Keeping PR Strategy Communications Privileged: Part 2

Law360 (February 4, 2019, 2:50 PM EST) --

Jeffrey Schomig

Part 1 of this article provided a state-of-the-law overview for when companies, facing high-profile legal challenges, hire public relations firms to work with the company's lawyers on messaging. This overview noted that courts typically take one of two approaches to analyze whether attorney-client privilege protection applies to lawyer-PR firm communications: the necessity approach (determining whether the PR agent's involvement in the attorney-client communication was necessary for the client to receive effective legal advice) and the functional equivalent employee approach (determining whether the PR agent developed a long-term track record working for the same client, such that the agent can be considered the equivalent of the client's employees for privilege analysis purposes).

Part 1 also discussed how the work product doctrine can provide further protection for PR-lawyer communications in response to ongoing or anticipated litigation.

This second part continues the analysis by focusing 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.

Recent Notable PR Cases

The Riddell Case: Hiring a PR Firm Through Your Lawyer is Not a Privilege Panacea

When Nicholas Behunin's business relationship with Charles and Michael Schwab soured, he brought a suit against them under fraud and breach of contract theories related to the Schwabs' alleged promises to fund his venture.[1] Soon after filing the lawsuit, Behunin directed his attorney to hire Levick Strategic Communications. Levick was to mount a public relations campaign in furtherance of the lawsuit and to pressure the Schwabs to settle on terms favorable to Behunin.

Specifically, Levick created a website (chuck-you.com) that attempted to tie the Schwab's funding efforts to a former Indonesian dictator. The Schwabs did not take kindly to this effort; they sued Behunin for defamation and sought discovery of all materials related to the creation of the website.

Behunin asserted attorney-client privilege for Levick's work. The California trial court rejected these arguments and the California Court of Appeals, after a survey of state and federal cases applying both the "necessity" and "functional equivalent employee" test to PR firm efforts, upheld this ruling.

The Court of Appeals found that although Behunin's attorney facilitated the hiring of Levick, the attorney "played no role in the creation or publication of [the website.]"[2] The court further found that Behunin "did not include any evidentiary

facts showing or explaining why [Behunin's attorney] needed Levick's assistance to accomplish the purpose for which Behunin retained him."[3]

For similar reasons, the court rejected the functional equivalent employee doctrine as a basis for privilege protection: "The functional-equivalent cases ... require a detailed factual showing that the consultant was responsible for a key corporate job, had a close working relationship with the company's principals on matters critical to the company's position in litigation, and possessed information possessed by no one else at the company."[4]

As with other cases that deny privilege protection for communications with PR firms, the court noted that "[t]here may be situations in which an attorney's use of a public relations consultant to develop a litigation strategy or a plan for maneuvering a lawsuit into an optimal position for settlement would make communication between the attorney, the client and the consultant reasonably necessary for the accomplishment of the purpose for which the attorney was consulted. But that is not this case."[5]

This case illustrates the importance of carefully considering whether incorporating a PR firm into your legal/litigation team truly advances, in a clear, explainable way, efforts to develop, convey and execute legal advice and strategy.

The Premera Case: Is Drafting a Press Release an Inherently Nonlegal Task?

The case of In re Premera Blue Cross Customer Data Security Breach Litigation[6] resulted from a breach of customer data, an increasingly common occurrence. Following the data breach, Premera retained outside counsel, which, in turn, hired a PR firm.

Despite the PR firm's engagement by outside counsel, the court found that draft press releases and notices to customers prepared by the PR firm were not protected by the attorney-client privilege or the work product doctrine:

> The fact that Premera planned eventually to have an attorney review those documents or that attorneys may have provided initial guidance as to how Premera should draft internal business documents does not make every internal draft and every internal communication relating to those documents privileged and immune from discovery.[7]

The court appeared to then go further, suggesting that drafting press releases and notices was an inherently nonlegal task:

> [D]rafting press releases relating to a security breach is a business function that Premera would have engaged in, regardless of actual or potential litigation. Having outside counsel hire a public relations firm is insufficient to cloak that business function with the attorney-client privilege.[8]

The court did leave room for the possibility that communications with a PR firm could be privileged if those communications were narrowly tailored towards seeking or providing legal advice.[9] This case serves as a reminder,

however, that hiring a PR firm through counsel, and including counsel on PR communications, may be viewed as mere window dressing, if the legal role is not clearly defined and the actual documents do not evidence a clear focus on legal advice or legal strategy.

The Wollesen Case: The Evolving Role of a PR Agent

The chain of events leading to Wollesen v. West Central Cooperative[10] began wholesomely enough, with the sale and purchase of agronomy products from West Central, a collection of farming companies and their shareholders. An employee of West Central, Chad Hartzler, allegedly began stealing seedcorn from West Central. He then sold it for personal profit, altering West Central's books so that purchasers were double-billed for the seedcorn. Hartzler eventually resigned from West Central.

As word of Hartzler's alleged activities became public, some of West Central's customers sued it. West Central retained the Wilcox Law Firm. That law firm, in turn, retained the PR firm Wixted Pope to repair West Central's image by, in part, blaming the malfeasance on the rogue employee, Hartzler.

In a subsequent lawsuit against West Central by some of its customers, including the Wollesen family, the plaintiffs attempted to demonstrate that this PR effort was West Central's attempt to use Hartzler as a scapegoat for its own negligence. Since the PR effort included attempts to advance Hartzler's claim that the Wollesens bribed him, the suit also included a defamation count against the PR firm.

The court sorted all of this out as follows:

> The threshold issue for the Court's consideration is the purpose for which Wixted Pope was hired. West Central retained the Wilcox Law Firm to represent West Central in the underlying Story County action. The Wilcox Law Firm, in turn, retained Wixted Pope. The Court finds that when Wixted Pope was first retained in May 2011, it was hired for the purpose of assisting West Central in communicating with its shareholders, employees, and the public at large. As the litigation progressed, however, Wixted Pope's role evolved. Wixted Pope began to take on tasks related to the litigation itself, including providing input on litigation strategy. Those documents pertaining to Wixted Pope's initial role will not be protected work product because they were not prepared in anticipation of litigation. Rather, those documents were created for a solely communicative purpose, separate from the underlying litigation. In reviewing the documents, the Court was mindful of the potential applicability of attorney-client privilege. Those documents created after Wixted Pope's role evolved, however, may be protected as work product because these documents could have been prepared in anticipation of litigation given Wixted Pope's new role regarding the litigation and litigation strategy.[12]

This case illustrates how a PR firm hired for ordinary, nonlegal PR work can later revise its role to more directly assist in the implementation of legal advice and, in doing so, become privilege-protected. The likelihood of successfully claiming

privilege after the PR firm's role has evolved substantially increases if a clear record exists that the PR firm's role has changed.

The Kimball Case: Too Many Cooks in the Kitchen

Chris Kimball, founder of the television cooking drama America's Test Kitchen, decided to expand on his recipe for success by forming a new, competing venture, CPK Media. Lawsuits between ATK and CPK followed in Massachusetts Superior Court, based largely on ATK's claims that Kimball misappropriated ATK resources for the benefit of CPK.

The suit gained immediate public attention in the foodie-entertainment world. Against this backdrop, ATK hired two public relations firms to "help ... explain their litigation positions to the public."[13] In a subsequent discovery fight, the court found that communications with the PR firms merited work product protection. (The court did not consider the application of attorney-client privilege in its decision.)

Using a broad standard, the court stated:

> It does not matter whether the disputed communications with [the PR firms] contain or reveal any opinions of legal counsel or whether they were created to assist with the litigation itself, as distinguished from more general public relations efforts. So long as the documents were created because of the threat of litigation, which they were, they fall within the scope of the work product doctrine.[14]

This case serves as another reminder that PR efforts clearly tied to litigation strategy can be protected by the work product doctrine. As the court noted in its opinion, however, whether PR efforts are tied to litigation to a degree that merits work product protection is a detailed question of fact — one that has resulted in many courts denying work product protection for PR materials where those materials did not adequately reflect litigation strategy.[15]

Practical Guidance for an Uncertain Legal Landscape

Identify How the PR Firm Will Improve the Client's Ability to Receive Effective Legal Representation

If a precise benefit is difficult to identity, then consider carefully whether involving the PR firm in legal communications is the best course of action. The common thread that binds cases which have granted protection to PR-lawyer communications is that the PR agent's role was integral to the client's ability to receive or act upon legal advice.

Some courts take their analysis so far as to determine whether the PR firm's involvement concerned a uniquely legal issue that could not be effectively handled by either the PR firm or lawyer individually.

Select PR Firms Familiar With the Legal Issues Faced and Experienced Working With Lawyers

Also, select lawyers who have experience working with PR firms and, more generally, working at the intersection of law and public policy. Foremost, this creates the type of experience-based teamwork that is most likely to address your strategic goals.

A court is also more likely to find that the relationship is a privileged one where the nexus between legal advice and PR considerations is clear.

Memorialize How the PR Agent Will Improve the Client's Ability to Receive or Implement Legal Advice

Before sharing legal communications with a PR agent, memorialize in the PR retainer agreement how the PR agent will improve the client's ability to receive or implement legal advice.

If the engagement relates to ongoing or anticipated litigation, saying so in the engagement can add contemporaneous evidence of expectations that becomes useful when invoking the added protection offered by the work product doctrine.

Hire the PR Firm Directly Through the Lawyers

If the client has already engaged the PR firm for purposes unrelated to the lawyer's work, then entering into a new retainer with the lawyers, or at least adding a legal-specific addendum to the existing agreement, will increase the chance of privilege protection.

Know Precisely Why You or Your Client Are Sharing Legal Communications With the PR Firm

Carefully consider whether the PR consultant must be read in on the nuances of legal analysis, involved in the minutiae of fact gathering efforts or receive detailed legal advice. Most often, clear, simple directives based on, but removed from, the actual attorney-client communication will be sufficient to guide the PR firm.

By minimizing the number of documents shared with the PR firm, one can minimize the number of documents vulnerable to discovery while still maintaining effective coordination between legal and PR efforts.

Legal Coordination on a Defensive PR Strategy Is More Likely to Be Protected

Legal coordination in furtherance of defensive PR strategy is more likely to be protected than that in support of offensive PR strategy. Courts are reluctant to provide smear campaigns a veneer of privilege.

A PR effort aimed at specific legal issues, particularly one designed to rebalance the scales of justice in furtherance of a fair hearing, stand a greater chance of privilege protection.

Be Thoughtful About How You Use the Work Product Doctrine

The work product doctrine can protect legal communications where the PR firm's role does not meet the stricter standards of the attorney-client privilege, but be thoughtful about how you use this doctrine. Claiming, for example, that documents shared with your PR firm were created because of anticipated litigation will run at cross-purposes to the CEO's assurance to shareholders that litigation was unforeseeable.

Additionally, when a company anticipates litigation to the degree required by the work-product doctrine, it obligates itself to preserve relevant evidence promptly thereafter. A failure to undertake this preservation can result in monetary sanctions against both the client and its attorneys, and can be used against the company in court.

Conclusion

Determining whether and to what extent your legal team should invite a PR agent into otherwise privileged communications involves a careful weighing of many factors — not the least of which is the unsettled and evolving case law on whether such involvement destroys privilege protection and creates discoverable, usable evidence.

But the job of attorneys is to thoughtfully balance these types of risks. That balancing can, under the right circumstances, create a valuable role for PR expertise when the client's legal demands give rise to critical public relations challenges — and where the client interacts with the PR agents mindful of the lessons provided by past cases.

Jeffrey P. Schomig is an attorney at WilmerHale.

[1] Behunin v. Superior Court, 215 Cal. Rptr. 3d 475 (Ct. App 2017).

[2] Behunin, 215 Cal. Rptr. 3d, at 479.

[3] Id., at 487.

[4] Id., at 490-91 (citing cases).

[5] Id., at 487-88., at ---. Behunin did not argue attorney work product protection on appeal, and so the court did not address it. Nevertheless, the court's opinion casts doubt on whether it would have accepted a work product argument: See,

e.g., Behunin at 488-89 ("To be sure, maximizing a client's negotiating position and increasing the prospects for a favorable settlement are important parts of representing a client in litigation. All kinds of strategies could conceivably put pressure on the Schwabs to settle with Behunin, such as hiring away employees of the Schwabs or their company, lobbying governmental officials to enact regulations adverse to the Schwab's investment business, and creating a competing brokerage business to take away the Schwab's clients. Such strategies might help get the Schwabs to settle the Sealutions litigation on favorable terms. But that does not mean Behunin's or [his attorney's] communications with headhunters, lobbyists, and lenders who might finance a competing company would be privileged. Without some explanation of how the communications assisted the attorney in developing a plan for resolving the litigation, Behunin would not be able to [sustain a privilege claim]").

[6] 296 F. Supp. 3d 1230 (D.Or. 2017).

[7] Id., at 1241.

[8] Id., at 1242.

[9] Id., at 1244 ("If, however, communications were sent to or from counsel seeking or providing actual legal advice, such as about possible legal consequences of proposed text or an action being contemplated by Premera, then such communications would be privileged"). In support, the court cited another district court case to elaborate on how the privilege analysis should play out. "[T]here is a difference between providing 'legal information' and 'legal advice,' that privilege only attaches to the latter, that the latter would include consultation 'concerning the legal consequences of what they might say in their speeches or ... advice on the legal consequences of what was included' in a document, but finding that because such information was not sought 'the attorneys were acting more as courier[s] of factual information, rather than legal advisers' and the communications were not privileged" (first alteration added). Id. (quoting Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1367 (N.D. Ill. 1995)).

[10] Wollesen v. West Central Cooperative, 2018 U.S. Dist. LEXIS 20864 (N.D. Iowa Feb. 8, 2018).

[11] Id., at *15.

[12] Id., at *18-19.

[13] America's Test Kitchen Inc. v. Kimball, No. 1684 CV 03325-BLS2, 2018 Mass. Super. LEXIS 45, *17 (Mass. Super Ct. Apr. 2, 2018).

[14] Id., at *19-20.

[15] Id., at *18-19, citing the following cautionary examples: In re Prograf Antitrust Litig., No. 1:11-md-02242, 2013 U.S. Dist. LEXIS 63594, at *10 (D. Mass. May 3, 2013) (Zobel, J.) ("documents regarding 'standard public relations services

related to . . . business or media fallout' of potential litigation were not protected work product because they had nothing to do with 'the rendering of legal advice'"); Egiazaryan v. Zalmayev, 290 F.R.D. 421, 436 (S.D.N.Y. 2013) (documents that "relate solely to public relations strategy and contain no discussion of legal strategy or attorney opinions or impressions" are not protected under work product doctrine); Burke v. Lakin Law Firm PC, No. 07-cv-0076, 2008 U.S. Dist. LEXIS 833, at *8 (S.D. Ill. Jan. 7, 2008) ("though the work product doctrine may protect documents that were prepared for one's defense in a court of law, it does not protect documents that were merely prepared for one's defense in the court of public opinion").