

## Compliance Today – June 2023



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### Supreme Court leaves open a major risk to internal corporate communications

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by Michael A. Morse, Esquire, CHC

It is commonplace for attorneys and compliance officers (particularly those who are also attorneys) to receive communications from clients that have more than one purpose. Take, for example, a doctor who calls a friend and the hospital’s compliance officer to set up a dinner for their families. During that call, the doctor mentions that he is thinking about starting his own practice and asks the compliance officer if he believes it is a good idea. Later in the conversation, the doctor mentions to the compliance officer that one of her colleagues has a habit of looking into the records of other physicians’ patients, and the doctor says she finds this “creepy.” The doctor asks the compliance officer if he is obligated to report the colleague for a potential HIPAA violation. While you might assume the attorney–client privilege protects this conversation between the doctor and compliance officer/attorney, that assumption can easily be wrong.

This hypothetical situation raises the issue of “dual–purpose communications,” which are communications between a lawyer and client that have both legal and nonlegal purposes. Dual–purpose communications occur routinely in businesses across the country, particularly in highly regulated areas such as healthcare compliance. Recent decisions by the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court have drawn into question how courts will determine whether dual–purpose communications are protected by the attorney–client privilege.

Courts have historically used one of two tests to analyze whether dual–purpose communications should be protected by the attorney–client privilege. First, under “the primary purpose” test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice. Second, the broader “a primary purpose” or “substantial purpose” test courts look at whether one primary purpose of the communication is to give or receive legal advice. This distinction, between whether legal advice was a primary purpose or **the** primary purpose, may appear semantic; however, it can have a game–changing impact on the free flow of information that is essential to compliance investigations and the work of in–house legal counsel.

#### **Ninth Circuit Court adopts narrow *the* primary purpose test**

In the case of *In re: Grand Jury*, a company and law firm were served grand jury subpoenas requesting documents and communications related to a criminal investigation, whose target was the company’s owner and the law firm’s client. The company and law firm produced some documents but withheld others, citing the attorney–client privilege and the work–product doctrine—the documents related to tax law and advice. The U.S. Department of Justice (DOJ) moved to compel production of the withheld documents. The district court granted the motion to compel in part, explaining that the documents at issue were either not protected by any privilege or

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were discoverable under the crime–fraud exception. The company and law firm disagreed with them and continued to withhold the documents, resulting in them being held in contempt of court.

The company and law firm appealed to the Ninth Circuit Court of Appeals, arguing that the district court erred in relying on **the** primary purpose test. The appellants argued instead that the Court of Appeals should adopt a new “because of” test, which considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation. The Court of Appeals affirmed the district court’s orders holding the company and law firm in contempt, reasoning that dual–purpose communications were not privileged because **the** primary purpose of the documents was to obtain tax advice, not legal advice.<sup>[1]</sup>

The Court of Appeals based its decision on several factors. First, the court noted that attorney–client privilege generally does not cover communications related to an attorney’s preparation of tax returns. Second, the court reasoned that applying the broader “because of” test was based on the attorney work–product doctrine, which is animated by a different policy goal than the attorney–client privilege. The work–product doctrine upholds the fairness of the adversarial process by allowing litigators to develop legal theories and strategies without their adversary using the discovery process to obtain that information. By contrast, the attorney–client privilege encourages full and frank communication between attorneys and their clients and is not tied to pending or threatened litigation. Third, the court held that the “because of” test was prone to abuse because it would create incentive for companies to add layers of lawyers to every business decision in hopes of insulating themselves from future scrutiny. Fourth, the court determined that most, if not all, Courts of Appeals have opted for some version of the “primary purpose” test instead of the appellant’s “because of” test.

## **Supreme Court agrees to decide test for dual–purpose communications**

The company and law firm filed a petition asking the Supreme Court to reverse the Ninth Circuit decision on several grounds. Chief among the appellants’ arguments was that the Supreme Court needed to intervene to resolve a split among the Courts of Appeals on the proper test for analyzing dual–purpose communications.

Appellants pointed to the District of Columbia Circuit’s decision in *In re Kellogg Brown & Root, Inc. (KBR)*, which adopted a standard that looked at whether a primary purpose of the dual–purpose communication was to obtain legal advice.<sup>[2]</sup> KBR was a False Claims Act case in which the qui tam relator alleged that KBR and certain subcontractors defrauded the US government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, the relator sought documents related to KBR’s prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its code of business conduct, which the company’s law department oversees. The district court denied KBR’s claim that the internal investigation was protected by attorney–client privilege, ruling that the investigation was “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.”

The DC Circuit reversed the district court’s decision, recognizing that attempting to find the one primary purpose for a dual–purpose communication can be an inherently impossible task. Justice Brett Kavanaugh (then still a member of the DC Circuit Court) reasoned that a test that focuses on identifying a primary purpose instead of **the** primary purpose would save courts the trouble of having to identify a predominate purpose among two or more potentially equal purposes. Moreover, the DC Circuit agreed with amici, who argued that the district court’s decision represented “a sea change in the well–settled rules governing internal corporate investigations,” particularly those conducted according to corporate compliance programs. In advocating for the Supreme Court to intervene in *In re: Grand Jury*, the appellants argued that the Ninth Circuit’s use of **the** primary purpose test risked the same broad and destabilizing effects that the DC Circuit put a stop to in KBR.

On October 3, 2022, the Supreme Court agreed to hear the appeal, setting up what appeared to be a major battle that could reshape the work of in-house counsel and corporate compliance investigations. In the ensuing briefing, 14 amici filed briefs joining the request to reverse the Ninth Circuit’s decision in *In re: Grand Jury*. Those briefs largely focused on the broad-reaching, devastating impact that the Ninth Circuit’s decision would have on in-house counsel and corporate compliance investigations. One brief, filed by the American Bar Association, raised a broad array of examples where the Ninth Circuit’s decision would disrupt well-settled internal corporate practice, including healthcare compliance investigations.

DOJ argued that the Ninth Circuit’s decision should be upheld and sought to paint *In re: Grand Jury* as the wrong case for the Supreme Court to use to address the issue of dual-purpose communications. The government reasoned that *In re: Grand Jury* presented issues of income tax fraud and that the attorney–client privilege issues in the tax context are unique. In particular, the government pointed to case law recognizing that the preparation of tax filings does not constitute legal advice—even when an attorney has given legal advice regarding the preparation of a tax return, the filing of the return itself waives the privilege not only to the transmitted data but also the details underlying that information.

The government also argued that there was no split between the DC Circuit and the Ninth Circuit on the proper standard for evaluating dual-purpose communications. The government argued that the Ninth Circuit decision was limited to the income tax context and that it expressly left open the possibility of applying the DC Circuit’s broader approach in future cases. Moreover, the government argued that the a primary purpose test or “significant purpose” test was no easier for courts to apply; it would actually increase the burden on courts by opening the gates to a flood of attorney–client privilege claims by “companies attempting to use the privilege as a shield for inconvenient facts.”

The Supreme Court heard an oral argument on the case on January 9, 2023. Public reports of the argument indicate that the Justices were very engaged and that their questions focused primarily on the workability of the significant versus primary purpose tests.<sup>[3]</sup> For example, Justice Neil Gorsuch and Chief Justice John Roberts “drilled down on whether courts must do a quantitative analysis of numerous documents to determine if a purpose is ‘primary,’ which seemed untenable to them.” While Justices Elena Kagan, Ketanji Brown Jackson, and Sonia Sotomayor seemed to favor the *primary* purpose test over the *significant* purpose test, Justices Roberts and Gorsuch had concerns about the application of the *primary* purpose test (and how courts determine what purpose is “primary”). However, none of the Justices expressed a worry about the chilling effect that the law firm emphasized, nor did they seem moved by arguments about certainty and predictability.

Two weeks after oral argument, the Supreme Court surprised many by issuing a one-sentence order dismissing the appeal as having been “improvidently granted.” Given the Justices’ questioning during oral argument, many believed that the Court was inclined to affirm the Ninth Circuit’s decision, particularly given the unique income tax context at issue. Some commentators have suggested that the dismissal is not a sign that the Justices lost interest in the issue of dual-purpose communications, only that the facts of the case were not the right vehicle for ruling on the issue.<sup>[4]</sup> Nonetheless, the Supreme Court’s dismissal lets the Ninth Circuit’s decision stand in *In re: Grand Jury* stands and its the primary purpose test.

## **Practical ramifications for in-house counsel and compliance officers**

The Supreme Court’s decision has several important ramifications for in-house counsel and compliance officers. First, some federal courts will continue to apply the more stringent *primary* purpose test, at least for now. Second, privilege reviews of in-house communications will continue to be time-sensitive, particularly in litigation involving large volumes of dual-purpose communications.

As a practical matter, in-house legal counsel and compliance officers may need to separate their legal and nonlegal communications to maximize the protections of the attorney–client privilege. When a legal issue arises throughout a business–related discussion, counsel/compliance officers should consider carving out the legal issue into a separate communication. While this is not always possible, such a practice would at least minimize the number of communications that might be considered dual–purpose communications.

In-house counsel and compliance professionals can also try to make clear in communications, particularly in emails and text messages, when they believe that their communications involve legal advice. While such disclaimers are by no means determinative, they can bolster later claims of privilege by demonstrating the intent of the parties engaging in that communication. For now, the uncertainty left standing by the Supreme Court will necessitate that in-house counsel and compliance officers remain especially cautious when engaging in dual–purpose communications.

## Takeaways

- Dual–purpose communications are communications between a lawyer and client that have both legal and nonlegal purposes.
- Courts have historically used one of two tests to analyze whether dual–purpose communications should be protected by the attorney–client privilege.
- Under “the primary purpose” test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business advice.
- Under the “a primary purpose” or “substantial purpose” test, courts look at whether one primary purpose of the communication is to give or receive legal advice.
- The Supreme Court has left open the issue of which test courts should use to determine if dual–purpose communications are protected by attorney–client privilege.

1 In re: Grand Jury, 23 F.4th 1088 (9thCir. Jan. 27, 2022).

2 In re Kellogg Brown & Root, Inc., et al., 756 F.3d 754 (D.C. Cir. 2014).

3 Crowell, “Supreme Court Weighs Whether ‘Dual Purpose’ Communications Are Privileged in *In re Grand Jury*,” January 11, 2023, <https://www.crowell.com/NewsEvents/AlertsNewsletters/All/Supreme-Court-Weighs-Whether-Dual-Purpose-Communications-Are-Privileged-in-In-re-Grand-Jury>.

4 Stephen Gillers, “A ‘DIG’ on attorney–client privilege: Why the court decided not to decide *In re Grand Jury*,” SCOTUSblog, January 25, 2023, <https://www.scotusblog.com/2023/01/a-dig-on-attorney-client-privilege-why-the-court-decided-not-to-decide-in-re-grand-jury/>.

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