

American College of Tax Counsel Files Amicus Brief With U.S. Supreme Court

National association of tax lawyers urges Supreme Court to overturn Ninth Circuit decision unduly restricting the availability of attorney-client privilege.

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*Armando Gomez, President of
the American College of Tax
Counsel*

American College of Tax Counsel (the “College”) announces the filing on November 23, 2022, of an amicus brief with the U.S. Supreme Court in the case of *In re Grand Jury* (No. 21-1397). The issue in this case is when a confidential communication between a lawyer and client made for both legal and non-legal purposes is protected by attorney-client privilege. The College’s brief supports the petitioner’s challenge to the test adopted by the Ninth Circuit, which would require that the legal purpose predominate; the College’s brief asks the Supreme Court to adopt the less-restrictive test adopted by the D.C. Circuit, which requires only that the legal purpose be significant.

Background of the Case

Countless attorney-client communications involve both legal and non-legal inquiries. For example, a lawyer may be asked to advise on both the legal validity and commercial feasibility of a proposed transaction, or to conduct an internal investigation for compliance with both legal requirements and corporate policies. The question presented in this case is the test for determining when attorney-client privilege attaches to such “dual purpose” communications.

The case arises in the context of a grand-jury subpoena of a law firm that advised its client about the tax laws governing expatriation and that prepared the tax filings required upon expatriation. The Ninth Circuit started from a premise, shared by some other lower courts, that the tax filing preparation work was “non-legal” and therefore that the attorney-client communications at issue had dual purposes. The court then held that the communications were not privileged because the legal purpose did not “predominate.” And it reasoned in part that applying the D.C. Circuit’s more protective “significant” legal purpose test would be particularly inappropriate for tax-related communications.

The College's Brief

The College's brief explains that the Ninth Circuit erred and that the D.C. Circuit is correct. In the words of Armando Gomez, President of the College: "The tax context underscores that confidential attorney-client communications should be privileged as long as they have a significant legal purpose. For tax-related communications, the legal purpose and the non-legal purpose asserted tend to be inextricably intertwined, and it is difficult verging on impossible to determine which purpose 'predominates.'"

The College's brief elaborates that the legal purpose of advising about the best tax position and the asserted non-legal purpose of assisting in the preparation of tax returns reflecting that position are often flip sides of the same coin. Through a variety of common scenarios facing tax attorneys, the College's brief illustrates that it would be futile to try to disentangle and weigh the tax-advice and return-preparation purposes of tax-law-related communications. And the College's brief further demonstrates that the problem is exacerbated by the substantial overbreadth of the rationales that lower courts have offered for sometimes treating a lawyer's assistance in tax-return preparation as effectively "non-legal." A confidential communication between a lawyer and a client to properly prepare and file a legally mandated form with the government is a conventional case for attorney-client privilege, and lower courts have failed to justify treating the tax-return-preparation context differently.

You can read the brief on the College's website by following [this link](#).

About Amicus Briefs

A brief by Amicus Curiae ("friend of the court"), also known as an amicus brief, allows a person or organization with a strong interest in or important views on the subject matter of a case to file a brief explaining those views and urging the court to rule in a manner consistent with those views. Amicus briefs are often filed in cases of broad public interest and are filed with the permission of the court and typically, as is true here, with the consent of all the parties in the case. The College's brief in this case was submitted by its governing Board of Regents, represented by attorneys Hashim M. Mooppan, Frank J. Jackson, Kathryn Keneally, and Kelly C. Holt of the law firm Jones Day in Washington D.C. and New York, and Lawrence Hill of the law firm Steptoe & Johnson LLP in New York.

About the American College of Tax Counsel

The American College of Tax Counsel, founded in 1981, is a nonprofit association of tax attorneys in private practice, law school teaching positions, and government, who are recognized for their excellence in tax practice and their substantial contributions and commitment to the legal profession. One of the chief purposes of the College is to provide a mechanism for input by tax attorneys into the development of U.S. tax laws and policy. A Board of 19 Regents serves as the College's governing body, with one regent drawn from each of the 13 federal judicial circuits, plus

two at-large positions. The Board is rounded out by the four members of its Executive Committee -- President, Vice President, Secretary-Treasurer, and Last Retiring President. The College can be found online at <http://www.actconline.org>.

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