

Tax Pros Must Be Cautious After Justices Boot Privilege Case

By **Kat Lucero**

Law360 (February 8, 2023, 5:01 PM EST) -- Tax practitioners are facing a legal minefield and must tread carefully regarding communications that contain both legal and nonlegal advice following the U.S. Supreme Court's sudden dismissal of a case that asked the justices to decide whether such dual-purpose communications are privileged.

The high court unexpectedly dismissed the dispute, known as *In Re Grand Jury*, by issuing a rare one-sentence decision last month just two weeks after the justices heard oral arguments, saying the petition in the case was improvidently granted. The outcome stunned and disappointed many in the legal community who had hoped the Supreme Court would issue a more detailed opinion that clarified the scope of privilege for dual-purpose communications.

The high court's dismissal means there is still a split in the circuit courts over how to determine whether dual-purpose communications are privileged. But practitioners who spoke to Law360 said they are adhering to a strict interpretation of privilege set by the Ninth Circuit in *In Re Grand Jury*. That court said in an amended opinion last year that dual-purpose communications that contained tax preparation advice were not privileged because the primary purpose of the discussions was not legal advice.

Though the Ninth Circuit's "primary purpose" standard is binding only in the states under its jurisdiction, attorneys said they would recommend taking additional measures to ensure certain communications remain confidential even outside those states.

"Sophisticated practitioners will definitely advise clients to try to break apart communications that have a legal purpose," Carina Federico of Crowell & Moring LLP said. "When you're giving advice, you don't necessarily know where you could end up litigating a case."

"You might be in two or three jurisdictions" that have different standards for protecting dual-purpose communications, Federico said. And if a client is facing criminal charges, as in the *In re Grand Jury* case, "you have little control" over the jurisdiction, she said.

The *In re Grand Jury* case involved an unnamed law firm's bid to shield certain international tax communications with a client from disclosure to a grand jury. After the Ninth Circuit ordered the firm to turn over those documents two years ago, the firm petitioned the Supreme Court to review its challenge. The justices agreed to review it in October.

In filings, the firm asked the high court to resolve the circuit split by overturning the Ninth Circuit's 2021

decision. The firm advocated a broader standard espoused by the D.C. Circuit in a case called *In Re Kellogg Brown & Root* — written by now-Justice Brett Kavanaugh — that said dual communications can be privileged if legal advice was just one of the significant purposes of the communications.

Various legal and business groups, including the American Bar Association, U.S. Chamber of Commerce and American College of Tax Counsel, filed a total of 13 amicus briefs urging the Supreme Court to adopt the significant purpose standard.

The federal government, meanwhile, asked the court not to overturn the Ninth Circuit's primary purpose standard, saying it has governed many lower courts for decades. The firm's petition sought a "supersized" version of privilege that would expand it to business or accounting communications that have a secondary or tertiary legal purpose, the U.S. solicitor general said in a brief in December.

But at oral arguments Jan. 9, the justices strained to understand if there was even a difference between the primary purpose and significant purpose standards based on the firm's and government's positions. Justice Elena Kagan quipped, "I'm wondering if you would just comment on, you know, the ancient legal principle, if it ain't broke, don't fix it."

Susan Combs, tax controversy and litigation partner at Holland & Hart LLP, said many lawyers have been dealing with the primary purpose standard for years and have been navigating it fairly well in the district courts.

"That's what some of the justices were pointing out," she said.

However, Combs and other tax practitioners said the Ninth Circuit's opinion — which also cautioned against the privileged treatment of tax return preparation discussions — is especially challenging to implement because legal advice usually overlaps with tax preparation issues.

For example, the Internal Revenue Service recently replaced the "virtual currencies" term in Form 1040's cryptocurrency question with "digital assets" and added a definition of "receive." A tax practitioner's communication with clients regarding the change could be seen by some as legal advice and others as tax return preparation advice, according to Joshua Smeltzer, partner at Gray Reed & McGraw LLP.

"That could be seen as solely a tax preparation issue, but the interpretation of that question is loaded with legal questions," Smeltzer said.

In the wake of the *In re Grand Jury* case, the first step is, if possible, to avoid mixing the reasons for legal and nonlegal communications in an email, text message, memo or other documents when an attorney is advising a client on a U.S. Department of Treasury regulation, Combs said. Attorneys must be "careful and thoughtful" in managing privileged communications, she said.

"You want the indicia in that document — as clear as possible — that legal advice is being provided," Combs said.

Combs suggested using labels and stating the intended purpose of the document if an attorney has concerns about the potential lack of clarity on the purpose of the communication. If a challenge is brought as to whether a communication is privileged or not, she said it likely won't come for months or years, when documents are sought in litigation or by a subpoena. If that happens, such indicia can be very helpful to a judge who must decide whether a communication's primary purpose was to provide

legal advice, she said.

Many practitioners have struggled for years on how to identify what is legal advice and tax preparation assistance in dual-purpose communications due to the uneven treatment in the federal courts on what is considered privileged tax information. Some have held that attorney-client privilege does not apply to communications that deal with a client's tax return preparation, while it does for tax controversy and tax planning issues.

"For lawyers who prepare tax returns and advise on the legal aspects of those same returns, there is a greater risk and there has always been a greater risk of privilege waiver," said Lawrence Hill, a partner at Steptoe & Johnson LLP who co-authored the amicus brief on behalf of the American College of Tax Counsel.

In particularly sensitive cases, such as criminal cases like *In Re Grand Jury*, Hill said, "it would be prudent to consider not having the same lawyer advise on the soft spots of the return and prepare the return."

--Additional reporting by Jack Karp. Editing by Aaron Pelc and Roy LeBlanc.