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Can Public Relations Be Private? The Attorney-Client Privilege and Communications with Public Relations Firms

By Carl H. Loewenson, Jr., and Lauren S. Gonzalez*

In this article, the authors explain that although broad claims of attorney-client privilege for communications with public relations companies have not been successful, limited claims of work product privilege have been accepted.

Open *The New York Times* or *The Wall Street Journal* website on any given day, and odds are you will find a report of a data breach or a ransomware attack. According to a recent report, by October 2021 there were already more reported data breaches than in all of 2020.[1] Since data breaches tend to rise in the last quarter of the year, 2021 may surpass the all-time high of 1,529, set in 2017. While not all of these breaches get front-page attention, many of these incidents – particularly those involving the exfiltration of millions of customers' sensitive data – lead to sustained press attention, as regulators investigate the incidents and civil lawyers file lawsuits ranging from consumer class actions to securities class actions and corporate derivative lawsuits.

Attorneys representing a company that has suffered a data breach or ransomware attack therefore find themselves handling problems that are often not confined to legal risks. Faced with sudden and unwelcome media interest, companies without a robust in-house public relations ("PR") group will for many good reasons want to retain a public relations firm. While there is a body of literature in public relations and academic circles arguing that public relations may have become an integral part of the lawyer's role in high-profile matters, the work an attorney does in pursuit of that role may not be covered by the attorney-client privilege. If a lawyer believes that hiring a public relations firm or consultant would further the client's litigation interests, the lawyer should not assume those communications will be covered by attorney-client privilege or work product protection.

Two cases in the early 2000s from the U.S. District Court for the Southern District of New York, *In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness*[2] ("*In re Grand Jury*") and *In re Copper Mkt.*

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[1] *See* https://fortune.com/2021/10/06/data-breach-2021-2020-total-hacks/ (last visited Oct. 22, 2021).

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

Antitrust Litig.[3] ("*In re Copper*"), extended attorney-client privilege to communications with public relations consultants made for the purpose of informing the legal advice the lawyers provided to their respective clients. Though still good law, New York courts – state and federal – consistently construe the holdings narrowly. When rejecting application of these holdings to subsequent public relations cases, courts stress the context and fact-specific nature of the inquiry as well as the precedents' unique contexts.

The decision by Judge Lewis Kaplan in *In re Grand Jury* held that attorney-client privilege covered communications with the public relations firm hired by the legal team representing the target of a high-profile federal criminal investigation. The consultants were tasked to help counter the growing public pressure on prosecutors to indict. The court found that the firm's work differed from typical publicity campaigns: their audience was not the general public, but the government actors responsible for charging decisions. The specific litigation goal the team was tasked with, avoiding an indictment or limiting the scope of one, "promote[d] broader public interests in . . . the administration of justice."[4]

The decision by Judge Laura Swain in *In re Copper* also protected communications between counsel and a public relations firm because the PR firm was determined to be the "functional equivalent" of the client's employee.[5] When a foreign corporation, whose principals did not speak English well and lacked experience in dealing with the Western media, suddenly became involved in a high-profile litigation, they hired the PR firm. The public relations firm worked in the corporation's office and possessed authority to make decisions on behalf of the foreign corporation concerning its public relations strategy. Finding that the firm was "essentially, incorporated into [the foreign corporation]'s staff to perform a corporate function that was necessary in the context of the government investigation," the court determined that the consultant's communications with counsel were protected like a corporate employee's communications would be.[6]

These cases have proven to be the exception to the rule. As a later Southern District of New York decision*, Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*,[7] by Judge Denise Cote explained when denying privilege to a third-party PR consultant, "[s]ome 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." In order to have communications with PR firms or consultants covered by attorney-client privilege, the party asserting the privilege must demonstrate the necessity of their services for providing legal advice. The party asserting privilege must show that there is a nexus between the consultant's work and how it affects and assists the lawyers in the litigation or investigation.

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[3] *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001).

[4] *In re Grand Jury*, 265 F. Supp. 2d at 329 (quoting *Upjohn Co. v. United States*, 499 U.S. 383, 389 (1981)).

[5] *In re Copper*, 200 F.R.D. at 220.

[6] *Id.* at 219.

[7] *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, 02 Civ. 7955 (DLC) (S.D.N.Y. Aug. 25, 2003).

Shortly before *In re Grand Jury* and *In re Copper*, Judge Jed Rakoff in the Southern District of New York, in *Calvin Klein Trademark Trust v. Wachner*,[8] had declined to protect as privileged certain communications between a company and its PR firm, because the PR firm was providing typical public relations advice such as reviewing press coverage and reaching out to various reporters rather than informing the legal strategy. If the public relations consultants provide more typical public relations functions or advice for communication with the general public and media, courts often find that the reasoning in *Calvin Klein* controls. New York state privilege law is more conservative than federal privilege law and requires an even higher showing: that the third party "be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."[9] Although broad claims of attorney-client privilege for communications with PR companies have not been successful, limited claims of work product privilege have been accepted.

"NECESSARY" DEFINED

Courts applying federal common law require that the party claiming privilege must demonstrate the PR firm was necessary for the lawyers to provide legal advice to their client and for the client to obtain legal advice from the attorney. When evaluating whether communications with PR firms should receive attorney-client privilege protections, courts emphasize the unusual circumstances present in *In re Grand Jury*. While accepting that applying privilege for that relationship may have been necessary for the unique context – a high profile criminal investigation where the lawyers were trying to counteract "the broad power of the government" – later courts have not been willing to extend the privilege to lower profile or lower risk situations.[10] Some found the holding almost exclusively "limited by its context: the . . . narrow scenario of public relations consultants assisting lawyers during a high profile grand jury investigation."[11]

The PR firm's role within the attorney-client relationship must be crucial and "beyond the expertise of counsel."[12] In other words, if the consultant does not provide specialized knowledge that the attorneys could not have acquired or understood on their own or directly through the client, there is no privilege. This reasoning is an extension of the holding of *United States v. Kovel* in which the U.S. Court of Appeals for the Second Circuit likened the communications made between the client and an accountant employed by the client's attorney to those between the client and a translator.[13] The court found the privileged relationship extended to parties serving an interpretive function for the client and attorney for concepts the counsel need to comprehend in order to provide legal advice.

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[8] *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000).

[9] *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 432 (S.D.N.Y. 2013).

[10] *In re Grand Jury*, 265 F. Supp. 2d at 330.

[11] *Ravenell v. Avis Budget Grp., Inc.*, 08-CV-2113 (SLT) (SMG) (E.D.N.Y. Apr. 4, 2012).

[12] *In re Grand Jury*, 265 F. Supp. 2d at 330.

[13] *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

For example, in a trademark infringement case, *Universal Standard Inc. v. Target Corp.*,[14] the court did not extend attorney-client privilege to the PR firm because they were not utilized in a specific litigation strategy that required the PR firm's help. Nor did the attorneys need public relations employees to act as a translator or interpreter of client communications. In that case, the court found that even without the publicity team the client could have communicated with counsel about the propriety of issuing a press release around the lawsuit's filing.

New York State courts or federal courts with diversity jurisdiction apply New York privilege law, which is more limiting than federal law in extending privilege to third parties. In addition to what federal privilege law requires, courts applying New York law analyze if disclosure to the third party was more than useful or convenient "but nearly indispensable" to facilitate legal advice.

In *Egiazaryan*, for example, the court explicitly distinguished the goals pursued by the public relations firm's activities which were "aimed at burnishing Egiazaryan's image" from the litigation goals which related to the administration of justice in *In re Grand Jury*.[15] The PR firm's insertion into the "legal decision making process" does not create a privileged relationship – no matter how extensive their involvement – if it is not necessary for the client to obtain legal advice "from his actual attorneys."[16]

Fine v. ESPN, Inc.,[17] exemplifies the high burden New York law requires to invoke the agency exception regarding waiver of the privilege as well as the narrow interpretation of *In re Grand Jury*. *Fine*'s facts were closely analogous to those in *In re Grand Jury* – the party claiming privilege over communications with the PR firm was subject to intense and high-profile media scrutiny as well as potential criminal charges. Even though counsel relied heavily on *In re Grand Jury* to argue that the PR firm helped counsel "shape media coverage to avoid prosecution," the court found all but two communications were ineligible for protection because they didn't have anything to do with legal advice.[18]

In a recent case, *People v. Ackerman McQueen*,[19] in the course of a high profile investigation of the National Rifle Association ("NRA") by the New York Attorney General, the NRA argued that communications with its longtime media firm, which had managed NRA platforms and had its employees appear on NRA TV, should be protected by attorney-client privilege. Applying the "necessary" test, the state court in Manhattan explained that the NRA did not need its PR firm to act as a "translator" for the NRA to understand its own lawyer's advice about the Second Amendment – it was a language the lawyers understood.

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[14] *Universal Standard Inc. v. Target Corp.*, 331 F.R.D. 80 (S.D.N.Y. 2019).

[15] *Egiazaryan*, 290 F.R.D. at 432.

[16] *Id.*

[17] *Fine v. ESPN, Inc.*, 5:12-CV-0836 (LEK/DEP) (N.D.N.Y. May. 28, 2015).

[18] *Id.*

[19] *People v. Ackerman McQueen,* 125 N.Y.S.3d 838 (N.Y. Sup. Ct. 2020).

On the other side of the dynamic, when the media company's employees appeared on NRA TV, the publicists were not necessary to convey legal strategy from the NRA's lawyers. The NRA or one of its employees could tell the publicity company's employee what to say without ever providing legal advice.

PURPOSE OF THE RELATIONSHIP OR COMMUNICATION

Many cases have held that if the publicity specialists are not retained for, or do not provide, necessary assistance for the lawyer's litigation strategy or legal advice, there is no attorney-client privilege. Courts analyzing the applicability of *In re Grand Jury* highlight the specific litigation tasks the counsel needed the PR team to accomplish in order to advance the client's litigation goals, such as "reducing public pressure on prosecutors and regulators to bring charges."[20] The more the publicity work resembles traditional PR tasks for business concerns, the more likely the communications will be not protected under the reasoning of *Calvin Klein*.

Courts look beyond affidavits or engagement letters proffered by those asserting a special or litigation-oriented relationship with PR consultants to determine the nature of the communications and relationship. Some courts deny the privilege after analyzing the nature of the work performed by the consultant.

For example, though the retention letter in *Haugh* stated that the PR consultant, who was also a lawyer licensed in Texas, would "provide us advice to assist us in providing legal services to Ms. Haugh," the court found the services provided by the consultant were "standard public relations services" that were not necessary in the attorney's provision of legal advice to the client.[21]

In *Ackerman McQueen*, the NRA argued that its decades-long relationship with its public relations firm was special and exceeded standard public relations work. The court found that though the firm managed the NRA media platforms and website, administered NRA TV, handled branding and strategy, and entered into contracts on behalf of the NRA, those services did not change the relationship from that of a third-party public relations firm. In another case, the court concluded that drafts exchanged and communications relating to a proposed press release were not for the predominant purpose of seeking or conveying legal advice, so copying the PR consultant on emails about the press release waived any privilege.[22]

General public relations advice strategizing about the effects of the litigation on the client's customers, the media, or on the public generally is not protected. For example, *Breest v. Haggis*,[23] a #MeToo case which garnered considerable media attention, held

[20] *McNamee v. Clemens*, No. 09 CV 1647 (SJ) (CLP) (E.D.N.Y. July 31, 2013).
[21] *Haugh, supra* n.7.
[22] *Pearlstein v. BlackBerry Ltd.,* 13-CV-07060 (CM)(KHP) (S.D.N.Y. Mar. 19, 2019).
[23] *Breest v. Haggis*, 64 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2019).

that attorney-client privilege did not cloak communications from the client, directly or through attorneys, with the PR firm made for the predominant purpose of spinning the information in the media or for business purposes.

Additionally, communications about a litigation strategy that is driven by publicity opportunities for the benefit of the client's image and reputation are not protected. For example, in *McNamee*, the client's legal team's discussion regarding strategic times for filings were driven by trying to get favorable magazine and TV interview profiles and not protected by privilege. PR assistance aimed at communicating with the public at large, even about the legal issues in the litigation, has repeatedly not been granted privilege protection.

Courts also look to the nature of the attorney's role within the dynamic. Federal and state courts have noted that when a lawyer's efforts are concentrated in media and public relations, lobbying, and political activism, then the privilege does not extend to communications with respect to many of those activities. Extending that reasoning, *Gottwald v. Sebert*,[24] a case which involved the famous singer Kesha, held that, in order to be protected from disclosure, the "predominant purpose" of a communication with a PR firm must involve legal advice. The court found that her attorney's communications with a PR firm strategizing a media campaign designed to pressure the litigation adversary into settling quicker and so that the prospective jury pool would be more favorable for the defendant did not satisfy the standard. Communications designed to effectuate these legal objectives, but for reasons not related to the legal merits (like settling out of fear of negative publicity or the prospect of decimating a person's career), did not pass the "predominant purpose" test.

Interposing a law firm in the middle of communications between a PR and its client will not protect the communications from disclosure. In *NXIVM Corp. v. O'Hara*,[25] the court determined from the record that the attorney never used the PR firm's services – hiring them was "a façade. . . . [Counsel] and his law firm were used as intermediaries in name only – a mule – with the anticipated effect of concealing all conversations and all actions under the cloak of an attorney-client privilege or work product."

WORK PRODUCT PROTECTION

Even if the attorney-client privilege has been waived, communications with PR firms may still be protected under the work product doctrine. In order for a communication to qualify as work product, the threshold test requires that (1) the document was drafted in anticipation of litigation or to have an impact on litigation strategy, and (2) it would not have been prepared in essentially similar form irrespective of the litigation. Both elements must be met to warrant protection.

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[24] *Gottwald v. Sebert*, 58 Misc. 3d 625, 627 (N.Y. Sup. Ct. 2017), *aff'd,* 161 A.D.3d 679 (2018).

[25] *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 140 (N.D.N.Y. 2007).

In *Pearlstein*, the court found that a near final version of a press release satisfied the first prong, but not the second, and therefore required its disclosure. Work product protection analysis is an individualized determination depending on the particular facts and circumstances – and sometimes document by document – of the case. Courts require detailed privilege logs and often *in camera* review.

When analyzing whether a communication is work product worthy of this protection, courts require more than a showing that the material was prepared at the behest of a lawyer or provided to one. Just like attorney-client privilege, general public relations advice strategizing about the effects of the litigation on the public, media or business are not protected – the protection is reserved for strategizing about the conduct of the litigation itself. Even if the communications sought "played an important role in [the] litigation strategy," but focused on the former, it will not get cloaked with work product protection.[26]

As a rule, waiver of work product protection is much more difficult to establish than attorney-client privilege waiver. If the publicity-related work product was drafted by counsel or the documents implicitly reflect attorney work product, i.e., witness interview notes written by attorneys, the communication is more likely to be protected than if written by the publicist. Work product disclosed to a PR firm sharing a common interest with the client will stay protected as long as the consultants intend to keep the information in confidence. But a PR firm's release of otherwise protected work product to the media will vitiate the protection. For example, in *O'Hara*, the court found that because work product was disclosed to the PR firm with the expectation that it would be released publicly, that work product did not receive protection.

COUNSEL'S ETHICAL CONSTRAINTS AND DUTIES

Counsel, especially defense counsel, can be faced with competing and seemingly incompatible obligations between codes of professional conduct and the best interests of their client in obtaining the best possible publicity. Traditionally, the role of lawyers and their role as it relates to influencing public opinion was construed narrowly and proscribed extrajudicial statements that could influence jury pools. The use of a PR firm to generate sympathetic media coverage in an effort to influence a prosecutor not to indict is all well and good (and is likely privileged under *In re Grand Jury*); but an effort to generate similar media coverage post-indictment in an effort to influence the trial jury would collide head on with the attorney's ethical obligations.

In New York, the central rule regarding lawyers communicating with the press is Professional Conduct Rule 3.6(a):

> A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should

[26] *McNamee*, *supra* n.20.

> know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

A lawyer also cannot evade this rule by delegating the task to the PR firm. Under Rule 5.3(b), a lawyer is responsible for conduct of a nonlawyer retained by the lawyer that would be a violation of the Rules if engaged in by the lawyer.

While codes of professional conduct now allow for counsel to comment in response to public statements – "limited to such information as is necessary to mitigate the recent adverse publicity" – in order to protect their client's interests, Rule 3.6(d), case law has shifted towards a more liberal view of a lawyer's relationship with the media. Justice Kennedy acknowledged the lawyer's role advocating for his or her client more broadly in the realm of public opinion, explaining in a concurring opinion, "[a]n attorney's duties do not begin inside the courtroom door."[27]

Calvin Klein and *In re Grand Jury* and their progeny both began at this evolved understanding of what is considered an acceptable scope of behavior for a lawyer outside of the courtroom. Though *In re Grand Jury* and *In re Copper* remain the only cases extending the attorney-client privilege to communications made for public relations goals, *Calvin Klein* in rejecting the application of the privilege accepted "that the modern client [may] come[] to court as prepared to massage the media as to persuade the judge."[28]

Although New York courts are not extending attorney-client privilege for communications discussing a strategy aimed at the general public or media, courts are also not sanctioning attorneys for engaging in that conduct. The principle underlying Rule 3.6 is protecting the right to a fair trial. Therefore, pre-indictment counsel partnerships with public relations firms as in *In re Grand Jury* and *Fine* are unlikely to run afoul of the rule. The comments to the New York rule explain that some trials, i.e., criminal jury trials, are the most sensitive to prejudicial extrajudicial speech, whereas non-jury hearings and arbitration proceedings may be less susceptible to prejudice. The judge's comments in *Gottwald*, regarding an email revealing that the attorney had targeted the potential judges and jury pools in his media strategy are illustrative for these distinctions:

> Leaving aside the jury selection implications of such a strategy, it is the duty of this court to render decisions purely based on its views of the correct legal result, without regard to any public relations implications. It would behoove counsel to focus more on persuading this court than the court of public opinion.[29]

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[27] *Gentile v. State Bar*, 501 U.S. 1030, 1043 (1991).

[28] *Calvin Klein Trademark Trust*, 198 F.R.D. at 56.

[29] *Gottwald*, 58 Misc. 3d at 636, n.11.

FUNCTIONAL EQUIVALENT

If a public relations firm or other consultant is determined to be the "functional equivalent" of the client's employee, then attorney-client privilege will extend to the PR specialists just as it would if they were actually the client's employees. Courts have identified the following non-exhaustive factors, many of which were present in *In re Copper*, which best position companies to meet the functional equivalent test: if the PR firm has primary responsibility for a key corporate job; has a continual and close working relationship with the company's principals on matters critical to the company's position in litigation; and possesses information possessed by no one else at the company.

Other factors include whether the consultant:

- Exercised independent decision-making on the company's behalf or if important aspects of the work were supervised by the client;
- Served as a company representative to third parties;
- Maintained an office at the company or otherwise spent a substantial amount of time working for it; and
- Exclusively worked for the client.

Ackerman McQueen demonstrates the high standard litigants must meet to claim attorney-client privilege under the functional equivalent theory. The NRA's decades-long and relatively involved relationship with the media company did not suffice. Pointing to the fact that the public relations firm had additional clients, its own legal counsel, and negotiated the contract for their employee publicists who appeared on NRA TV, the court also found that the firm never assumed the functions or duties of an NRA employee.

PRACTICE NOTES

While many of the cases that assess the attorney-client privilege and work product protection for communications involving public relations often turn on their facts, a number of themes emerge from the cases of the past two decades. These themes can serve as practice pointers for any counsel considering adding a PR firm to the team in the representation of a client in a high-profile criminal or civil matter.

- The attorney, not the client, should contract with the consultant and be invoiced for services. If relevant, the legal-related work should be kept separate and billed separately from the general PR work. For example, if the same PR firm is assisting with matters related to the conduct of the litigation and also providing assistance in managing the effects of the litigation, separate bills could be beneficial.

- The engagement letter should describe the work as facilitating legal services and should explain the particular project or litigation the consultants are working on as opposed to the company's media image generally.

- If possible, the engagement letter should include a confidentiality clause – similar to the clause that counsel would include in the retention of any consulting expert – and subsequently exchanged documents and emails should include language that recipients should limit dissemination.

- All communications by the client with the consultant should involve an attorney if possible. Though this is not dispositive, it is a relevant factor supporting protection of the communications. An attorney should be copied on all communications with the PR firm.

- When hiring a PR consultant, an attorney should be strategic in the timing of the hire and the type of a consultant. If a PR firm is hired before litigation is reasonably anticipated, it could appear they were employed for more of a business purpose than a litigation one. Additionally, the consultant should ideally be specialized either in crisis work, legal issues, or a particular subject matter that is unfamiliar to the client and attorney.

- Discuss the legal implications of public relations issues in the documents. For example, if the document outlines talking points or a press release, the attorney's comments and edits should state or demonstrate the attorney's considerations of legal impacts of alternative expressions.