

Supreme Court to Take Up the Most Consequential Attorney-Client Privilege Case in Four Decades: What It Means for You

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For the first time since its 1981 opinion in *United States v. Upjohn*, the United States Supreme Court, in a review of the Ninth Circuit's decision in *In re Grand Jury*, will examine the scope of the attorney-client privilege for communications between a company and its lawyers.

What types of materials are at issue?

The case concerns a grand jury subpoena issued to an unnamed law firm and its corporate client. The subpoena demanded, among other materials, communications between the law firm and its client about international tax issues, the tax consequences of expatriation, and the preparation of tax returns. The firm withheld documents reflecting discussions with its client about these tax issues, claiming that they reflected legal advice and requests by its client for that advice.

What are the competing legal standards that the Court will consider?

At issue is the application of the "primary purpose" standard for determining whether communications are covered by the attorney-client privilege. Courts use this test to determine whether attorney-client privilege applies to communications made both to secure legal advice and for some other, business-related purpose. The test is also used to determine whether privilege applies when a lawyer – particularly an in-house company lawyer – serves both as a legal advisor and in some other business function for the company. *The Supreme Court is being asked to consider whether (1) the primary purpose of a communication must be to secure legal advice, or (2) a significant legal purpose is sufficient to confer privilege protection.*

How does the "primary purpose" standard differ from the "significant purpose" standard?

This is a question the Court will be asked to clarify. The former formulation is most common. The latter arose in 2014 in the D.C. Circuit's *In re Kellogg Brown & Root* decision, which then-Judge Kavanaugh authored. The D.C. Circuit's standard left room for a communication to have multiple "primary purposes," which would allow a court to uphold attorney-client privilege even where both a legal and non-legal

purpose may have equally motivated the communication. By contrast, the more traditional primary purpose application requires a court to determine the single most important purpose of a communication and uphold privilege only where that purpose was to obtain or provide legal advice.

How did the Ninth Circuit apply the primary purpose test in the decision now under review?

The Ninth Circuit declined to apply the more flexible, D.C. Circuit approach because it found adopting that approach to be unnecessary in the context of the tax communications at issue. The district court had found that the tax communications were the result of lawyers serving more as tax preparers than legal advisors and the advice was more business and tax strategy than legal advice. The Court of Appeals found, therefore, that the trial court's finding that legal advice was not the primary purpose was not clearly in error. The Ninth Circuit elaborated:

The *Kellogg* test would only change the outcome of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a non-legal purpose. Because the district court did not clearly err in finding that the predominant purpose of the disputed communications was not to obtain legal advice, they do not fall within the narrow universe where the *Kellogg* test would change the outcome of the privilege analysis.

Do these standards apply to other types of situations, or just to tax preparation work?

Courts apply the primary purpose test broadly anytime they conduct an attorney-client privilege assessment for communications that serve both legal and non-legal purposes. While some courts have shown extra caution applying attorney-client privilege to tax-related materials, given that the Supreme Court has previously declined to articulate a common-law tax practitioner's privilege, the petition to the Court in this matter requests a review of the primary purpose standard generally, rather than confining it to legal advice in the tax context. The Ninth Circuit also cautioned in a footnote that its decision should not be read as removing legal advice about tax matters from the protection of attorney-client privilege.

Context matters when comparing primary purpose tests.

While the significant purpose test could be read as conferring broad privilege protection whenever a lawyer is involved in a group communication or an issue relates to legal advice, neither the D.C. Circuit in *Kellogg* nor any court since has applied the test so broadly. In *Kellogg*, the materials at issue were clearly prepared at the direction of counsel to help counsel assess potential legal exposure on an issue critical to the company's business. The materials were also marked as privileged. But company policy and government regulation also mandated that the company conduct a review of potential malfeasance. The question was whether the primary purpose of complying with regulatory requirements or following company policy motivated the lawyer-led review, rather than the need to obtain legal advice. In this context, the court came to the commonsense conclusion that the materials developed for this lawyer-led review could serve both purposes and still be privileged.

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