HOW TO PROTECT PRIVILEGE WITH RESPECT TO COMMUNICATIONS WITH LITIGATION-RELATED PUBLIC-RELATIONS CONSULTANTS

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Litigation specialists generally agree that many cases are decided not only in courts, but also in the court of public opinion. This is especially true when high-profile clients or salacious subject matters are involved. A New York court has noted that the media, prosecutors, and law enforcement may engage in activities that color public opinion to the detriment of the subject's reputation and even to the detriment of the subject's ability to obtain a fair trial, such that advocacy in the public forum is necessary.[1] Not only can media coverage lead to a biased jury, but it can create such negative publicity that affected companies have a financial incentive to settle cases to avoid further reputational damage even where they are confident in the merits of their case. Companies often fear that by the time the case is concluded, the press will no longer be interested in the story, and the negative publicity will have already taken its toll.

Several courts have recognized that efforts to control media messages are part of an attorney's duties. Justice Kennedy (writing for himself and Justices Marshall, Blackmun and Stevens) in *Gentile v. State Bar of Nevada* stated that:

> "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."[2]

Some courts have even awarded attorneys' fees for public-relations efforts.[3]

Even the American Bar Association has recognized the lawyer's role in the media; in 1994 the ABA changed an ethical rule to allow an attorney to correct false publicity.

Given the importance of dealing with the media and most attorneys' lack of experience or education in dealing with the media, many companies turn to public-relations consultants to

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[1] *See In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp.2d 321, 330 (S.D. N.Y. 2003).

[2] 501 U.S. 1030, 1043 (1991).

[3] *See, e.g. Gilbrook v. City of Westminster*, 177 F.3d 839, 877 (9th Cir. 1999) (affirming an attorneys' fee award for media and public relations work in a civil rights action); *Child v. Spillane*, 866 F.2d 691, 698 (4th Cir. 1989) (stating that attorneys should be compensated for public relations in cases involving issues of vital public concern).

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guide their media strategies. But as necessary as such consultants are, there is an inherent conflict between public-relations consultants, whose goal is often to create credibility by avoiding the appearance that the company is trying to hide something, and attorneys, who often find the need to protect information or disclose it in a way that is consistent with legal strategy. This conflict often results in animated debate between the public-relations consultant and corporate counsel about confidential information and how it should be used. And because attorneys are often most familiar with the factual aspects of litigation or a business crisis, it is only natural that attorneys and media consultants would communicate about issues such as the facts of the case, some of which may be confidential, and how to enmesh the litigation and media strategies.

Although intuition might indicate that these communications regarding strategy would be privileged, case law has indicated that some communications with public-relations consultants are not privileged. Some cases in the early 2000s spurred articles claiming that companies and public-relations firms need only follow a few steps to ensure their communications are privileged. There is no fail-safe way to protect your communications, but there are steps corporate counsel and public-relations consultants can take to make it more likely that a court will find that the communications are privileged. This article sets forth those steps, then provides a summary of case law in the past nine years that addresses whether communications with public-relations consultants are protected under the attorney-client and work-product doctrines.

TIPS TO PROTECT COMMUNICATIONS WITH PUBLIC-RELATIONS CONSULTANTS

- **Outside counsel should hire the public-relations consultant**. A New York case held that communications would not have been privileged if the company had hired the consultant directly.[4]

- **Invoices for the public-relations consultants' services should be billed through the law firm, not through the company.**[5]

- **Hire a public-relations firm that specializes in media relations related to litigation.** A New York Court has noted that this was a factor in holding that the communications with the public-relations firm were privileged.[6]

- **Make sure the engagement letter with the public-relations firm states the legal purpose for hiring the firm.**[7] A New York Court has recognized the following as valid legal purposes: advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, seeking to avoid or narrow charges brought against the client, zealously seeking acquittal or vindication, and how possible

[4] *See In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp. 2d 321, 331 (S.D. N.Y. 2003).

[5] *See id.*

[6] *See In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 219 (S.D. N.Y. 2001).

[7] *See id.*

statements to the press would be reported in order to advise a client as to whether the making of particular statement would be in the client's best interest legally.[8]

- **All communications with the public-relations consultant should involve an attorney if possible.** Although having an attorney present is not determinative in some jurisdictions, it is generally considered a factor supporting protection of the communication.

- **Public-relations consultants should be hired for particular projects.** If the consultants are hired to deal with the company's media image generally, some courts are more likely to find that consultants were not hired for a legal purpose even when working on a particular piece of litigation.

- **Make sure the communications with public-relations consultants show on the face of the communication how it is related to the litigation.** For example, an email from the public-relations consultant to an attorney shouldn't just say, "Please review the attached press release and let me know your thoughts." It should say, "Please review the attached press release so we can discuss whether it is consistent with your legal strategy and any legal implications the press release may have."

- **Instructions to the public-relations consultant should be requested in writing by an attorney.** Make sure to follow up any verbal request with a written request.

- **Access to work performed by the public-relations consultant at the request of the attorney should be limited to the legal team and those within the company that are involved in the litigation.** These documents should be password protected and should be stored in an area with limited access.

- **Discuss the legal implications of public-relations issues in the documents**. For example, if the documents contain drafts of a press release and the attorney's edits, make sure the comments show that the attorney was considering the legal impact of alternative expressions rather than just providing editorial comments. Although this seems like a subtle distinction, many courts have held that communications were not privileged because it appeared on the face of the document that the attorney was providing editorial rather than legal advice. Sometimes the legal implications of what appears to be editorial advice can be stated in comments to the document. Courts are much more likely to credit these comments when they are provided at the time the edits are made rather than after the fact.

- **Don't disclose them!** Many of the cases dealing with this subject involve an inadvertent disclosure of the documents at issue. While inadvertent disclosure generally will not waive privilege if the proper procedural rules are followed, opposing attorneys are much more likely to spend the time and attention trying to get the documents into evidence if they know that the documents contain helpful information for their case. Moreover, if they are inadvertently disclosed, the opposing party will likely file them with the court for review, possibly prejudicing the judge. Many cases also indicate that the court will be

[8] *In re Grand Jury*, 265 F.Supp.2d at 331.

more likely to hold the communications are not privileged if the court finds information in the documents that does not support the party's factual assertions in the case.

- **Make sure the documents are listed on a privilege log.** A Texas court has held that documents that were not included on a privilege log but were later discovered by the opposing party in a deposition were not privileged because the party asserting the privilege had not included the documents on its privilege log and the documents were not prepared in anticipation of litigation.[9]

- **Use of the communications or materials may result in their waiver.** A Tennessee court has held that an otherwise privileged report lost its privilege after the party asserting it stated that the report existed and supported the party's position in a public-relations offensive.[10] Courts generally hold that the privilege cannot act as both a sword and a shield.

- **Keep in mind that work product may be discoverable.** Under federal law, an opposing party may overcome the work-product doctrine if it can show "substantial need" for the materials and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." The exception to this rule is when the documents contain the "mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation."[11]

SUMMARY OF RELEVANT CASE LAW

In reviewing these cases, keep in mind that in many situations, it is impossible to determine what law will apply at the time of the communications. The communications may arise before litigation, in which case it will be unclear where litigation will occur. Even in cases where the company is already involved in litigation and therefore knows the applicable jurisdiction at the time of the communication, communications in one case or prior to litigation may become relevant in subsequent cases in different jurisdictions. Therefore, it is important to be aware of case law in different jurisdictions. Moreover, because case law in some jurisdictions is limited, courts in such jurisdictions are likely to look to other jurisdictions' treatment of similar communications for guidance.

Several cases have recognized that communications between a company or its attorneys and public-relations consultants are privileged. New York courts have been the leader in jurisprudence in this area. In one of the first cases to address the issue, *In re Copper Market Antitrust Litigation*, a New York court held that communications with a public-relations firm hired by a Tokyo company were privileged.[12] In that case, the Tokyo company hired the public-relations firm to act as its agent and spokesperson with respect to the Western media regarding an investigation and subsequent litigation concerning an alleged conspiracy to manipulate global copper prices. The court held that although the consultants provided only public-relations

[9] *See In re Anderson*, 163 S.W.3d 136, 141 (Tex. App.—San Antonio 2005, no pet.).
[10] *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 788 (Tenn. Ct. App. 2000) (stating that "a party may not use a work product to publicly further its cause offensively as a sword, and then assert the benefit of privilege as a shield.")
[11] Fed. R. Civ. P. 26(b)(3).
[12] 200 F.R.D. 213, 215 (S.D. N.Y. 2001).

services, the communications were privileged because the legal ramifications and potential liabilities stemming from the communications were material factors in their creation and because the public-relations consultant was privy to confidential information.[13] The court noted that the public-relations firm specializes in litigation-related crisis management and that it was clear that the company retained the public-relations firm "to make sure its statements would not result in further exposure in the litigation which grew out of the copper scandal."[14]

The court held that the public-relations firm was the functional equivalent of an in-house public-relations department and should be treated no differently than the company's employees. The court noted that communications are privileged if they are made by employees acting at the direction of their corporate superiors to supply information needed for legal advice where the communication concerns matters within the scope of the employees' corporate duties and the employees are aware that the communications are for the purpose of rendering legal advice.[15] The court held that under the facts of the case, the public-relations firm was the "functional equivalent" of an employee, and thus the communications were privileged.[16]

The court also held that the communications and materials prepared by the public-relations consultant were protected by the work-product doctrine.[17] The court held that because the materials were prepared in collaboration with the company's attorneys in the context of litigation, they were "documents prepared by or for a representative of a party, including his or her agent."[18]

Just two years later, a New York court again ruled that communications with public-relations consultants were privileged in *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*.[19] In that case, Judge Kaplan of the Southern District of New York held that confidential communications between lawyers and public-relations consultants hired by the lawyers to assist them in dealing with the media are privileged as long as the communications are made for the purpose of giving or receiving advice directed at handling the client's legal problems.[20]

In *In re Grand Jury*, there was intense media coverage of a high profile client (Martha Stewart) being investigated by prosecutors and regulators.[21] A public-relations firm was hired to communicate with the media in a way that would bring balance and accuracy to the media coverage so that prosecutors and regulators could make their decisions without undue influence from the negative press coverage.[22]

In holding that the communications between the legal team, client and public-relations firm were privileged, the court noted that the attorney-client privilege protects not only

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[13] *Id.* at 219.
[14] *Id.* at 221.
[15] *Id.* at 218.
[16] *Id.* at 220.
[17] *Id.* at 221.
[18] *Id.*
[19] 265 F.Supp.2d 321 (S.D. N.Y. 2003).
[20] *Id.* at 323-24.
[21] *Id.*
[22] *Id.* at 323.

communications by the client to the lawyer, but also communications by the lawyer to the client.[23] The Court also noted that the privilege protects those assisting the lawyer in the rendition of legal services, such as secretaries and law clerks, and has been applied even more broadly to encompass communications with an accountant to enable the attorney to understand the client's situation in order to provide legal services, citing *United States v. Kovel*,[24] which had held that communications between an accountant and an attorney were privileged because the accountant served a legal role as an "interpreter" of the client's complicated tax story.[25] In determining whether the public-relations firm at issue was involved in providing a legal service, the court noted that the role of lawyers has expanded to include, in some instances, advocating for the client in the court of public opinion.[26]

The court laid out several situations in which a lawyer may need to consult a public-relations consultant regarding legal issues: "advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions," "seeking to avoid or narrow charges brought against the client," "zealously seeking acquittal or vindication," and how possible statements to the press would be reported in order to advise a client as to whether the making of a particular statement would be in the client's best interest legally.[27] The court held that whether the communications took place in the presence of the attorney was not important so long as the communication was for legal purposes.[28] With respect to the communications in that case, the court held that all but two conversations with the public-relations firm were privileged.[29] One unprivileged conversation was simply the public-relations firm asking the client's opinion of the media coverage on a particular day and the other concerned a problem with a wire story.[30] In both cases, the court held that the communications were not for the purpose of obtaining legal services and therefore did not fall within the attorney-client privilege.[31]

The court also held that the documents were also protected by the work-product doctrine.

The Court stated that communications between a client and a public-relations firm would not be privileged if the client had hired the firm directly, even if the firm was hired only with respect to a legal situation.[32]

That same year, in *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, however, a New York court ruled that communications with a public-relations consultant were not privileged.[33] In that case, a company hired a public-relations consultant who was also an attorney to help deal with

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[23] *Id.* at 324.
[24] 296 F.2d 918, 922 (2d Cir.1961)
[25] *In re Grand Jury*, 265 F.Supp.2d at 325.
[26] *Id.* at 327-28.
[27] *Id.* at 331.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 331 (S.D. N.Y. 2003).
[33] No. 02 CIV 7955, 2003 WL 21998674 (S.D. N.Y. Aug. 25, 2003).

media attention he suspected would result when his client filed a lawsuit.[34] The public-relations consultant entered into an agreement with the company that explicitly stated that the relationship was for the purpose of rendering legal advice and that communications between the parties would be confidential and privileged.[35] The consultant stated in an affidavit that she reviewed materials received from the client not only from the standpoint of public relations, but more important for the impact on the litigation strategy.[36] She advised the company regarding handling media communications, including issuing a press release.[37] Upon reviewing the communications, the court found that there were no requests for legal advice.[38] The court found that the communications were for standard public relations and therefore the documents were not shielded from discovery by the attorney-client privilege.[39] The court distinguished the case from *In re Grand Jury Subpoenas* because the lawyer had not identified any nexus between the consultant's work and the attorney's role in preparing the complaint or the case for trial.[40] The court stated that "[a] media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice.[41]

However, the court held that public-relations consultants are a representative of the company for purposes of the work-product privilege and determined that the work-product privilege applies to documents created "because of" litigation, even where the document is not created "primarily" or "exclusively" for litigation.[42] The court held that all communications with the public-relations consultant were protected under the work-product doctrine.[43]

A D.C. Circuit Court has held that the attorney-client privilege extends to communications between a client and its public relations and government-affairs consultants based on an affidavit stating that the attorneys worked with the consultants in the same manner as they did with full-time employees and that they were integral members of the team that dealt with issues intertwined with the litigation and legal strategies.[44] Citing *In re Copper Market Antitrust Litigation*, the Court held that under the circumstances, there was no reason to distinguish between employees and hired consultants so long as they possess information needed by attorneys in rendering legal advice.[45] The court did not address whether the communications were for the purpose of providing legal advice.

However, beware of some cases that have held that communications with public-relations consultants were not protected by the attorney-client or work-product doctrines. In *de Espana v.*

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[34] *Id.* at *1-2

[35] *Id.* at *1.

[36] *Id.* at * 1-2.

[37] *Id.* at *2.

[38] *Id*.

[39] *Id.* at *3.

[40] *Id*.

[41] *Id*.

[42] *Id.* at *4 (citing *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir. 1998).

[43] *Id.* at *5.

[44] *Federal Trade Comm'n. v. Glaxosmithkline*, 294 F.3d 141, 148 (D.C. 2002).

[45] *Id.*

American Bureau of Shipping, a New York court ordered the production of notes from phone conferences and communications with a public-relations firm, holding that they were not protected by the attorney-client or work-product privileges.[46] The court dispensed with the argument that the attorney-client privilege applied by merely stating that press and public-relations strategies are non-legal issues and therefore not protected. With respect to the work-product privilege, the court held that "ABS would have created notes concerning press and public-relations strategies in the normal course of business without the threat of litigation," and therefore the work-product doctrine did not apply.

Similarly, in *New York Times v. United States Dept. of Defense*, a New York court held that a "draft editorial," "talking points" and related notes and comments drafted for public-relations purposes were not work product because they were not created "because of actual impending litigation."[47] In *NXIVM Corp. v. O'Hara*, a New York court broadly ruled that "if he was advising NXIVM on anything and everything other than legal services, whether business, media, public relations, or lobbying, there is no attorney-client privilege."[48] The court went on to distinguish the case from *In re Grand Jury Subpoenas* by noting that an attorney was not involved in the communications at issue and the public-relations firm did not receive any instructions or seek any guidance from the public-relations firm to help the lawyers advise the client.[49] The court noted that the privilege was intended to protect strategy about the litigation itself, not about the effects of the litigation on the client's public image.[50]

Other courts have also appeared more reluctant to protect communications with public-relations consultants. A Louisiana court has rejected the idea of a blanket privilege for communications due to extensive regulation.[51] In that case, Merck argued that, because the drug industry is so extensively regulated by the FDA, virtually all communications within the industry are privileged because they carry a potential legal issue.[52] The court rejected this argument and instead reviewed each communication at issue to determine the applicability of the privilege. The court noted that it had a particular problem with arguments that grammatical, editorial and word-choice comments on non-legal documents such as scientific reports, articles and study proposals were privileged, stating "[w]e could not see the legal significance of these comments and changes…"[53]

The court also rejected Merck's argument that the documents were privileged because they were a "collaborative effort" to accomplish a legally sufficient draft. *Id.* at 807. The court held that communications concerning public relations were not privileged unless they were primarily related to legal assistance, but the court did not define what it considered to be legal assistance as opposed to public relations.[54]

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[46] 2005 WL 3455782 (S.D. N.Y. Dec. 14, 2005).

[47] No. 03 CIV 3573 LTSRLE, 499 F. Supp.2d 501, 517 (S.D. N.Y. 2007).

[48] 241 F.R.D. 109, 130 (N.D. N.Y. 2007).

[49] *Id.* at 142.

[50] *Id.* at 142.

[51] *See In re Vioxx Prods. Liab. Litig.*, 501 F. Supp.2d 789, 800 (E.D. La. 2007).

[52] *Id.*

[53] *Id.* at 802.

[54] *See id.*

An Illinois court has also held that public-relations advice is not privileged because it is not legal advice.[55] In that case, an attorney was asked to provide advice about how to present a pardon decision to the media. The court held that the advice was not privileged merely because it came from an attorney and that the advice was not legal. The court also held that an email to the attorney, which was to be used for "background purposes," along with the attorney's revisions, were not privileged because the client was not seeking legal advice, and the attorney's revisions did not reflect client confidences or convey legal advice. However, another Illinois court took a much more lenient approach, stating that if the public-relations firm would merely provide an affidavit stating that the communications between the firm and the attorney concerned legal advice, the court would not order their production.[56]

A Kansas court held in *Burton v. R.J. Reynolds Tobacco Co.* that documents prepared by a company's outside and inside attorneys concerning public relations were not privileged.[57] For example, one of the documents at issue was a draft position paper concerning carbon monoxide and cigarette smoking. The paper was prepared to respond to criticisms resulting from FTC test results showing carbon monoxide levels in commercial cigarettes. The court noted that the position paper and other communications could have been prepared by a non-lawyer and cited to non-legal literature. The court held that the documents were not privileged because they were intended for public-relations purposes rather than legal purposes and did not communicate any legal advice.[58]

Many state courts, relying on state rather than federal privilege law, have also been reluctant to find such communications privileged. A New Jersey court has held that an opposing party is entitled to depose a public-relations consultant regarding public statements and her activities in gathering information to use in such statements.[59] In that case, a public-relations consultant was hired to advise the company after a massive explosion at the company's gas plant.[60] The court held that privilege does not extend to "advocacy in the court of public opinion."[61]

A Delaware court has held that a public-relations firm was not the agent of the client, and therefore communications between the company's attorney and the public-relations firm were not privileged.[62] The court noted that although an affidavit filed by the public-relations company stated that it communicated with the attorney and had access to confidential communications "relating to legal advice," "[h]e does not assert that such communications actually concerned legal advice."[63] The court acknowledged that in some situations, confidential communications

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[55] *Evans v. City of* Chicago, 231 F.R.D. 302, 314 (N.D. Ill. 2005).

[56] *Ludwig v. Pilkington N. Am., Inc.*, No. 03 C 1086, 2004 WL 1898238 at *3 (N.D. Ill. Aug. 13, 2004).

[57] 200 F.R.D. 661, 669 (D. Kan. 2001).

[58] *Id.*

[59] *See In re Long Branch Manufactured Gas Plant*, 907 A.2d 438, 449 (N.J. Super. Ct. Law Div. 2005).

[60] *Id.* at 447.

[61] *Id.* at 448 (citations omitted).

[62] *American Legacy Found. v. Lorillard Tobacco Co.*, No. 4 19406, 2004 WL 5388054 at *4-5 (Del. Ch. Nov. 3, 2004).

[63] *Id.*

with a public-relations firm may be protected by the attorney-client privilege but did not provide guidance regarding what those situations might be.[64]

CONCLUSION

Overall, the case law concerning whether communications with a public-relations consultant are privileged indicates that there are many steps corporate counsel can take to increase the chances that a communication with public-relations consultants will be privileged, but there are no guarantees that those steps will protect all communications with public-relations consultants.

[64] *Id.* at *5.