# SUPREME COURT DECLINES TO DECIDE LIMITS OF ATTORNEY CLIENT PRIVILEGE-THE QUESTION: IS THE ADVICE LEGAL OR BUSINESS?

**UNITED STATES SUPREME COURT,**

**CASE No. 21–1397 IN RE GRAND JURY.**

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## I. The Attack on the Attorney Client Privilege.

To most observers, the attorney client privilege appears to be a rock solid right that protects one's ability to freely seek and obtain confidential legal advice. In the business community, it is generally expected that the attorney client privilege protects such confidences from being revealed to any adversary, including the "government." Right now, however, three United States Circuit Courts of Appeals have rendered separate and conflicting decisions that create uncertainty about the extent of the attorney client privilege when the advice is so-called, "dual purpose" advice. That is advice that could be identified as partially legal in nature and part that is what can be classified as "business" advice.

The business and legal communities was awaiting clarification and a resolution of the conflicting decisions by the United States Supreme Court (SCOTUS). However, surprisingly, SCOTUS heard oral argument on this case on

January 9, 2023, but incredibly then decided it had "improvidently granted" the petition and *dismissed* the case. SCOTUS did not give a reason for the dismissal. In some appellate lawyer circles, there is speculation that the case was "not the right vehicle" for digging into the issue. However, if that is the reason, it leaves the legal community wondering, even speculating, about the correct test for what advice really is privileged. So, where are we?

First, one should be aware of the specific controversy that brought the case to SCOTUS to begin with. This issue surfaced at SCOTUS after the Ninth Circuit Court of Appeals based in San Francisco decided a case that created a "test," described below, for whether the privilege applies to so called "dual purpose" advice. That is, advice provided to a client by a lawyer that addresses both business and legal matters. *In re Grand Jury*, 23 F. 4th 1088 (9th Cir. 2022). As most businesses that regularly obtain legal advice know, "dual purpose" advice is frequently sought and obtained.

The major concern asserted on appeal is that the Ninth Circuit's "test" that is to be applied by a trial judge is purely discretionary. It is up to the judge to decide whether business or legal advice *predominates* in whatever advice is transmitted by the lawyer to the client. So, it was argued that it is virtually impossible for companies and their lawyers to predict how this "test" will be applied to any run of the mill "dual purpose" advice. In any case that applies the Ninth Circuit rule, it is predictable that when litigation arises and the adversary demands production of documentation that includes "dual purpose" advice, the analysis of those documents will be a task for the judge that is possibly more onerous than conducting the trial of the lawsuit.

This article presents a summary of the issues raised by the *Grand Jury* case in order that businesses and counsel may be aware of the controversy and the importance of protecting confidentiality rights by carefully separating one's legal

advice from business advice. Mixing the two in one document or recorded discussion could lead to unfair, and what some courts would call, unlawful disclosure of legal strategy.

## II. Why the Ninth Circuit Decision Spells Disaster For The Sanctity of Legal Advice.

### A. Factual Context of *In re Grand Jury*.

In order to fully grasp the threat to the attorney client privilege, it is important to understand the facts in the *Grand Jury* case. That case arose from a grand jury proceeding that was to investigate a company's suspected tax fraud. As part of that investigation, the federal government's lawyers demanded the company's lawyers produce all documents that showed the advice it gave to the company as to the tax issues involved. The law firm objected to production based on the protections afforded by the attorney client privilege, but the trial court ordered production of so called "dual purpose" documentary evidence withheld by the firm. That decision was appealed by the law firm to the Ninth Circuit Court of Appeals where the firm sought reversal of the trial court's order.

Of course, after full briefing and submission to the Ninth Circuit, a decision was rendered affirming the trial court's order. In so doing, the Ninth Circuit crafted a "test" that where "dual purpose" advice is provided, 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. *See In re Grand Jury*, 23 F. 4th at 1091–93. described above.

That decision caused the law firm to appeal to our court of last resort, SCOTUS. Recently, the law firm's appeal, asserted by filing a Petition for Writ of

Certiorari (Petition), was granted. In its Petition, the law firm made it clear that the Ninth Circuit's decision requiring production of the evidence of its advice to its client is not only erroneous, but it creates uncertainty in all aspects of corporate or business management where legal guidance is obtained. Of course, now that SCOTUS has dismissed the case, the quandary persists.

**B. The "Split" of Authority Compounds The Uncertainty.**

In its briefing, the law firm pointed out to SCOTUS that the "split" of authority between the three Circuit Courts of Appeal heaps additional uncertainty upon the viability of the attorney client privilege. First, they asserted the Ninth Circuit's "test" is impossible to apply consistently. Additionally, the "tests" of each of the three Circuit Courts are materially different.

The Seventh Circuit holds that in the case of a dual purpose communication, the privilege does not apply to communications that serve both legal and nonlegal purposes. *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999). There is no requirement to determine significance, and the mere fact that the document contains nonlegal information renders the privilege inapplicable. Id.

In marked contrast with the Ninth and Seventh Circuits, the DC Circuit decision "boils down to whether obtaining or providing legal advice *was one of the significant purposes* of the attorney-client communication." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014), (Emphasis added); accord *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.,* 892 F.3d 1264, 1267–68 (D.C. Cir. 2018). While *Frederick* concerned a document created to prepare an income tax return and for use in litigation, the ultimate application of the holding could apply to any part of a communication from attorneys to their clients.

C, Specific Irreconcilable Dilemmas.

The lawyers who petitioned SCOTUS and three Amici that filed preliminary briefs have raised a list of irreconcilable dilemmas that are raised by the Ninth Circuit decision. Any business should be concerned about these issues:

**a. "Dual purpose" advice is common. So, that is an adversary's target for production**. A trial court must follow the law so if appellate courts set up rules that require production, trial judges will likely order business and their lawyers to turn over those documents. If the documents are produced, the company's adversary will become privy to the company's innermost business and legal strategy. That would mean a company could not be assured discussions with legal counsel are protected.

b. **The nature of the advice in a document is not always clear.** That is, any business and legal advice can be inextricably intertwined so that determining what is legal or business advice is virtually impossible.

c. **The judge's decision about which type of advice predominates is an imprecise judgment call.**

d. **Judges are not likely to understand a company's business, so it may be virtually impossible for a trial judge to differentiate business advice from legal advice.** So, when a trial judge makes what could be called a close call, such a decision will necessarily be fraught with difficulty in deciphering "details" and subject to judicial mistakes.

e. **After the fact analysis is uncertain**. "Balancing *ex post* * * * introduces substantial uncertainty into the privilege's application" and "[f]or just that reason, [this Court has] rejected use of a balancing test in defining the contours of the privilege." *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998)." Petition at 20.

**f. Chilling of Communications.** "[T]he Ninth Circuit's rule will chill communications between clients and their attorneys. See *Mohawk Indus,* v. *Carpenter,* 558 U.S. 100, 110 (2009) (recognizing that '[t]he breadth of the privilege' 449 U.S. at 392 [*Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)] (explaining that 'narrow scope' of privilege would hinder corporate attorneys' ability 'to formulate sound advice' and 'to ensure their client's compliance with the law'). Petition at 21.

**g. Any Legal Discipline is Implicated**. "[W]hile the issue in this case is presented in the context of a tax attorney providing advice to a client, the same privilege issue confronts attorneys advising clients regarding countless other areas of law. For example, insurance, health, environmental, real property, entertainment, and intellectual property, to name just a few, are legal specialties where the advice given often has both legal and nonlegal purposes." Amicus Brief of California Lawyers Association at 5.

**h. Lack of Uniformity of Rules Creates Chaos.** "Attorneys and clients with interests in multiple circuits will be presented with either conflicting privilege standards regarding attorney-client communications or a lack of settled authority. One test that applies to all dual-purpose communications is necessary to ensure uniformity and protection of the sanctity of the attorney-client privilege." *Id.* at 9.

**i. Regulatory Legislation Advice is Hampered.** "[A] 'vast and complicated array of regulatory legislation confront[s] the modern corporation.'" citing *Upjohn* 449 U.S. at 392. Businesses rely on lawyers to navigate this legal thicket. Amicus Brief of American Chamber of Commerce at 15.

**j. Non-Lawyers Will Be Less Likely to Seek Legal Advice.** The "practical import" of the Ninth Circuit decision is that businesses and non-lawyers will be less likely to seek legal advice from in house and outside counsel. It will

also heap additional costs on the business community because communications with lawyers will need to be "siloed" by category. *Id.* at 18.

**k. Internal Investigations Will be Hampered.** "[C]ompanies have leaned heavily on in-house counsel when conducting internal investigations. The Ninth Circuit's rule would have a chilling effect on the free exchange of information between in-house counsel and corporate executives." Amicus Brief of Washington Legal Foundation at 6.

**k. Information Flow to Outside Counsel Will Be Limited.** "But the flow of information from corporations to outside counsel will be choked if the Ninth Circuit's decision stands. Companies will learn from this case and no longer ask outside counsel for advice that later could be used as evidence in a criminal investigation or civil case." *Id.*

**l. Information Learned During Investigations Will Not Be Shared.** "Protecting communications that include facts that companies learn during internal investigations is key to in-house counsel's ability to properly conduct internal investigations. But if a dual-purpose communication includes these facts and provides legal advice, it is not protected under the Ninth Circuit's rule." *Id.* at 9.

**m. Limitation of Rewards for Internal Compliance**. "[P]enalizing companies with compliance policies would conflict with many legal regimes and doctrines that encourage corporations to comply with the law. For example, in *Faragher v. City of Boca Raton,* this Court held that an employer has an affirmative defense to a hostile-work-environment claim where the employer has "provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." 524 U.S. 775, 806 (1998). The Federal Sentencing Guidelines also reward internal-compliance programs and similar efforts to

"promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S.S.G. § 8B2.1(a)(2)." *Id.* at 10.

**n. Delegation of Internal Investigations to Outside Counsel Will Be Limited.** "Two examples prove the point. Last year, a former professional hockey player sued the Chicago Blackhawks alleging that the team was complicit in a sexual assault by the team's video coach. Rather than have in-house counsel investigate the allegations, the team hired outside counsel to handle the investigation. *See generally* Reid J. Schar, *Report to the Chicago Blackhawks Hockey Team Regarding the Organization's Response to Allegations of Sexual Misconduct by a Former Coach*, Jenner & Block LLP (Oct. 2021). Two months ago, Temple began investigating a toxic workplace environment at the Hope Center. But again, rather than rely on in-house employment counsel, the university hired outside counsel to handle the investigation. *See* Colleen Flaherty, *The Hope Center's Revolving Door,* Inside Higher Ed (Apr. 14, 2022), https://bit.ly/3yxC4Mf." *Id.* at 12.

As noted, it is the job of SCOTUS to decide what test should be applied in the *Grand Jury* case. The above listed complications of the Ninth Circuit "test" that weaken, if not abrogate, the attorney client privilege as to "dual purpose" advice, are not exclusive. No doubt, the unique methods and processes of a business could raise other objections to the "test."

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## III. Conclusion.

If the basis for SCOTUS's dismissal of the case is that "it is not the right vehicle" for delving into the issue, that decision does not serve well the business or legal communities. The "bottom line" is beware and consider the issues raised above. There will be more litigation on this issue-for sure.