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SCOTUS DIGs on Attorney Client Privilege Test for Dual Purpose Communications

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Today, the United States Supreme Court issued a "non-decision" in *In re Grand Jury*. The case involved a conflict among federal circuit courts of appeal over which legal test should be applied to evaluate whether so-called dual purpose communications (those that have both a legal and business purpose) are protected by the attorney-client privilege.

The Supreme Court DIGed, or "dismissed as improvidently granted," the matter of *In re Grand Jury* to the disappointment of many following the case in hopes the Court would resolve the split between the Ninth Circuit's "the primary-purpose" test versus the D.C. Circuit's "a primary purpose" test used when evaluating whether dual purpose communications are protected by attorney-client privilege. The procedural dismissal occurs in around 2% of cases before the Supreme Court. See Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 Wis. L. Rev. 1421 (2005). As the procedural "sister" of a denial of certiorari, when certiorari is "dismissed as improvidently granted" it is as though certiorari was never granted in the first place. Unfortunately, of the few cases that get DIGed, almost all have been fully briefed and argued in front the Court before getting dismissed. And then, only a half receive an explanation of the Court's reasoning for dismissal. In this instance, the Supreme Court's order left us guessing, but comments by several Justices suggested a view that district courts rarely face complicated "dual purpose" questions and that "the primary purpose" test is applied and working in the courtroom. Both factors suggest that the Court's discretionary grant of review may have been improvidently granted.

So where does that leave tax practitioners, and what are best practices going forward? First, the Ninth Circuit's opinion that "the primary-purpose" test applies to attorney-client privilege claims for dual-purpose communications *stands*, as do opinions from a majority of circuits that also apply "the primary-purpose" test. Likewise, the D.C. Circuit's "a primary purpose" test remains valid law in D.C. Moreover, the array of state court standards on this issue will continue to govern disputes outside of federal courthouses. Unfortunately, attorney-client communications are often made without knowing which court will adjudicate a privilege issue and thus what standard will be applied. Going forward, cautious practitioners should operate under the assumption that their communication with clients will be evaluated under the more restrictive "the primary-purpose" test. Further, tax practitioners should remain aware of the substantial body of jurisprudence that eliminates any potential claim of privilege for

communications made in the furtherance of tax preparation. See *U.S. v. Frederick*, 182 F.3d 496 (7th Cir. 1999).