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SUPREME COURT DISMISSES CASE ON SCOPE OF ATTORNEY-CLIENT PRIVILEGE

On January 23rd, the United States Supreme Court dismissed in a *per curiam order* *In re Grand Jury*, a case examining the scope of the attorney-client privilege two weeks after hearing oral arguments. The case invited the Supreme Court to decide a recurring question: When a client confers with a lawyer and receives both legal and non-legal advice, and the non-legal advice cannot be disentangled from the legal advice, does the attorney-client privilege protect all of the advice or none of it?

A law firm specializing in international tax law, the name of which has been kept confidential, was fighting disclosure of dual-purpose documents sought by a federal grand jury investigation into one of the firm's clients. The law firm produced more than 1,700 documents but claimed that others were privileged. The district court ordered the law firm to produce the remaining documents. When the firm refused, the trial court held the firm in contempt. The Ninth Circuit Court of Appeals affirmed and the law firm appealed to the Supreme Court.

Before the Supreme Court, the law firm argued that the privilege should protect all client communications "where obtaining or providing legal advice was one of the *significant purposes* behind the communication," even if non-legal advice predominated. The government argued that legal advice is privileged only when providing legal advice was the *primary purpose* behind the attorney-client communication. Thirteen amicus briefs from legal and business organizations, including the American Bar Association and the Chamber of Commerce, supported the law firm's interpretation, arguing that the daily interactions between businesses and their attorneys routinely touch both legal and non-legal advice and thus require an expansive privilege.

The Supreme Court ultimately did not decide the issue, but rather dismissed the case as improvidently granted. Generally, such a dismissal does not imply that the Supreme Court lost interest in deciding the issue, but rather suggests that the facts of the case may simply not be the right vehicle for exploring it. Much of the factual record around the case is shrouded behind strict grand jury secrecy, including the name of the law firm. The oral arguments thus were forced to focus on abstract analysis and hypotheticals.

The one sentence *per curiam* order offers no explanation of the justices' thinking about the case. Nor does it provide any indication of which justices voted to dismiss. It is possible that a majority of the court wants to save the issue for a case with enough facts in the public record to permit a serious evaluation of the question.

We will continue to monitor changes to the attorney-client privilege. As the attorney-client privilege girds the trust necessary for everyday interactions between businesses and their lawyers, an updated attorney-client privilege rule that reflects the modern reality that clients often discuss multiple topics with lawyers that are not exclusively law-related would be a welcome change. □

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