

Proskauer Files Amicus Brief in Support of a “Practical and Commonsense” Application of the Attorney-Client Privilege

Proskauer For Good on January 5, 2023

Proskauer recently submitted an *amicus* [brief](#) on behalf of The Buckeye Institute, an independent research and educational institution, in connection with the U.S. Supreme Court case of [In Re Grand Jury](#). On appeal from the U.S. Court of Appeals for the Ninth Circuit, this case represents the first time the Court has examined the scope of the attorney-client privilege since it decided *United States v. Upjohn* in 1981.

As highlighted by the Proskauer brief, the attorney-client privilege serves as a critical public policy that is fundamental to the legal profession. It protects from the disclosure of confidential communications between an attorney and a client made for the purpose of obtaining or providing legal advice, and is intended to encourage full and frank communications between attorneys and clients and promote broader public interests in the observance of law and administration of justice. Currently, tax attorneys face uncertainty in advising clients about the application of the attorney-client privilege, because, while the attorney-client privilege applies to protect communications in connection with the provision of legal advice, it does not protect the same communications with respect to non-legal (for example, tax-return preparation) advice. The specific issue before the Supreme Court in *In re Grand Jury* is whether communications that involve both legal advice and advice given with respect to tax return preparation could be protected by the attorney-client privilege.

The Proskauer brief points out that adopting a narrow view — that advice having both legal and tax return preparation aspects is not privileged — would severely weaken the attorney-client privilege by ignoring the practical reality that the tax Code is voluminous and complex and attorneys routinely furnish legal and non-legal advice as part of tax advice, making the relative purposes impossible to distinguish:

What is the primary purpose of the communications? Tax return preparation or legal advice? To put it simply, that is an unanswerable question: the advice is for *both*, and cannot be subdivided as a practical matter any further.

The Proskauer brief urges the court “to adopt a practical and commonsense approach similar (or identical)” to the “significant purpose” test (previously adopted by the D.C. Circuit) to provide confidence and uniformity. Under that test, dual-purpose communications are privileged where one of the significant purposes is to obtain or provide legal advice.

Because *In Re Grand Jury* is likely to have significant implications in both criminal and civil proceedings, multiple organizations have joined The Buckeye Institute in filing *amici* in this case seeking clarity on the scope of the attorney-client privilege with respect to dual-purpose communications. A resolution of *In Re Grand Jury* in favor of a broad scope to the attorney-client privilege would provide stability and certainty to countless individuals, small businesses, nonprofits, and others who must navigate an increasingly complex body of tax law, and would allow such persons to organize their affairs with confidence that communications with their lawyers will not be used against them.

The Proskauer team is led by partners [Richard M. Corn](#) and [Mark D. Harris](#) and includes associate [J. Tyler Moser](#).

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