FP SCOTUS Predictions: Will the Supreme Court Shred Attorney-Client Privilege Claims – Including for Inside Counsel?

Insights
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The Supreme Court just heard arguments in a case that could transform the way in-house and outside attorneys communicate with their clients every single day. The issue before SCOTUS in the case of *In re Grand Jury* is whether a party can claim attorney-client privilege over communications with multiple purposes and which contain both legal and non-legal advice. If the Court limits the circumstances under which communications can be privileged, it will significantly alter the way employers interact with both internal and external counsel. For a summary of this crucial case – and our prediction for how we believe it will be decided – read on.

[Ed. Note: Unfortunately, SCOTUS dismissed this case from its docket without issuing a decision on January 23. You can read more about it here, including a summary of steps you should take in light of this dismissal.]

What is This Case About?

In short, this case will answer the question of whether the attorney-client privilege applies to dual-purpose communications – meaning those that include both legal and non-legal advice blended together.

The Petitioner is a law firm that specializes in tax law. It provided legal advice to a company concerning expatriation and prepared tax filings. During a subsequent criminal tax investigation of the company and its owner, a federal grand jury subpoenaed the company and the law firm for documents related to the tax expatriation. The company and law firm withheld certain documents on the basis of the attorney-client privilege and work-product doctrine (a separate doctrine that only applies to materials prepared in *anticipation of litigation*).

These withheld communications included both legal advice to the company on how to navigate certain tax laws – and also non-legal advice regarding the preparation of tax returns necessary for that expatriation. The lower court ordered the company and law firm to produce the withheld documents, but they refused. After the court held them in contempt, the company and law firm appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit identified three tests that courts have applied to determine whether to shield such dual-purpose communications from disclosure:

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dual-purpose communications from disclosure:

- **The "primary purpose" test:** The narrowest of the three, it asks whether the primary purpose of a communication is legal or non-legal. If the primary purpose is not legal, then the communication is not privileged.
- **The "because of" test:** A middle-ground standard, it asks whether the document was created because of anticipated litigation. Thus, if an attorney or client creates a communication to prepare for litigation and includes other non-legal content, the entire communication would remain privileged. This test would overlap with the work-product doctrine, but would also protect client communications even if they were not prepared in anticipation of litigation.
- **The "significant purpose" test:** The broadest test, it simply asks whether "solicitation of legal advice was one of the material purposes of the communication." This test applies the attorney-client privilege to the entire communication so long as one of its purposes enjoys the privilege.

The Ninth Circuit ultimately adopted the narrow "primary purpose test" and upheld the contempt order. The company's counsel thereafter sought further review, and the Supreme Court agreed to wade in and establish a test to be applied to cases across the country.

How Could the SCOTUS Decision Impact Employers?

If the worst-case scenario unfolds and the Court adopts the narrowest test "primary purpose" test, this could leave the privilege vulnerable to the unpredictable whims of courts and how they choose to balance the various purposes in a single communication. Given the stakes at play, this would then discourage lawyers from advising clients on the potential non-legal impact of various options – including internal counsel often called upon to provide guidance on legal and non-legal considerations.

This includes not only non-legal factors surrounding a termination such as customer relationships, impact on workplace culture, etc., but perhaps something as far-ranging as the public relations ramifications of workplace decisions. The Rules of Professional Responsibility task lawyers to advise on these non-legal matters. But in addition to how impractical it is for in-house counsel to segregate legal and non-legal advice in separate communications, they would have less incentive to provide non-legal advice at all if doing so could potentially expose their ***legal*** advice to disclosure.

FP SCOTUS Prediction: Court Will Probably Adopt Broad Test

Given our analysis of the case and the questioning at oral argument, two of our authors predict the Supreme Court will adopt the broad "significant purpose" test. This test aligns more closely with modern-day communications between clients and their legal counsel, particularly in-house counsel. In the era of electronic communications, it is simply not practical to separate legal advice from non-legal advice in day-to-day exchanges between in-house legal counsel and their clients.

The "significant purpose" test also serves to avoid unduly burdening courts with evaluating privilege assertions during the discovery phase of litigation or in connection with compliance with

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government investigations. Applying this test also reduces the amount of variation in judicial decisions about when dual-purpose communications are protected by the attorney-client privilege. Predictability in protecting privileged communications is critical to the frank exchange of information between a client and legal counsel.

FP Predictions: The Breakdown

However, there was not unanimous agreement on this point. Another two of our authors believe a different outcome will be reached.

- **Wendy Hughes:** Based on oral argument, my sense is that the Court will not adopt Petitioner's articulated "any legitimate legal purpose" standard due to the risk of overbreadth in practice and its apparent deviation from the significant purpose test. I predict the Court will uphold the Ninth Circuit's application of the primary purpose standard in assessing privilege protection of mixed-purpose communications outside the context of internal investigations. As noted during oral argument, courts have been applying this test in federal courts and a majority of state courts for years. And, despite the fact that this approach does not consider the practicalities of today's dependence on electronic communications and does not provide the type of predictability favored by in-house legal counsel, I did not get the sense that the Justices thought there were countervailing practical concerns that made the primary purpose test unworkable or that it overburdened the lower courts. As stated by Justice Kagan, "if it ain't broke, don't fix it." I think the Court will uphold the Ninth Circuit's "primary purpose" test in a 6-3 or 5-4 decision.
- **Jeff Shapiro:** The questions at oral argument showed just how difficult of an issue this is. As Justice Gorsuch succinctly stated, "I'll be honest. I am struggling this morning." I agree with Wendy that it is virtually certain that the Court will not adopt the Petitioner's "any legitimate legal purpose" standard, as even some of the more conservative Justices expressed concern with that approach. On the other hand, other questions recognized how difficult it is to decide which of multiple purposes is "primary" or to attach percentages to various purposes. While I expect the Court's more liberal justices to favor the "primary purpose" test, my sense is that the majority will adopt the "significant purpose" test in a 6-3 or 5-4 decision.
- **Samantha Monsees:** An overarching theme during oral arguments echoed by both factions of the Court was a concern over the seemingly overbroad application of the "any legitimate legal purpose" test. I concur (see what I did there?) with Wendy and Jeff that based on the questions posed by the Court during oral argument, it is unlikely that the Court will adopt the "any legitimate legal purpose" standard. As Justice Kagan stated, imposing the "any legitimate legal purpose" test advocated by the Petitioner is "a big ask," and is not consistent with the underlying nature of what the privilege is supposed to be protecting. However, Chief Justice Roberts was skeptical of the government's "primary purpose" test, expressing concern that placing the burden on the district court to parse out dual-purpose communications was too onerous. Much like Justice Gorsuch, "I'm struggling this morning" with how this will fall, but I predict the majority of the Court will overturn the Ninth Circuit's application of the "primary purpose" test in

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favor of the "significant purpose" test in a 6-3 or 5-4 decision.

- **Jeremy Wood:** Near the end of her argument, counsel for the United States suggested that the Court could decide the case presented by "saying nothing." By the end of arguments, a few Justices may have preferred that result. Indeed, those on and before the Supreme Court seemed to agree on one point: That no real problem existed, and that lower courts are applying the attorney-client privilege just fine. But if the parties and Justices could agree that lower courts were generally applying the attorney-client privilege properly, they struggled to identify how to articulate the proper test. This became especially apparent in Justice Gorsuch's questions to the government's counsel, where he pointed out inconsistencies in the parties' position.

  But Justice Gorsuch also suggested a compromise position that might persuade the majority of the Court. Thus, I predict that the Court will split the difference between the "primary purpose" test and "significant purpose" test by holding that dual-purpose communications are subject to disclosure if their non-legal purpose is not only primary but so predominates that their legal purpose cannot be called significant. Thus, for example, a communication would remain privileged if 55% of its substance is non-legal and 45% legal. I predict Justice Gorsuch will either write the majority decision or a concurrence, and that all Justices will join in the result. Justice Sotomayor will write a separate concurrence holding that the Court could have and should have simply affirmed on the primary purpose test as articulated by the Ninth Circuit.

What Should You Do in the Meantime?

The Court just heard oral arguments on January 9, and it typically takes several months before they issue a decision after hearing arguments. We expect a decision to be reached by the end of this term, which should wrap up in late June.

Until the Supreme Court reaches a decision, the Ninth Circuit's opinion and its narrow test govern all attorney-client communications in jurisdictions under that circuit's purview. That includes California, Washington, Oregon, Arizona, Nevada, Idaho, Montana, Hawaii, and Alaska. In those jurisdictions, a communication that touches on both legal and non-legal matters faces a real risk of disclosure.

Accordingly, corporate decision-makers and their lawyers, both in-house and external, should consider separating legal from non-legal advice in their client communications to the extent possible. Thus, for example, if a company is concerned about the impact of a settlement on its public image or of an employment decision on workforce morale, they should address image and morale apart from the actual legal dimensions of the decision.

This is especially true where Chief Legal Officers and their equivalent play both legal and business roles in their organizations. While this adds an unfortunate burden to already-strapped professionals, it will better insulate legal advice from disclosure, if privilege protections are later challenged.

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Conclusion

We will continue to monitor and provide updates about this important Supreme Court decision. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have any questions, reach out to your Fisher Phillips attorney or the authors of this Insight.

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