Keeping PR Strategy Communications Privileged: Part 1

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Jeffrey Schomig

Companies faced with high-profile legal challenges often turn to outside public relations firms to help them navigate the choppy waters of industry reputation, maintain shareholder confidence and preserve their hard-earned good name. Recent cases serve as a continuing reminder that internal documents generated by a PR firm face uncertain privilege protection, even if those efforts are in support of a broader legal strategy.

The attorney-client privilege protects confidential communications between client and lawyer to secure legal advice. Communications not in furtherance of legal advice, or that are disclosed to parties other than the client and the client's attorney, are not privileged. Courts grant narrow exceptions to this confidentiality rule when a person other than an attorney or client, such as a subject matter expert or interpreter, is invited into the attorney-client discussion in a manner that significantly improves the client's ability to receive informed legal advice.

Few areas of privilege law are marked by more outcome disparity than the question of whether this third-party exception to the attorney-client privilege applies to the work of public relations firms in support of a client's broader, legal strategy. To the risk-averse, this uncertainty leads to an assumption that legal communications will not be protected as privileged if they involve a public relations firm.

This results in placing legal and public relations efforts into separate silos, or even refraining from hiring public relation consultants altogether. Such a cautious approach, while perhaps safest in preventing the creation of potentially discoverable material, may not be the best fit for every circumstance.

Where the matter is being litigated in the press, is an influence on or influenced by public policy, or in other scenarios where the client's opportunity for a fair trial or its ability to withstand substantial economic harm is at play, involving public relations experts in the legal team may be worth the risk. Part of weighing this risk is understanding how courts have applied privilege law in circumstances like yours.

This article is designed to help lawyers, public relations consultants and clients make well-informed decisions about how and when the attorney-client privilege and related work product doctrine may protect communications involving public relations consultants. It will first explain how courts have analyzed privilege protection involving public relation consultants. It will then take lessons from the case law to develop practical, flexible guidance on how lawyers can work with PR professionals in a manner that properly accounts for privilege and discovery risks.

The Zigs and Zags of Privilege Law in Cases Involving Public Relations Firms

State and federal courts have split on whether to uphold attorney-client privilege protection for communications involving PR consultants. The outcomes depend on the details of each client-PR relationship, and the circumstances giving rise to that engagement. Courts typically take one of two approaches to the privilege analysis.

The Necessity Test

One approach looks at the degree to which the PR agent was "necessary, or at least highly useful," to the lawyer's ability to effectively render legal advice to the client.[1] This approach tends to equate the third party's role with that of a foreign language interpreter between client and lawyer.

Under this approach, courts have maintained attorney-client privilege protection for communications between lawyers and a PR firm in the following scenarios:

- In response to wide-ranging media reports about a grand jury investigation into Martha Stewart's alleged insider trading, Stewart's lawyers hired a public relations firm to help her lawyers devise a strategy to "neutralize the environment" that they feared was placing pressure on prosecutors to return an indictment. The court upheld privilege protection for communications between Stewart's lawyers and the PR firm since "the advocacy of the client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation."[2]

- Although most of a PR agent's work on behalf of a client was of the ordinary public relations variety, certain communications between the client's outside counsel and the PR agent concerned legal analysis of legislation and congressional testimony, or discussions of a pending lawsuit, all of which furthered the agent's preparation of public statements before Congress in relation to a product safety/public health issue. The court found these to be privileged.[3]

The Functional Equivalent Employee Test

A second approach to privilege analysis is the functional equivalent employee doctrine. This approach looks to whether the PR consultant is so meshed with the client-company as to be considered the client's employee for confidentiality purposes.

The precise set of factors that elevate an outside agent to the status of functionally equivalent to an employee varies, but has included factors such as whether the company tasked the consultant with primary responsibility over a key corporate job, whether that responsibility included matters critical to the company's position in a legal matter and whether the consultant was the best person with whom the attorney could communicate to prepare legal advice.

The following are examples of courts approving the functional equivalence of PR consultants:

- The PR agent prepared, in consultation with the company's lawyers, statements for public release, and internal documents to company employees about their confidentiality obligations, all in response to a government investigation and anticipated private litigation stemming from a company scandal.[4]

- A large pharmaceutical company's in-house intellectual property lawyers shared legal advice and entertained legal requests from outside PR and government relations consultants in connection with obtaining approval for and marketing new drugs, where those consultants acted as part of a team with full-time employees regarding their particular assignments and, as a result, "became integral members of the team assigned to deal with issues [that] ... were completely intertwined with litigation and legal strategies."[5]

- A PR firm was hired by a Native American tribe which had no other PR expertise, worked closely with the tribe's counsel through the entirety of its engagement and did not undertake public relations activities for the tribe beyond those directed towards improving the tribe's image with regard to an ongoing legal dispute.[6]

- A PR firm was hired by a company which lacked an internal PR department to develop communications strategy regarding a recall of the company's product, and to interact directly with government regulators on the company's behalf, where the recall raised clear legal issues and counsel worked closely with the PR company to address those issues.[7]

- A retail development company's general counsel communicated with its PR agent, who the company hired to participate in public meetings, meet with residents, secure access agreements for environmental testing and otherwise be the company's public face in response to its environmental remediation efforts.[8]

Failure to Meet These Tests

Under either approach, the privilege holder must still demonstrate that legal advice depended upon, or was at least significantly improved by, the PR agent's role in the attorney-client communication. Courts may find that the PR agent's role was not sufficiently important to the attorney's formulation of legal advice or to the attorney's ability to effectively communicate with the client about that advice.

Such cases often emphasize the privilege claimant's failure to submit detailed evidence in support of the specific legal benefit offered by the PR agent's participation. They also tend to rely on an after-the-fact attempt to shoehorn the PR agent into a legal role, when evidence suggests a more traditional public relations role. For example, courts have denied privilege protection in the following instances:

- A draft press release was prepared by a party's outside public relations firm and shared with the party's attorney for approval.[9]

- "Media strategy" documents were exchanged between a client and her public relations consultant, related to ongoing litigation, but where the court did not see legal strategy or advice evidenced on the face of documents.[10]

- Documents were shared with and created by a PR consultant who was not involved in legal advice related to pending litigation, but instead, "facilitated the development of a public relations campaign and media strategy primarily aimed at protecting [the client's] public image and reputation in the face of allegations that he used performance-enhancing drugs."[11]

- A municipality sought to protect communications with a PR firm it hired, where the town offered no contemporaneous evidence of legal purpose, but only a "general," "vague" affidavit by the town's attorney stating that the PR firm was helpful in formulating explanations to the public about the town's litigation position.[12]

- Materials were prepared by a PR consultant hired by a Russian politician to help develop messaging in support of the politician's defamation case, where the court found that the politician failed to adequately explain how the consultants had "improved the comprehension of communications between attorney and client" or why [the consultant's] involvement was "necessary to [the politician's] obtaining legal advice from his actual attorneys"[13]

Notably, in many of these cases, the court still acknowledged that the attorney-client privilege can apply to communications with PR firms, even though they held that the parties failed to demonstrate sufficient need or nexus to legal advice in the particular matter.

The Work Product Doctrine (to the Rescue?)

Some courts that have declined attorney-client privilege protection for communications with PR firms have nevertheless granted work product protection for those same materials. Work product protection is limited to materials prepared because of ongoing or reasonably anticipated litigation. As such, the doctrine applies only to litigation-driven materials. Courts are sometimes skeptical that materials generated for PR efforts have this requisite nexus to litigation.[14]

Further, those claiming work product protection should carefully consider the potential collateral consequences of doing so. Stating that a public relations effort was in furtherance of addressing a particular litigation threat could run at cross-purposes to broader strategy if, for example, the client's CEO has just assured shareholders and the public that such a threat is minimal.

Additionally, the type of anticipated litigation needed to sustain a work product claim might obligate the claimant to begin preserving relevant documents promptly after the date that triggered the anticipation. Failure to undertake this preservation can later result in a court ordering monetary and other serious sanctions.

If, after weighing these considerations, a party can sustain a work-product claim, then courts typically allow work product to be shared more freely with "friendly" third parties, rather than undertaking the more demanding necessity or functional equivalent employee analyses described above. This key distinction has resulted in courts finding that the work product doctrine protects litigation-driven materials from disclosure even though sharing them with a PR firm caused a waiver of the attorney-client privilege.[15]

The second part of this article focuses on recent cases confronting privilege protection for PR firm communications. Acknowledging the current uneven state of the law, it concludes with a series of key takeaways derived from those legal points that are most predictable.

Jeffrey P. Schomig is an attorney at WilmerHale.

[1] United States v. Kovel , 296 F.2d 918, 922 (2d Cir. 1961).

[2] In re Grand Jury Subpoenas Dated March 24, 2003 , 265 F. Supp. 2d 321, 323, 330 (S.D.N.Y. 2003).

[3] In re Riddell Concussion Reduction Litig. , Civ. No. 13-7585, 2016 U.S.Dist. LEXIS 168457, at *26 (D.N.J. Dec. 5, 2016).

[4] In re Copper Market Antitrust Litig. , 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

[5] F.T.C. v. GlaxoSmithKline , 294 F.3d 141, 148 (D.C. Cir. 2002).

[6] Grand Canyon Skywalk Development LLC v. Cieslak , Nos. 2:15-cv-01189, 2:13-cv-00596, 2015 U.S. Dist. LEXIS 107457, at *22-23 (D. Nev. Aug. 13, 2015).

[7] A.H. v. Evenflo Co. Inc. , 2012 U.S. Dist. LEXIS 76100, at *12 (D. Colo., May 31, 2012).

[8] Schaeffer v. Gregory Village Partners LP , 78 F. Supp. 3d 1198, 1204 (N.D. Cal. 2015).

[9] Calvin Klein v. Trademark Trust v. Wachner , 124 F. Supp. 2d 207, 209-10 (S.D.N.Y. 2000).

[10] Haugh v. Schroder Inv. Mgmt. N. Am. Inc. , No. 02- Civ. 7955, 2003 WL 21998674, at *1-2 (S.D.N.Y. Aug. 25, 2003).

[11] McNamee v. Clemmens , No. 09 cv 1647, 2013 U.S. Dist. LEXIS 179736, at *18 (E.D.N.Y. Sept. 18, 2013).

[12] Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg , New York, 171 F. Supp. 3d 136, 146 (S.D.N.Y. 2016).

[13] Egiazaryan v. Zalmayev , 290 F.R.D. 421, 431 (S.D.N.Y. 2013).

[14] See, e.g., Riddell, 2016 U.S. Dist. LEXIS 168457, at *17 ("It is true that many of Riddell's documents were prepared because of Congressional inquiries into concussions. However, no evidence exists to show this was likely to lead to litigation. As noted, [a] mere 'remote prospect' or 'inchoate possibility' of litigation does not satisfy the work-product doctrine") (citation omitted).

[15] See, e.g., Calvin Klein Trademark Trust v. Wachner , 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (contrasting with attorney-client privilege: "It does not follow, however, that an otherwise valid assertion of work-product protection is waived with respect to an attorney's own work-product simply because the attorney provides the work-product to a public relations consultant whom he has hired and who maintains the attorney's work-product in confidence. This is especially so if, as plaintiffs here assert, the public relations firm needs to know the attorney's strategy in order to advise as to public relations, and the public relations impact bears, in turn, on the attorney's own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form") (citing cases).