

For All Intents and Dual-Purposes, SCOTUS Fails to Resolve Circuit Split

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A three-way circuit split has long plagued the realm of attorney-client privilege on how to treat communications that implicate both legal and non-legal concerns (known as “dual-purpose communications”). Namely, if a lawyer communicates with their client, simultaneously providing legal advice and business advice, is the entire communication protected by the attorney-client privilege? How substantial must the legal advice be for the communication to be privileged? The Supreme Court recently had the opportunity to resolve this split, but in a strange turn of events, dismissed the previously granted writ of certiorari as improvidently granted two weeks after hearing oral argument. Before delving into the oral argument and subsequent dismissal by the Supreme Court, it is worth reviewing a brief history of the existing circuit split.

The federal circuits generally maintain one of three positions on dual-purpose communications: (1) they are not privileged if they contain both legal and non-legal advice (at least in the tax context), (2) they are privileged if legal advice is “a substantial purpose” of the communication, or (3) they are privileged if legal advice is “the primary purpose” of the communication.

In the Seventh Circuit, dual-purpose communications involving tax advice are not privileged. This approach was established in [U.S. v. Frederick](#), a 1999 decision that considered the privileged nature of communications with a lawyer who was also an accountant that provided both legal and tax advice to his clients. When the IRS sought to obtain documents from some of the lawyer's clients, the lawyer refused, asserting they were protected by the attorney-client privilege. Many of the documents at issue were created in connection with the lawyer's preparation of the clients' tax returns. The Seventh Circuit, acknowledging that some documents might be solely legal (and privileged), while other documents might be solely non-legal (and not privileged), held that "dual-purpose" documents "prepared for use in preparing tax returns and for use in litigation" were not privileged. The court reasoned that otherwise, clients in litigation could simply hire a lawyer to prepare their tax returns and then invoke attorney-client privilege to prevent the production of tax documents. Thus, at least with respect to tax advice, dual-purpose communications are not considered privileged in the Seventh Circuit.

The "primary purpose test" (also known as the "significant purpose test") was established in 2014 by the D.C. Circuit in [In re Kellogg Brown & Root](#) and articulated as follows: "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" If so, then the document is privileged. The court in *In re Kellogg Brown & Root* considered the privileged nature of documents related to a company's internal investigation, which had both a business purpose and a legal purpose. While the company asserted privilege over these documents, the party seeking discovery claimed they were unprivileged business records. The district court ordered their production, finding that the documents were "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." The D.C. Circuit reversed, reasoning that under the primary purpose test, it was clear that at least "one of the significant purposes" of the internal investigation was to obtain or provide legal advice. The communications were therefore privileged and did not need to be disclosed.

The majority approach falls somewhere in between the strict Seventh Circuit rule and the more forgiving D.C. Circuit rule. In the same case that ended up before the Supreme Court this past January, [In re Grand Jury](#) (2021), the Ninth Circuit articulated a narrower form of the “primary purpose test,” in which dual-purpose communications are considered privileged if legal advice was **the** primary purpose of the communication (in contrast with the D.C. Circuit formulation that asks whether legal advice was **a** primary or significant purpose). Similar versions of this rule are also used in the Second, Fifth, and Sixth Circuits. Under the Ninth Circuit’s approach, the dual-purpose communication can only have a single primary purpose, while the D.C. Circuit’s test contemplates the possibility of multiple “significant purposes.” In *In re Grand Jury*, a company and its law firm were both served with grand jury subpoenas requesting documents related to a criminal investigation. Certain communications were withheld that included both tax advice and legal advice, as the company’s law firm had also prepared the company’s tax documents. The Ninth Circuit agreed that **the** primary purpose of the communications at issue was not to obtain legal advice and affirmed the district court’s finding that the documents were not privileged. It is worth noting that the Ninth Circuit acknowledged the D.C. Circuit’s broader approach, but held that while it *might* apply in the context of internal corporate investigations, it did not apply to the tax issues presented in *In re Grand Jury*.

The subpoenaed parties in *In re Grand Jury* thereafter [appealed](#), and the Supreme Court granted certiorari on the question of “[w]hether a communication involving both legal and non-legal advice is protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication.” On January 9, 2023, the Supreme Court held [oral argument](#) on the issue.

The justices expressed varying opinions at oral argument, but all agreed that the question presented was extremely difficult to answer. Even the parties seemed to change their positions throughout the case, proposing slightly different approaches throughout the litigation. At oral argument, the law firm resisting production contended that the Ninth Circuit approach would make it too difficult to predict whether communications will be protected, but Justice Sotomayor responded that such predictions will be difficult no matter the outcome. Justice Kagan noted that it was a “big ask” to depart from the more widely accepted Ninth Circuit “primary purpose” approach. Justice Gorsuch stated, “I’ll be honest. I’m struggling this morning.”

The Supreme Court [dismissed](#) the writ of certiorari two weeks after oral argument as improvidently granted, an unexpected but not unheard-of result. It is possible that the complicated question at issue, compounded with the secrecy of the grand jury process, did not provide the Court with the proper vehicle to resolve the issue. Left without guidance from the Supreme Court and perhaps even more uncertainty than before, lawyers should be vigilant and confirm the accepted approach to dual-purpose communications in their practicing jurisdiction before communicating with their clients about both legal and business matters.

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