

because the company disclosed reasonably promptly after becoming aware of the misconduct. Therefore, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at the time.” *Id.*

10. *Id.*, at 5.

11. *Id.* at 4.

12. *Id.* at 5.

13. The USAO will refer to the Monaco Memo when evaluating whether the company has implemented and tested an effective compliance program. *Id.* at 5.

## Questions Remain as Supreme Court Declines to Decide Scope of Attorney-Client Privilege for “Dual-Purpose” Communications

**By Katherine Cicardo Mannino and  
Brittany Holt Alexander**

The US Supreme Court recently dismissed a *writ of certiorari* as improvidently granted in a case that has far-reaching implications for counsel of all industries.<sup>1</sup> The case under review was *In re Grand Jury*.<sup>2</sup> There, acknowledging that attorneys “often wear dual hats, serving as both a lawyer and a trusted business advisor,” the Ninth Circuit sought to determine to what extent the attorney-client privilege applies to dual-purpose communications that implicate both business and legal concerns.

### Details of the Case

A company and a law firm were each served with grand jury subpoenas requesting documents and communications related to a criminal investigation. The company and law firm each withheld certain documents as privileged. The district court ordered production of the withheld materials, and when the company and law firm refused, they were held in contempt. The company and law firm appealed.

Some of the documents withheld based on attorney-client privilege were dual-purpose communications involving both legal and non-legal purposes. The Ninth Circuit held that the primary purpose test applies to these types of communications. Under that 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.” Implicit in this consideration is the notion that a dual-purpose communication has but one “primary,” or predominate, purpose.

The court left open whether the DC Circuit’s application of “a primary purpose” test might apply in some limited circumstances.<sup>3</sup> Under that test, a court would ask whether obtaining or providing legal advice was one of the significant purposes of the communication. The court found that this 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,” and that this was not such a case.

The question presented to the Supreme Court for review was whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was at least one of the significant

**Katherine Cicardo Mannino and Brittany Holt Alexander**  
*are attorneys of Phelps Dunbar LLP.*

purposes behind that communication. In granting the writ, the Supreme Court signaled that it intended to resolve whether the communications' purpose must be primarily legal or whether it is sufficient if one of the significant purposes is legal.

But, in a surprising move that came two weeks after the justices heard oral arguments, the Supreme Court ultimately did not resolve the question, stating instead that “[t]he writ of certiorari is dismissed as improvidently granted.” This is a rare occurrence that happens only when the Court determines that it should not have accepted the case in the first place, usually either because there is no conflict warranting review or because dismissal is preferable to a fractured opinion where no consensus could be reached.

## Lessons for Counsel

The Supreme Court's dismissal of the writ, and its resulting choice not to set a clear test for determining whether “dual-purpose” communications are covered by attorney-client privilege, leaves law firms and businesses in a state of uncertainty about how to protect such communications.

Accordingly, lawyers and clients must continue to exercise caution when communicating about both legal and non-legal issues, as the management of attorney-client communications will continue to be fact-specific and will vary based on jurisdiction. However, there are a few key takeaways for practitioners who want to maximize the potential privilege protections afforded to “dual-purpose” communications:

- First, attorneys and clients should familiarize themselves with the relevant privilege rulings and applicable privilege test(s) in the various jurisdictions in which they practice or conduct business.
- Second, to the extent a document or communication is intended for legal purposes, that purpose should be well and clearly documented. The reason for this is simple: It is sometimes very difficult to discern the parties' intent or purpose for a document or communication years after the fact. A clear and visible statement about the parties' intent on the face of the document is therefore recommended.
- Finally, to the extent practicable, legal and non-legal advice should be segregated as much as possible—either in separate documents or communications, or in separate portions of a single document or communication. Such segregation makes the privileged nature of a purely legal communication more certain and predicable, while also allowing for ease of redacting clearly privileged information, if such redactions are appropriate and allowed.

## Notes

1. <https://cdn.ca9.uscourts.gov/datastore/opinions/2022/01/27/21-55085.pdf>.
2. *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021).
3. [https://www.cadc.uscourts.gov/internet/opinions.nsf/701A3512988256CD85257D04004F78AA/\\$file/14-5055-1499662.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/701A3512988256CD85257D04004F78AA/$file/14-5055-1499662.pdf).