ATTORNEY-CLIENT PRIVILEGE AND COMMUNICATIONS WITH THIRD PARTIES

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With the proliferation of electronic communication, it is all the more critical to understand the parameters of preserving attorney-client privilege and communications prepared in anticipation of litigation, particularly for larger companies with many employees and outside contractors. In general, attorney-client privilege protects communications: (1) between a client and their attorney; (2) that are intended to be, and in fact were, kept confidential; and (3) for the purpose of obtaining or providing legal advice. Attorney-client privilege usually extends to an attorney's communications with company employees as long as the communication is made for the purpose of securing legal advice concerning a subject within the scope of employment. Court decisions have varied, however, as to the scope of this privilege as to communications with other third parties, such as consultants or former employees. A few recent decisions are worth consideration.

In *Walsh v. CSG Partners, LLC*, decided on June 16, 2021, a federal court in New York State addressed whether attorney-client privilege applied to documents withheld by an investment bank in response to investigative document requests by the U.S. Department of Labor. The bank withheld numerous documents, including communi-

cations between the bank's clients and those clients' legal counsel. The bank asserted the privilege based in part on the fact that it had worked closely with each company's business personnel and legal team and contributed expertise and knowledge that the companies and their counsel did not have.

The court rejected the bank's arguments and held that no attorney-client privilege applied to the communications between the bank's clients and its legal counsel because the bank was a third party. Although, attorney-client privilege can apply to communications involving a third party if the purpose is to improve the comprehension of the communications between the attorney and client. However, the court held that this narrow exception did not apply because the investment bank simply provided information and financial advice and did not provide any assistance as to comprehending legal issues as an expert might. Thus, the privilege did not apply.

In addition, the court held that the "functional equivalent doctrine," which has been adopted by several courts, also did not apply. The functional equivalent doctrine protects communications between a company's lawyer and a third-party consultant who serves as a de facto high-ranking employee of the company. To determine if a consultant is the functional equivalent of an employee, courts look to a number of factors, including, among others, whether the consultant had a continuous and close working relationship with the company's principals on matters critical to the company's position in litigation, whether the consultant exercised decision-making authority on the company's behalf, and whether the consultant sought legal advice from corporate counsel to guide their work for the company.

In the *Walsh* case, the court rejected the bank's contention that the withheld communications were protected by virtue of the bank being a de facto employee of its clients. While the bank had a close working relationship with each company's leadership, the relationship was limited to business dealings and, critically, the relationship did not extend to each of the company's positions in litigation. Furthermore, the bank did not possess decision-making authority for its clients; rather, the bank's role was limited to providing them with information necessary to negotiate the terms of transactions, soliciting bank financing, and preparing financial models. The court also found it significant that the bank did not solicit advice from its clients' legal counsel in order to guide its work for its clients. Instead, the flow of information went only from the bank to its clients and their attorneys. As such, the court held, the bank could not withhold the communications under attorney-client privilege.

In contrast, in *Spectrum Dynamics Med. Ltd. v. GE*, decided on September 9, 2021, a different judge from the same court in New York State held that certain documents undisputedly disclosed to a third party nevertheless were protected by attorney-client privilege. The communications in *Spectrum* were email communications related to a corporate name change and restructuring transaction. The plaintiff (the disclosing party) asserted that the third-party consultant at issue employed two individuals acting as de facto employees or agents for the plaintiff in the role of financial managers in connection with the restructuring transaction. Thus, the plaintiff argued, the individuals understood and respected the confidential and privileged nature of the email communications with counsel and were essential to the plaintiff's ability to complete the restructuring transaction. The defendant argued that the privilege was waived because the plaintiff disclosed the communications to a third party (i.e., the consultant and its two employees).

The court held in favor of the plaintiff and concluded that the communications were protected by attorney-client privilege. More specifically, the plaintiff demonstrated that the two third-party employees were essential consultants to the plaintiff's predecessor in connection with the corporate restructuring transaction and served in an in-house role insofar as they were treated as employees, required to maintain confidentiality, and provided essential advice to attorneys working on the restructuring transaction and name change. Accordingly, the court held that the individuals' involvement improved the comprehension of the communications between attorney and client, and the privilege was not waived under these circumstances.

Finally, *FaZe Clan, Inc. v. Tenney*, decided in March 2020 by yet another judge from the same court, contains a useful discussion of whether an attorney's communications with a third party are protected as attorney work product. The work product doctrine provides that a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. At issue in *FaZe Clan* were emails exchanged between a party's attorney and a nonparty consultant. The court held that, although emails to a third party can qualify as work product under some circumstances, the emails at issue were not protected because they pertained to the third-party agency's *business* strategy and not to strategy concerning litigation. Thus, the communications were discoverable in the lawsuit.

The decisions in this article serve as a reminder that attorneys and companies should be mindful of, and have policies in place regarding, communications with attorneys and outside parties to ensure the protection of confidential information. Although the applicability of attorney-client privilege is very fact dependent, as shown by the decisions in this article, parties should be able to draw a line between privileged and discoverable communications with proper procedures in place.

Although not foolproof, it is good practice for an attorney communicating with a client to label all privileged communications prominently as "Confidential" and "Attorney-Client Privileged" or "Attorney Work Product," as applicable. For emails, this designation can be included in the subject line. In addition, attorneys and their clients should avoid lengthy email chains, and privileged communications with clients should be addressed to one client representative (e.g., in-house counsel) and not to numerous recipients whenever possible. Finally, it is critical that the communications pertain solely to legal advice and not business strategy; otherwise, these communications will likely not be protected from disclosure.

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