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American Bar Association Litigation Section

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SCOTUS to Weigh in on Privilege Standard for Dual-Purpose Communications

The application and scope of the attorney-client privilege for communications containing both legal and nonlegal advice is a critical consideration to protect the privilege.

By Jessica Barnes

A “bedrock doctrine of the legal profession,” “hallmark of Anglo-American jurisprudence,” and “cornerstone of the American legal system”—these are just a few ways that the attorney-client privilege was described in briefing in a matter before the Supreme Court of the United States (SCOTUS) that has attracted attention from legal scholars across the country.

This closely watched SCOTUS case is *In Re Grand Jury*, No. 21-1397, which involves a dispute over the withholding of documents in the form of communications containing both legal and non-legal advice (dual-purpose communications) in response to grand-jury subpoenas on the basis of privilege. Specifically, the petitioner-law firm provided legal advice to a client regarding the tax consequences of the client’s anticipated expatriation (i.e., renouncing citizenship). Thus, some of the communications from the law firm to the client were made for the dual purpose of providing legal advice about tax consequences *and* to facilitate preparation of the client’s tax returns.

For example, some of the documents that the law firm withheld on a privileged basis included communications related to unsettled statutory requirements, strategies for filing amended income-tax returns for purposes of expatriation, and the drafting of a submission to the IRS advocating for the abatement of a penalty assessment. The law firm withheld these dual-purpose communications on the ground that while relating to the client’s tax returns, they were sufficiently motivated by the additional purpose of obtaining or providing legal advice regarding the client’s taxes.

The District Court for the Central District of California used the “primary purpose test” and permitted petitioner-law firm to withhold in full a set of documents related to the preparation of the client’s tax return because the “primary purpose” of those documents

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was obtaining legal advice and not solely tax-return preparation. Additionally, the district court ordered disclosure of the portions of communications where the primary or predominant purpose concerned the procedural aspects of the preparation of the client's tax return.

Where it found that a portion of a tax-preparation communication contained tax-related legal advice, the district court instructed petitioner-law firm to redact the communication before disclosing the rest of the document. The Ninth Circuit affirmed, upholding the primary-purpose test's application to dual-purpose communications.

Notably, there is a circuit split as to when the attorney-client privilege applies in dual-purpose communications:

- The D.C. Circuit uses the “significant purpose test” and directs courts to look to the legal purpose behind a communication and evaluate whether it is significant.
- The Ninth Circuit, on the other hand, uses the primary-purpose test and directs courts to determine the primary purpose of a communication, and find that the communication is privileged only when that one primary purpose is legal advice.
- The Seventh Circuit has taken a different approach, at least in the context of tax law, concluding that a dual-purpose tax-related document—a document prepared for use in preparing tax returns and for use in litigation—is *not* privileged.

Various amici filed briefs arguing against the stricter standard for asserting attorney client privilege, including:

- Association of Professional Responsibility Lawyers: While ultimately not supporting either side, the association emphasized the critical importance of the privilege and urged the court to adopt a rule that provides certainty and clarity as to the scope of the privilege at the moment that communications between lawyers and their clients occur.
- Federation of Defense & Corporate Counsel: Writing in support of petitioner-law firm, the group argued that the need for certainty is heightened further by the new realities of corporate life, in which legal advice is often sought for combined legal and business reasons by digital means, leading to even more dual-purpose legal communications. Ultimately, this group concluded that the significant-purpose test strikes the right balance.
- American Bar Association: Filing a brief in support of petitioner-law firm, the ABA argued that the primary-purpose test would narrow the privilege far beyond already well-established exceptions and limitations (e.g., crime-fraud exception, waiver by publication to third parties, and inapplicability when not seeking legal advice at all), without justification.

Overall, it is important for attorneys to be mindful of the state of the law in the jurisdictions in which they practice, especially until SCOTUS opines on the breadth of the sacred attorney-client privilege in the realm of dual-purpose communications.

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