



Business Litigation Update

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Supreme Court Ultimately Declines to Decide Attorney-Client Privilege Case

On Monday, the Supreme Court dismissed the writ of certiorari as improvidently granted in *In re Grand Jury*, a case that had potentially significant consequences for federal common law attorney-client privilege. Oral argument in the case was heard on January 9, 2023. The case hinged on which test should be used to determine whether the federal common law attorney-client privilege applied to dual purpose communications, that is, communications which contain both legal and non-legal advice. Many legal and business organizations supported a decision that would have broadened the privilege to include dual purpose topics, as long as seeking legal advice was one purpose for the communication.

The Court's decision leaves in place a Ninth Circuit decision holding that the attorney-client privilege did not apply where the primary purpose of the documents was not legal but involved tax return preparation. The *In re Grand Jury* decision held that the privilege protects documents only where the primary purpose of the communication is legal, and that if the nonlegal purpose of the advice is found to outweigh the legal purpose, then the communication is not privileged and is subject to disclosure.

The Justices, who seemed skeptical at oral argument that the Ninth Circuit's formulation was unworkable, difficult to administer or marked a shift in the way courts currently analyze privilege claims, let the *In re Grand Jury* decision stand.

While the legal and business organizations submitting amicus briefs hoped for clear guidance and a broader scope of the privilege, the formulation of the test to analyze

attorney-client privilege claims in federal court appears to differ in the D.C. Circuit, Ninth Circuit and Seventh Circuit.

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