

HWG Ethics Update

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For our latest ethics update, we examine the Supreme Court's recent dismissal of *In re Grand Jury* and what that means for in house privilege.

As you may have heard, *In re Grand Jury* was gearing up to be one of the biggest attorney-client privilege decisions in history and then it was dismissed as improvidently granted on January 23, 2023. In other words, the Supreme Court changed its mind about deciding the case.

Facts: An unnamed law firm that prepares tax forms for clients received a subpoena from a federal grand jury conducting a criminal investigation of one of the firm's clients. The firm withheld some documents as privileged, and the government moved to compel in the U.S. District Court for the Central District of California.

Holding: The Central District granted the motion in part and, applying the primary or predominant purpose test to these dual purpose—i.e., legal and nonlegal—communications, ordered disclosure of the portions of communications “where the primary or predominate purpose was about the procedural aspects of the preparation of [the client's] tax return[s]” or where a certified public accountant “provided advice as an accountant.” The Ninth Circuit affirmed.

According to petitioner, the Ninth Circuit's decision created a three-way split among the circuits. In the D.C. Circuit, a communication is privileged so long as there is a significant legal purpose behind it, and it does not matter whether there is also a significant non-legal purpose. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). In the Ninth Circuit, a communication is privileged only if the legal purpose(s) is/are more significant than the non-legal purpose(s). And in the Seventh Circuit, “a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged.” *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999).

The Ninth Circuit's decision created an uproar. Amici, including the American Bar Association, feared erosion of the privilege, and filed numerous briefs. But after oral argument, the Supreme Court declined to decide the case. This could mean they think the status quo is fine—there were some comments by the Justices to this effect during the argument—or that the case was not the right vehicle for this decision. Perhaps a future case will provide that vehicle.

Practical Tips: Your communications may have more or less protection, depending on the

jurisdiction you appear in. In order to ensure maximum protection, try to keep communications seeking legal advice separate from those seeking business advice. Separating legal questions and adding a privileged header to those communications is good practice. If that is not possible, make legal advice the main purpose of any document you intend to keep privileged. For example, do not create a lengthy memorandum that contains a mix of business and legal advice. Separate them into two memorandums to maintain privilege over the truly legal issues or clearly label the advice that is legal in the memorandum and place it in its own distinct section of the memorandum.

For more information about this case, check out [Scotusblog's webpage](#) dedicated to it.