

Thoughts for In-House Counsel: Attorney-Client Privilege

The U.S. Supreme Court has dismissed a case asking the Court to adopt an approach that would broaden the scope of the attorney-client privilege when communications contain both legal and nonlegal advice. The Supreme Court agreed to review *In re Grand Jury*, in which the U.S. Court of Appeals for the Ninth Circuit ordered a firm to disclose tax-related communications. The Ninth Circuit held that the communications were not covered by attorney-client privilege because their *primary purpose* was not to provide legal advice. After accepting the review, the Supreme Court recently decided to dismiss the case leaving additional questions, particularly for in-house counsel.

Circuit Split

A split currently exists among various jurisdictions as to whether legal advice must be the *primary purpose* of the communication to obtain privileged status or, conversely, must only be a *significant purpose*. The U.S. Court of Appeals for the Seventh Circuit adds another even stricter interpretation holding that communications containing both legal and nonlegal advice are *per se* not protected by attorney-client privilege—at least in the tax filing preparation context. *United States v. Frederick*, 182 F.3d 496, (7th Cir. 1999), cert. denied, 528 U.S. 1154 (2000). Given subsequent case law within the Seventh Circuit, however, it is unclear whether the Seventh Circuit's rule is intended to apply beyond tax preparation scenarios.

In re Grand Jury

Prior to the Supreme Court's dismissal of *In re Grand Jury*, many interest groups filed amicus briefs in support of the broader significant purpose test instead of the stricter primary purpose test. Advocates of the significant purpose test, likely including most in-house counsel, want predictability and clarity in determining whether communications will be privileged. Government agencies typically prefer the primary purpose test to minimize impediments in their efforts to subpoena documents.

The Supreme Court refused to adopt either test and dismissed the case. The dismissal lends itself to further speculation about how the Court (and lower courts) will address these issues in the future. The Court may be deferring to

POSTED:

Feb 1, 2023

RELATED PRACTICES:

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

RELATED PEOPLE:

[Joshua D. Taggatz](#)

<https://www.reinhartlaw.com/people/joshua-tagatz>

[Catherine L. Davies](#)

<https://www.reinhartlaw.com/people/catherine-davies>

[Steven P. Bogart](#)

<https://www.reinhartlaw.com/people/steven-bogart>



jurisdictions to adopt the standard they prefer, or the dismissal may indicate the Court is comfortable with the Ninth Circuit's approach. However, the Court did agree to review the case, so it remains to be seen whether it will be more interested in addressing the issue when a different set of facts arises. The Court's questions in this case indicate that it will explore further the extent to which a lawyer's involvement triggers attorney-client privilege for the communication. Is having a lawyer in the room enough? How substantive must the lawyer's role be?

Next Steps

For now, even in jurisdictions that have adopted the significant purpose test—and even more so in jurisdictions utilizing the primary purpose test or another stricter standard—in-house attorneys should assume that all communications containing both legal and nonlegal advice may be subject to discovery and subpoena.

Counsel will want to improve the likelihood of attorney-client privilege protection by clearly communicating that the purpose of any written or oral communication is to provide legal advice and to restrict those discussions to legal topics. As always, counsel should caution participants not to forward communications to others. For questions regarding attorney-client privilege, please contact Cathy Davies, Steve Bogart or Josh Taggatz of Reinhart's Ethics and Professional Responsibility Team.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.