AN A.S. PRATT PUBLICATION
JUNE 2023
VOL. 9 NO. 5

PRATT'S PRIVACY & CYBERSECURITY LAW REPORT

Pratt's Privacy & Cybersecurity Law Report

VOLUME 9 **NUMBER 5** **June 2023**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please contact:
Alexandra Jefferies at ..... (937) 560-3067
Email: ..... alexandra.jefferies@lexisnexis.com
For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844
Outside the United States and Canada, please call ..... (518) 487-3385
Fax Number ..... (800) 828-8341
Customer Service Web site ..... http://www.lexisnexis.com/custserv/
For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940
Outside the United States and Canada, please call ..... (937) 247-0293

ISBN: 978-1-6328-3362-4 (print)
ISBN: 978-1-6328-3363-1 (eBook)

ISSN: 2380-4785 (Print)
ISSN: 2380-4823 (Online)

Cite this publication as:
[author name], [*article title*], [vol. no.] PRATT'S PRIVACY &CYBERSECURITY LAW REPORT [page number] (LexisNexis A.S. Pratt);
Laura Clark Fey and Jeff Johnson, *Shielding Personal Information in eDiscovery*, [1] PRATT'S PRIVACY & CYBERSECURITY LAW REPORT [82] (LexisNexis A.S. Pratt)

An A.S. Pratt Publication
Editorial

Editorial Offices
630 Central Ave., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW BENDER

(2023–Pub. 4939)

Editor-in-Chief, Editor & Board of Editors

Pratt's Privacy & Cybersecurity Law Report is published nine times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Privacy & Cybersecurity Law Report*, LexisNexis Matthew Bender, 630 Central Ave., New Providence, NJ 07974.

Top 10 Ways to Protect Attorney-Client Communications After Supreme Court Punts Case

By Wendy Hughes, Samantha J. Monsees, Jeffrey Shapiro and Jeremy F. Wood*

In this article, the authors offer 10 ways to maximize the attorney-client privilege protections.

The U.S. Supreme Court was seemingly set to decide whether and when a party can assert attorney-client privilege protection over communications containing both legal and non-legal advice, but the Court decided to bypass the debate completely and dismissed the case from its docket. The Court dismissed the writ of certiorari it had granted in *In re Grand Jury* as "improvidently granted," and as a result will not issue an opinion in the case. That means the status quo remains, with different courts in different jurisdictions applying different tests in deciding whether a "dual purpose" communication is covered by the attorney-client privilege.

What does this mean for attorney-client communications? How should counsel, particularly in-house counsel, navigate this difficult area to maximize privilege protections? This article provides the top 10 ways to proceed in this area.

ATTORNEY-CLIENT PRIVILEGE IN A NUTSHELL

Understanding the requirements and scope of the attorney-client privilege is essential to protecting attorney-client communications and avoiding privilege waivers.

The attorney-client privilege protects from disclosure communications conducted in confidence for the purpose of obtaining or providing legal advice (regardless of whether the purpose has to be "primary," or "significant" or something in between, a privileged communication must be for seeking or providing legal advice).

Communications

Four basic types of communications potentially deserve privilege protection:

- A client's request for legal advice;
- A client's disclosure of facts so they can get legal advice;
- A lawyer's request for facts so they can provide legal advice; and
- The provision of legal advice.

* The authors, attorneys with Fisher Phillips, may be contacted at whughes@fisherphillips.com, smonsees@fisherphillips.com, jsshapiro@fisherphillips.com and jwood@fisherphillips.com, respectively.

When thinking about whether a communication may be privileged, and how best to establish and preserve that privilege, you should think about which of these buckets may apply.

Confidentiality

The privilege only applies to "confidential" communications. While it is somewhat counter-intuitive, the privilege generally does not apply to communications involving agents, consultants, or other third parties working with or on behalf of the company (even on sensitive and confidential matters and even if there is a non-disclosure agreement in place). Indeed, the most common way to lose the privilege is to include a third party in a meeting, call, or email where legal advice is being requested or provided – or to share privileged discussions or documents with a third party after the fact. A third party's involvement may not break the privilege in very limited circumstances where the third party assisted in the provision of legal advice. Exact standards vary by jurisdiction so extreme caution is warranted when including any third party in an attorney-client communication.

The privilege can also be lost if the communication includes or is shared with employees without a legitimate "need to know" the information. Doing so might cause a court to find that the communication was not sufficiently related to legal advice and/or that the company waived the privilege.

In short, anyone who takes part in privileged communications or receives documents that include legal advice must exercise great care to protect the confidentiality of these communications.

Providing Legal Advice

Lastly, and getting to the core of the *In Re Grand Jury* case, the privilege only applies to the provision of legal advice, not the provision of business or other non-legal advice. There is a common misperception that a communication is privileged as long as a lawyer is copied on the email or present in the meeting. That is not correct. Indeed, as we saw in *In Re Grand* Jury, many communications from counsel are not privileged, particularly with in-house counsel whose responsibilities often include advising on non-legal business matters.

Another point of confusion is whether labeling a document as "privileged and confidential" alone makes it such. It does not. The privilege forms from the substance of the communication, specifically whether it fits into one of the four basic communication categories identified above.

Admittedly though, in some circumstances, labeling a communication as privileged and confidential may assist in protecting it if privilege protection is later challenged. It may also help avoid inadvertent waivers by a recipient forwarding the communication to a person outside the scope of confidentiality. Including the proper labeling of privileged

and confidential communications with clients, here are 10 suggested best practices to maximize the protection of attorney-client privileged communications.

TOP 10 BEST PRACTICES

The following are some general rules lawyers should follow – and as importantly to educate and advise their clients to follow – with respect to attorney-client privileged communications:

1. Limit the non-lawyer recipients on requests for or discussions about legal advice. With emails, include counsel on the "To" line and the non-lawyers (if any) on the "cc" line. With particularly sensitive and confidential issues for which a privilege is intended to be maintained, it is often best to use separate parallel communications to discuss legal and non-legal issues.

2. Educate your clients about the attorney-client privilege – on both how to create and preserve the privilege and on the fact that a communication might ultimately have to be disclosed one day despite best efforts. This means understanding what constitutes a privileged communication in the first instance and how the privileged is susceptible to waiver, particularly through the disclosure to third parties who are not assisting with the provision of legal advice. Lawyers should advise their clients to pause (or call) before sending emails containing very sensitive or potentially troubling information. Sometimes a phone call is the more prudent course.

3. Confirm the accuracy of email distribution lists and be careful with the "reply all" or the auto-complete function.

4. Focus on the substance of the communication and remember that merely including an attorney in a meeting or on a communication does not mean the communication is privileged. Ensure the content of the email clearly reflects the request for legal advice (e.g., "so that you can provide legal advice" or "this responds to your request for legal advice").

5. Identify privileged documents (including notes of privileged conversations) as such, using headers such as "privileged and confidential attorney-client communication" or "privileged and confidential prepared at the request of counsel." In addition, maintain dates and names of participants, meetings, and distributions to support claims of confidential treatment of attorney-client communications.

6. Do not include consultants (including internal "consultants" who perform similar functions as employees), contractors, or other third parties (except external counsel) in communications with the company's lawyers. There are instances where a third party's involvement may not break the privilege, but those instances are rare and limited to where the third party assisted in the

provision of legal advice. Exact standards vary depending on the jurisdiction so clients should consult legal counsel in advance of including third parties on any attorney-client communications. When in doubt, do not do it.

7. Only forward privileged documents or communicate the substance of legal advice to other employees if they have a legitimate "need to know" the information and advice. If you do share privileged communications with other employees, include counsel in the transmittal and make sure the recipient knows that the document is privileged and confidential.

8. Urge your business leaders to come to you when they have questions or concerns and ask that they notify you immediately if they think a privileged communication may have been inadvertently or mistakenly shared with others.

9. Be careful what devices and messaging applications you use for privileged communications. Do not use personal message accounts, including text messages, to communicate about privileged matters. When using collaboration software at work, such as Teams or Slack, use secure private legal channels or direct message features with restrictions on permissible participants to maintain confidentiality of attorney-client communications. Do use sensitivity labels to protect privileged content in Teams, O365 groups, or SharePoint sites, such as "Sensitive/Confidential Legal." Use good information governance and delete privileged communications when they are no longer needed for business, statutory/regulatory, or litigation purposes.

10. Do not claim privilege over absolutely everything during discovery in litigation. Opposing counsel most often challenge an assertion of privilege when a company characterizes every responsive communication as privileged or where the context of withheld documents suggests they might have business rather than legal purposes. Just one overzealous assertion of privilege can lead to greater skepticism and increase scrutiny of all privilege entries on a privilege log by opposing counsel, which, in turn, could lead to in camera review by the court.