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U.S. Supreme Court Grants Certiorari in Case Involving Application of Attorney-Client Privilege to Dual-Purpose Communications with Tax Attorneys

On Oct. 3, 2022, the U.S. Supreme Court granted certiorari in *In Re Grand Jury*.¹ On appeal from the Ninth Circuit, *In Re Grand Jury* considers whether the attorney-client privilege protects communications between a client and attorney involving both legal and non-legal advice (“dual-purpose communications”). Because *In Re Grand Jury* is likely to have significant implications in both criminal and civil proceedings, multiple legal and business organizations have filed amici in this case seeking clarity on the scope of the attorney-client privilege.

Facts and Procedural History

In *In Re Grand Jury*, a law firm specializing in international tax performed multiple functions for a taxpayer: (i) it advised on the tax consequences of expatriation; (ii) it prepared several income tax returns for the taxpayer; and (iii) it prepared Form 8854 certifying compliance with the expatriation tax. The government opened a criminal investigation of the taxpayer. The attorney and two law firm employees received grand jury subpoenas seeking information about the taxpayer’s expatriation. They produced some of the requested documents but withheld other documents under the attorney-client privilege.

¹ *In Re Grand Jury*, ____ U.S. ____ (2022) (No. 21-1397).

The district court concluded that some of the communications at issue were not protected by the attorney-client privilege and ordered the petitioner to produce the withheld documents to comply with the subpoenas. When the petitioner continued to withhold the client communications, the district court held it in contempt. On appeal, the Ninth Circuit affirmed the district court decision. The petitioner filed a petition for certiorari in the U.S. Supreme Court.²

Background on Attorney-Client Privilege and Circuit Split

Generally, the attorney-client privilege protects from disclosure confidential communications between an attorney and a client made for the purpose of obtaining or providing legal advice.³ The purpose of the attorney-client privilege is to promote fulsome communication between attorneys and their clients so that clients can obtain complete and accurate legal advice. In practice, clients often consult with their attorneys for multiple purposes. Therefore, it is common for attorneys to provide advice that has components of both legal and non-legal advice. The issue becomes whether such dual-purpose communications are discoverable by third parties.

In the tax context, courts typically distinguish between two types of communications: (i) legal communications concerning tax controversy or tax planning issues; or (ii) non-legal communications concerning tax return preparation.⁴ Where an attorney provides legal advice and prepares tax returns, it is often difficult to establish which communications are protected under the attorney-client privilege. In the non-tax context, the issue often comes up regarding whether the advice is legal or business in nature, or legal or compliance-related in nature.

Currently, there is a split among the circuit courts on whether dual-purpose communications are protected under the attorney-client privilege:

- The D.C. Circuit previously held that dual-purpose communications are privileged where one of the significant purposes is to obtain or provide legal advice.⁵ Under this approach, the communication will be treated as privileged even where the non-legal purpose for the communication is more significant.
- In contrast, the Seventh Circuit held that dual-purpose communications made in connection with tax return preparation are never privileged regardless of how significant the legal purpose is.⁶
- In this case, the Ninth Circuit adopted the “primary purpose test.” The court weighed the purposes and held that a communication is only privileged where the legal purpose is at least as significant as any non-legal purpose.⁷

Parties’ Arguments

In support of its petition for certiorari, the law firm argued that granting certiorari was appropriate because the circuit split promotes confusion, especially where tax attorneys have clients in multiple jurisdictions. The law firm claimed that the Ninth Circuit erred in adopting the primary purpose test because it will be difficult to apply in practice, will provide unpredictable outcomes, and will discourage communication between clients and their attorneys. According to the law firm, the disposition in this case will be outcome determinative because the parties do not dispute that the communications involved legal

² Petition for Writ of Certiorari, _____ U.S. ____ (2022) (No. 21-1397).

³ *Fisher v. U.S.*, 425 U.S. 391, 403 (1976).

⁴ *U.S. v. Abrahams*, 905 F.2d 1276.

⁵ *In re Kellogg, Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

⁶ *U.S. v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999).

⁷ 23 F.4th 1088 (9th Cir. 2022).

advice. Finally, the law firm argued that this case provided the Supreme Court with the rare opportunity to clarify the scope of the attorney-client privilege where so few privilege issues come up on appeal.

The government argued that granting certiorari was inappropriate in this case. According to the government, the D.C. Circuit's standard is too confusing and provides an incentive to involve lawyers on non-legal matters to create attorney-client privilege. The government claimed that a more restrictive standard is justified in the tax context where the taxpayer discloses his or her tax return to the IRS. Finally, the government argued that the law firm failed to prove that the outcome of this case would be different in another circuit.

The Supreme Court granted the petition for certiorari Oct. 3, 2022.

Conclusion

Currently, tax attorneys face uncertainty in advising clients about the application of the attorney-client privilege. It remains to be seen what standard the Supreme Court will adopt, but the case should produce uniformity across the circuit courts. Because the waiver of attorney-client privilege can have significant and harmful consequences in civil and criminal tax cases, taxpayers should consult with their advisors to understand how *In Re Grand Jury* affects them.

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