

Privilege Newsletter

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Fitting Consultants Within the Attorney-Client Privilege and Work Product Protection – Public Relations Consultants

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In our last newsletter, we analyzed the reluctance of courts to apply privilege to the work of forensic computer consultants following data breaches. Here, we address often unavailing efforts to fit communications with third-party public relations consultants within the client's attorney-client privilege. [\[1\]](#)

Consultants' work may be privileged if the primary purpose of the engagement is to assist counsel with providing legal advice.[\[2\]](#) The *Kove*[\[3\]](#) doctrine treats consultants as agents of counsel, and within the client's attorney-client privilege, where the consultant is "necessary, or at least highly useful" to counsel's forming legal advice and strategy. The core question is whether the primary purpose of the consultant's work is legal rather than primarily to further business interests. Courts recognize the significant business interests in managing public relations in the wake of a crisis, but many courts are reluctant to treat public relations services as advancing primarily legal interests.[\[4\]](#) Some of these courts, however, do apply work product protections to aspects of PR consultants' work. Recent case law aligns with the pattern that a majority of, but not all, courts reject application of privilege to PR consultant communications.

No Privilege Where Purpose of PR Consultants' Communications Was Reputational Protection Rather Than Legal Defense.

Rapp v. Fowler[\[5\]](#): In this matter, involving allegations of sexual abuse of a minor, the court held that email communications among defendant, his manager, public relations consultants, and counsel were not privileged. The 39 emails at issue were created after a reporter requested comment on allegations of sexual abuse. Of those emails, only 13 were originated by the lawyers and only one was addressed to defendant. The defendant only originated eight emails, and only one was addressed to a lawyer; all others were addressed to the manager and PR consultants. The court found that the defendant, his manager, and the PR consultants, "first and foremost," were seeking and providing business and reputational advice. The court noted that the consultants were not specifically engaged by the lawyers to help them provide legal advice, but instead were defendant's regular PR consultants. Under these circumstances, the court held the emails were not privileged.

Disclosing Privileged Communications to PR Consultants Waived Privilege.

Breuder v. Board of Trustees of Community College District No. 502[\[6\]](#): The former President of a college brought this wrongful termination case against the college's Board of Trustees. Defendant withheld as privileged more than 300 documents that were sent to third-party PR consultants hired by the Board, arguing: (1) the consultants were the functional equivalents of employees; and (2) the consultants were necessary to assist counsel to provide legal advice to the Board. The court rejected both arguments. First, the court explained that the Seventh Circuit has not adopted the "functional equivalent" doctrine, and the court declined to adopt it here. Second, the court found that the consultants were not necessary for counsel to provide legal advice. The court explained that the necessity requirement means more than "useful and convenient;" it requires that advice be "nearly

indispensable, or serve some specialized purpose in facilitating attorney-client communications.” The court found that the consultants were retained, “albeit by counsel,” to perform general public relations work for counsel and the Board during a period of turmoil, legal and otherwise. “Courts have consistently held that this type of general public relations work, even when related to ongoing litigation, falls outside the scope of the narrowly construed attorney-client privilege.” Even if the consultants actively participated in the development of legal strategy, the court found that defendant failed to demonstrate that their work was necessary. “At the end of the day, ‘a media campaign is not a legal strategy.’”^[7]

Public Relations Communications Are Privileged Where Consultant Assists Counsel.

Kirkpatrick v. City of Oakland, California^[8]: In this action, involving allegations of retaliatory discharge and violations of federal constitutional rights, the court held that communications with plaintiff’s public relations consultant did not waive the attorney-client privilege or work product protections. Defendants sought production of communications among plaintiff, her attorneys, and a public relations consultant. After reviewing *in camera* exemplar communications chosen by the parties, the court held that the communications were protected by both the attorney-client privilege and the work product doctrine. The court found that the consultant did, in fact, assist counsel in the conduct of the litigation, and that the consultant’s work product was prepared “because of” litigation. “[W]hile some of the communications were for a public relations purpose, that public relations purpose was part of a litigation strategy and the communications ‘would not have been created in substantially similar form but for the prospect of litigation.’” The court concluded that “‘the litigation purpose so permeates any [PR] purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.’”^[9]

Privilege Applies to Public Relations Consultant Communications Only If Essential to Providing Legal Advice.

Resolute Forest Products, Inc. v. Greenpeace International^[10]: In this defamation matter, plaintiff’s counsel asserted that he believed that it was critical to have expert PR advice “to provide accurate, useful, and well-informed legal advice” concerning defendants’ alleged social media attacks. The court found that the consultant was, in fact, involved in legal strategy. Nevertheless, the court rejected application of the attorney-client privilege, finding plaintiff did not demonstrate that the consultant was “essential” to providing legal advice, that is, that counsel would not have been able to provide competent advice absent the consultant’s assistance. However, the court held that work product protections did apply to documents concerning the analysis of defendants’ statements and preparation of litigation strategy, as well as documents assisting counsel in obtaining necessary information for the provision of legal advice, where the work product was prepared at the behest of an attorney or provided to an attorney in anticipation of litigation.

Public Relations Communications to Counsel Requesting Legal Advice Are Privileged.

Sandoz Inc. v. Lannett Company, Inc.^[11]: In this matter, involving allegations of unfair competition and tortious interference, the court held that communications *from* defendant’s third-party public relations consultant *to* company counsel seeking legal advice were protected by the attorney-client privilege. The consultant sent his work product to counsel requesting legal advice and counsel responded with comments regarding legal strategy, which the consultant incorporated into the work product. Although defendant did not demonstrate that the consultant’s presence was indispensable to assist counsel, the court found that it was “patent from the face” of the documents that legal advice was involved.

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[1] See David M. Greenwald & Michele L. Slachetka, *Testimonial Privileges*, § 1:30 (Agents and representatives – Public Relations Consultants) (West 2021).

[2] See *id.*, §§ 1:29-1:32 (West 2021) for a detailed discussion of third-party agents and representatives (collecting cases).

[3] 296 F.2d 918, 922 (2d Cir. 1961).

[4] *Testimonial Privileges*, § 1:30, n.1 (of the approximately 25 decisions collected, the courts rejected privilege in more than 21 of those cases).

[5] 20-CV-9586 (LAK), 2021 WL 4804096 (S.D.N.Y. October 13, 2021) (applying New York law). You may read the decision [here](#).

[6] No. 15 CV 9323, 2021 WL 4283464 (N.D. Ill. Sept. 21, 2021). You may read the decision [here](#).

[7] 2021 WL 4283464, *8.

[8] No. 20-CV-05843-JSC, 2022 WL 137628 (N.D. Cal. Jan. 14, 2022). You may read the decision [here](#).

[9] 2022 WL 137628, *1.

[10] No. 17-CV-02824-JST (KAW), 2022 WL 885368 (N.D. Cal. Mar. 25, 2022). You may read the decision [here](#).

[11] No. CV 20-3538, 2021 WL 5139975 (E.D. Pa. Nov. 4, 2021) (applying Pennsylvania law). You may read the decision [here](#).

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