FP SCOTUS Recap: Top 10 Ways You Can Protect Attorney-Client Communications After Supreme Court Punts Case

Insights
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The 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 SCOTUS recently decided to bypass the debate completely and dismissed the case from its docket. On January 23, 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 Insight provides the top 10 ways you can 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. For a full recap about the debate we thought SCOTUS was going to settle, you can read our review of the case and our (now irrelevant) predictions here. But let's provide a quick overview here.

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.

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 an NDA 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, we have come up with 10 of our 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. Don't 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.

Conclusion

We will continue to monitor and provide updates about other important Supreme Court decisions impacting the workplace. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have any questions, reach out to your Fisher Phillips attorney or the authors of this Insight.

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