



Business Litigation Update

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Supreme Court Hears Oral Argument in Most Consequential Attorney-Client Privilege Case in Decades

The Supreme Court heard oral argument today in *In re Grand Jury*, a case about the scope of the federal common law attorney-client privilege that may have a significant impact on the entire legal practice. At issue is the test to be applied to communications that contain both legal and nonlegal advice. The appeal challenges a Ninth Circuit decision affirming a lower court holding that the attorney-client privilege did not protect documents of an unnamed law firm from disclosure to a grand jury 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 firm argued in its certiorari petition that this analysis is in conflict with the D.C. Circuit's test (authored by then-Judge Brett Kavanaugh) in *In re Kellogg Brown & Root Inc.* that considers whether obtaining or providing legal advice was one of the significant purposes of the communication such that the privilege would apply.

At oral argument, petitioner argued that the Court should adopt a significant purpose test such that any bona fide, good faith legal purpose would be sufficient to shield a communication from discovery. Justice Sotomayor inquired why the federal courts should apply a significant purpose test when the majority of state courts follow the primary purpose test and expressed doubt that the primary purpose test was difficult to administer, pointing to the meticulous redaction of documents in the underlying dispute.

The Solicitor General argued that the primary purpose test has been used for decades and that adoption of a test expanding the privilege to protect any document with a bona fide legal purpose would be destabilizing. The government noted that the context of the communication is an important consideration where the legal and nonlegal purposes are intertwined and one that courts use in the analysis, identifying internal investigations as the classic situation where the communication is made for a legal purpose.

There was significant discussion during the argument of how courts apply the primary purpose test and that courts are generally not weighing the percentage of legal versus nonlegal purpose(s) of a document with mathematical certainty but instead use their discretion and apply their judgment.

More than a dozen amicus briefs were filed by a variety of legal and business organizations, including the American Bar Association, urging the Court to adopt a broad interpretation of the privilege that would protect communications containing both legal and nonlegal topics if seeking legal advice was one purpose for the communication.

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