Court to resolve what it framed as a split among three incompatible tests: the D.C. Circuit’s significant purpose test; the Ninth Circuit’s primary purpose test; and the Seventh Circuit’s approach that, in cases involving tax returns, “dual-purpose communications are never privileged no matter how significant the legal purpose.” The government, by contrast, urged the court to reject the petition, arguing that the district court properly determined that the documents were not privileged by applying the primary purpose test. The government further argued that the Ninth Circuit’s decision does not conflict with *Kellogg* since it did not preclude application of the significant purpose test in the future. Finally, the government asserted that the Seventh Circuit’s test was limited to the attorney-prepared accountants’ work papers at issue in *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999), and in any event, that the Seventh Circuit’s approach would not have led to a different result in the pending case. More generally, the government argued that tax-related communications raise unique privilege questions making *In re Grand Jury* an inappropriate forum to determine a widely applicable test, while the law firm responded that there is “no justification for adopting different privilege rules for tax cases,” and that clarity is “particularly important in the context of tax advice” since tax attorneys regularly provide clients with legal and nonlegal advice.

The court granted certiorari on Oct. 3, 2022, and thereafter the government advocated for the primary purpose test, noting that most circuit courts of appeals consider the predominate purpose of a communication and that the more expansive significant purpose test has never been applied to tax-related communications. The law firm—supported by numerous amici—initially urged the court to adopt the significant purpose test.

In its reply brief and at oral argument, however, the law firm proposed application of a “bona fide—i.e., meaningful or legitimate” test. Reply Br. at 6; see Transcript of Oral Argument, *In re Grand Jury*, No. 21-1397 (Jan. 9, 2023) (Tr.) at 5:21-24; 6:17-22. In justifying this shift, the law firm argued that a bona fide test protects privileged information without requiring a court “to make [an ex ante] judgment ... about the relative importance of legal and non-legal considerations.”

Throughout the oral argument, both the justices and counsel struggled to delineate the optimal “quantity” of legal advice that would push a dual-purpose communication over the privilege line. The law firm argued that the bona fide standard resolved the issue, explaining that the “degree of significance, whether it was 25% legal, 33% legal, [or] 42% legal, wouldn’t matter,” and that the privilege would attach so long as the legal purpose of the communication was legitimate. The justices questions, however, suggested that the proposed standard did little to provide the needed clarity. For example, when Chief Justice John Roberts inquired if “a 10% chance of prevailing” qualified as bona fide, petitioner responded only that the line should be drawn between “legitimate” and a “long shot” to “guard against pretext.” When it was the government’s turn, the justices likewise tried to pin down how to quantify whether the purpose of a communication was primarily legal, with Justice Neil Gorsuch expressing that he was “struggling” and “really confused” by the government’s position.

A second common theme throughout the oral argument was the justices’ concern with expanding the privilege beyond its proper scope. Justice Sonia Sotomayor noted that because a “small percentage” of an accountant’s work involved legal advice, the test proposed by the law firm would undermine the court’s precedent that “accountants didn’t have privilege.” See *Couch v. United States*, 409 U.S. 322, 335 (1973). Justice Ketanji Brown Jackson acknowledged the difficulty of having a court identify the most significant purpose of a conversation after the fact but viewed as problematic the potential that the bona fide test could be satisfied where a lawyer

adds relatively little to an otherwise non-privileged discussion about a business decision.

In light of the justices’ confusion and concern with adopting a new standard, Justice Elena Kagan asked the law firm to address “the ancient legal principle, if it ain’t broke, don’t fix it.” And sure enough, two weeks after oral argument, the Supreme Court issued its decision dismissing the writ as improvidently granted.

### Conclusion

Given the absence of clarity from the Supreme Court, disputes will continue to arise over the application of the attorney-client privilege to dual-purpose communications. Tax practitioners need to be especially conscious of this issue. While attorneys can and do give legal advice in connection with the preparation of tax returns, the legal and nonlegal purposes of such advice are frequently entangled, thereby creating a risk that a court applying the primary purpose test will reject a claim of privilege since it is hard to conclude that the legal aspect of the attorney’s advice predominates. See Brief for American College of Tax Counsel as Amicus Curiae Supporting Petitioner at 7-8, *In re Grand Jury*, No. 21-1397 (Nov. 23, 2022)

In circuits that have adopted the primary purpose test, practitioners need to be cognizant not only of the high threshold for establishing that dual purpose communications are privileged as a general matter, but also of the judicial antagonism to treating an attorney’s assistance in preparing a tax return as legal advice. See *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987) (collecting cases). Even practitioners in jurisdictions that have adopted (or at least not foreclosed) the less restrictive significant purpose test will need to take care to distinguish between communications that reflect legal advice from those that reflect accounting advice. While it remains to be seen whether courts can be persuaded to apply the *Kellogg* test in the tax context, practitioners should not assume their tax-related advice will remain privileged.

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