

Alert | White Collar Defense & Special Investigations



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‘If It Ain’t Broke, Don’t Fix It’: U.S. Supreme Court Dismisses Case on Attorney-Client Privilege

In a case set to consider whether the attorney-client privilege protects communications between a client and attorney where the communications contain both legal and non-legal advice (“dual-purpose” communications), on Jan. 23, 2023, the U.S. Supreme Court dismissed *In Re Grand Jury*, No. 21-1397, after hearing oral arguments two weeks earlier. If decided on the merits, the case would have had a significant impact in both civil and criminal proceedings. In the face of the Justices’ rigorous questioning and confusion given both parties’ evolving positions during oral argument, the Court dismissed the writ of certiorari as improvidently granted, leaving clients and attorneys without a clear standard.

Facts and Procedural History

For a detailed overview of the background and oral arguments of *In Re Grand Jury*, refer to our Oct. 6, 2022 [GT Alert: U.S. Supreme Court Grants Certiorari in Case Involving Application of Attorney-Client Privilege to Dual-Purpose Communications with Tax Attorneys](#) and our Jan. 13, 2023 [GT Alert: U.S. Supreme Court Is Asked to Adopt the ‘Significant Purpose’ Test to Permit the Withholding of Dual-Purpose Communications as Subject to the Attorney-Client Privilege.](#)

Key Takeaways of Dismissal

Although the dismissal of *In Re Grand Jury* may have surprised some, the Justices' tepid reaction to the "significant purpose" test may have been a harbinger of the dismissal. While it is uncommon for the Court to hear oral arguments and then dismiss a case (a process called "dismissed as improvidently granted" (DIG)), it is not unheard of, as the Court has done so two or three times per term on average over the last 50 years.¹ Some experts speculate that the Justices dismissed the case out of a reluctance to create a bright-line rule that may have been difficult to apply universally. Others reason, based on the Justices' comments during oral argument, that the Court did not believe there was a significant conflict or difficulty in how lower courts analyze the privilege in dual-purpose communications. Justice Kagan asked counsel for the petitioner law firm how his proposed expansion of the significant purpose test would reconcile with the "ancient principle of 'if it ain't broke, don't fix it.'" Whatever the rationale, many are now left wondering what comes next.

The Court's dismissal of *In Re Grand Jury* has three important repercussions. First, it allows the Ninth Circuit's strict "primary purpose" test, which requires the main purpose of the communication to be legal advice for it to be privileged, to stand. Second, clients and their counsel should be mindful of dual-purpose communications and consider taking steps to remove business advice from communications concerning legal advice. Finally, the dismissal means a continued split among circuit courts on the application of the attorney-client privilege to dual-purpose communications.

Conclusion

The uncertainty for clients and their attorneys about how the attorney-client privilege is applied will continue for the foreseeable future and may vary from jurisdiction to jurisdiction. With such a fractured approach, clients may wish to consult with their attorneys to understand how this dismissal affects them.

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¹ Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 Wis. L. Rev. 1421 (2005).

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