

# Dual-Purpose Communications and the Scope of Attorney-Client Privilege

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On Jan. 23, 2023, the United States Supreme Court dismissed an appeal that sought to resolve a conflict relating to dual-purpose communications and the scope of attorney-client privilege.

In *In re Grand Jury*, 23 F. 4th 1088 (9th Cir. 2021), cert granted, 143 S. Ct. 80 (2022)), the Court's determination to grant certiorari was widely seen as an opportunity to resolve a split between differing privilege standards in relation to "dual-purpose communications," or communications between clients and counsel which serve both a business and legal purpose.

However, after granting certiorari and hearing oral argument, the Court rescinded certiorari as improvidently granted and dismissed the appeal.

The Court's lack of decision in this case — closely followed by in-house, corporate, and litigation counsel nationwide — will have broad implications for businesses and employees as they navigate communications with in-house and outside counsel.

In *In re Grand Jury*, a grand jury issued subpoenas to a business and its law firm seeking materials - including electronic and other communications - relating to the company's taxes and cryptocurrency interests. The company and law firm challenged the subpoena and specifically objected to the production of materials they claimed were dual-purpose communications covered by the attorney-client privilege.

Different courts have applied different tests when determining whether privilege applies to dual-purpose communications.

The narrower — and more widely adopted — "primary purpose" test is based on whether legal advice was sought as the primary purpose for communication between an attorney and their client. If it was, then the communications are subject to attorney-client privilege, and parties cannot be forced to produce these materials or testify as to these communications in court proceedings.

The broader "because-of" test focuses on whether the communication would have occurred absent legal advice being sought. If it would not have occurred without legal counsel, then it is protected under attorney-client privilege.

In *In re Grand Jury*, the District Court applied the primary purpose test and determined that the primary purpose of the communications at issue was to obtain tax advice, as opposed to legal advice, and directed the company and law firm to produce the materials and information to the grand jury.

The company and law firm appealed to the 9th Circuit Court of Appeals, arguing that the District Court erred when it applied the primary purpose test instead of the because-of test. Specifically, the company and law firm drew parallels to the work-produce doctrine — which applies a because-of test to determine whether documents created because of anticipated litigation are protected — and urged the 9th Circuit to adopt the because-of test in the related attorney-client privilege context.

The 9th Circuit determined that although attorney-client privilege and the work-product doctrine are related, they serve different policy goals, which justifies different tests for forced disclosure. The 9th Circuit held that the District Court correctly applied the primary purpose test and did not err in its application to the circumstances at issue and affirmed the District Court's Order.

The Supreme Court granted certiorari on Oct. 3, 2022 and heard oral argument on Jan. 9, 2023. After oral argument, however, the Court rescinded certiorari as improvidently granted and dismissed the appeal. As a practical matter, this means that the 9th Circuit's decision will remain in place, and the conflicting application of the "primary purpose" test and the "because-of" test will continue.

The Supreme Court's refusal to expand the privilege standard for dual-purpose communications serves as an important reminder for businesses and their employees to understand the limitations of attorney-client privilege and maintain disciplined communications practices.

Clients and attorneys should draw a clear distinction between business and legal counseling, and when appropriate, clearly identify the purpose of the communication. For example, introducing an email to counsel with "for business purposes" or "for legal purposes" may appropriately segregate privileged communications from those that are non-privileged – and may serve to conserve resources and expense in the event of litigation and/or other adverse proceedings.

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