

The Attorney-Client Privilege and Communications Between Counsel and Public-Relations Consultants

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When high-profile environmental litigation is commenced against a company, the general counsel's first call—after calling outside counsel—is often to a public-relations firm. Timely public-relations efforts can alleviate concerns of a public company's investors and help manage public perceptions in high-profile cases. Young lawyers are often the ones called upon to interface with public-relations consultants on a day-to-day basis. In interacting with these consultants, young lawyers should not assume that their communications are protected by the attorney-client privilege. While some courts have found that the attorney-client privilege extends to such communications, other courts are increasingly holding that communications between counsel and public-relations consultants are not protected by the privilege absent specific circumstances.

Attorney-Client Privilege

Courts have long acknowledged the importance to our legal system of “encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice.” *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). Accordingly, where a client seeks legal advice from an attorney in his or her capacity as such, any confidential communications relating to that legal advice will be protected from disclosure by the attorney-client privilege. *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, 2003 WL 21998674, at *2 (S.D. N.Y. Aug. 25, 2003). This privilege can extend to confidential communications between the client and the attorney's agents; as courts have recognized, “the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now

practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts.” *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

The extent to which these non-lawyers come within the bounds of attorney-client privilege, and which non-lawyers fall within the protection of the privilege, is often unclear. This is particularly the case when the non-lawyer in question is a public-relations consultant. For example, within six months of each other, two judges in the Southern District of New York reached opposite conclusions regarding the applicability of attorney-client privilege to communications with public-relations consultants. See *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D. N.Y. 2001); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D. N.Y. 2000).

Two Conflicting Views from One Court

In *Calvin Klein*, Judge Jed S. Rakoff refused to extend the attorney-client privilege to protect documents and testimony sought from Robinson Lerer & Montgomery (RLM), a public-relations firm retained by counsel to Calvin Klein. The defendant contended that the plaintiff's counsel retained RLM, which also assisted Calvin Klein on general public-relations matters, “to wage a press war against the defendant.” *Calvin Klein*, 198 F.R.D. at 54. Calvin Klein countered claiming that its counsel had retained RLM solely for “defensive purposes,” such as helping counsel understand the possible reaction of Calvin Klein's constituencies to the litigation. As an initial matter, the court found that few, if any of the withheld documents contained or revealed confidential communications from Calvin Klein made for the purpose of obtaining legal advice. The “possibility” that these communications

between counsel and RLM might help counsel formulate legal advice, was “not in itself sufficient to implicate the privilege.” Second, the court determined that, even if certain withheld documents contained confidential communications, counsel's disclosure to RLM waived the privilege. Finally, the court concluded that extending the privilege to the documents and communications at issue would apply the privilege too broadly because RLM did not appear to perform functions “materially different from those that any ordinary public relations firm would have performed” if it had been retained directly by Calvin Klein.

Less than six months later, the same court, in an opinion by Judge Laura T. Swain, reached the exact opposite conclusion in *In re Copper Market Antitrust Litigation*. Coincidentally, the case involved the same public-relations firm, RLM. 200 F.R.D. at 215. Unlike Calvin Klein, however, defense counsel in *Copper Antitrust* retained RLM to provide “crisis management” with respect to the defense of anti-trust litigation brought against Sumitomo Corporation. RLM worked largely out of Sumitomo's Toyko headquarters, acted as Sumitomo's “spokesperson” when dealing with the Western press on issues related to the “copper trading scandal,” and frequently conferred with counsel. *Id.* Under these facts, the court found that RLM acted as the “functional equivalent of an in-house public-relations department with respect to Western media relations.” Therefore, the court equated RLM with Sumitomo for purposes of analyzing the applicability of the privilege. “Accordingly, confidential communications between RLM and Sumitomo's counsel or between RLM and Sumitomo, or among RLM, Sumitomo's in-house counsel and [Sumitomo's outside counsel] that were made for the purpose of facilitating the

rendition of legal services to Sumitomo can be protected from disclosure by the attorney-client privilege.”

In re Grand Jury Subpoenas Attempts to Clarify Application

Three years after the decisions in *Calvin Klein* and *Copper Antitrust*, the Southern District of New York had an opportunity to reconcile those two decisions. In the resulting opinion, the court relied not on *Calvin Klein* or *Copper Antitrust*, but turned to the policies that undergird the attorney-client privilege.

In re Grand Jury Subpoenas presented the court with the “troublesome question whether and to what extent the attorney-client privilege and the protection afforded to work product extend to communications between and among a prospective defendant in a criminal case [the target], her lawyers, and a public relations firm hired by the lawyers to aid in avoiding an indictment.” 265 F.Supp.2d at 322. The target was under investigation by the U.S. attorney’s office in a “high profile matter” that had been the subject of intense press interest and extensive coverage for months.” Counsel for the target retained a public relations firm to provide “defensive” public relations, including: (i) to communicate with the media to help restore balance and accuracy to the press coverage; (ii) to reduce the risk that prosecutors would bring charges as a result of media pressure; and (iii) to neutralize the environment in a way that prosecutors could exercise discretion without undue influence from negative press coverage. The target and the firm asserted attorney-client privilege and work-product immunity in response to government subpoenas seeking documents and grand-jury testimony from the firm.

Unlike *Calvin Klein* and *Copper Antitrust*, the *Grand Jury Subpoenas* court relied on the Second Circuit’s decision in *United States v. Kovel* to frame its analysis of the privilege issue: “The privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services.” The key inquiry under *Kovel*, the court explained, is determining whether the problem with

which the target’s counsel needed outside assistance related to providing legal advice.

[W]hether attorney efforts to influence public opinion in order to advance the client’s legal position—in this case by neutralizing what the attorneys perceived as a climate of opinion pressing

and how possible statements to the press—ranging from “no comment” to detailed factual presentations—likely would be reported in order to advise a client as to whether the making of particular statements would be in the client’s legal interest. And there simply is no practical way for such

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prosecutors and regulators to act in ways adverse to Target’s interests—are services, the rendition of which, also should be facilitated by applying the privilege to relevant communications which have this as their object.

Id. at 326.

Not surprisingly, the court found little help in answering this question in either *Calvin Klein* or *Copper Antitrust*. Instead, the court relied upon policies that form the basis of the attorney-client privilege. The court concluded that extending the privilege would promote broader public interests in the administration of justice:

This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers’ public relations consultants. For example, lawyers may need skilled advice as to whether

discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers’ defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions.

Id. at 330.

Based on this analysis, the court held that “(1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client’s legal problems are protected by the attorney-client privilege.” Importantly, the court stressed that, to invoke *Kovel*, counsel, not the client, must directly retain the public-relations firm.

The In re Grand Jury Subpoenas Test is Construed Narrowly

In the seven years since *In re Grand Jury Subpoenas* was decided, other courts have relied on its reasoning when confronted with similar factual circumstances. *See, e.g., In re New York Renu with Moistureloc Prod. Liability Litig.*, 2008 WL 2338552, at *7–8 (D. S.C. May 8, 2008); *Haugh*, 2003 WL 21998674, at *3. These courts

have construed *Grand Jury Subpoenas* more narrowly, however, and found that the privilege does not exist without a clear indication that the communications between the public-relations consultant and counsel were for the purpose of obtaining legal advice.

In *Haugh*, the client sought to file an employment-discrimination action after her termination, which had been highly publicized in industry publications. The client's attorney retained a public-relations consultant who was also a lawyer licensed to practice in Texas. 2003 WL 21998674, at *1. The attorney anticipated that the consultant would assist with the media attacks he expected to occur once the client filed her lawsuit. The consultant assisted in the preparation of press releases and developed both litigation and media strategy. Upon learning of several written communications between the attorney and the consultant, the defendant filed a motion to compel their production. The plaintiff opposed production of the documents, arguing that they were protected by the attorney-client privilege.

In determining whether the attorney-client privilege should apply, the *Haugh* court noted that, under *Kovel*, "it is crucial that the party asserting the privilege show that the communication is made so that the client may obtain legal advice from her attorney." Here, the plaintiff had not made any such showing, having demonstrated only that the consultant had performed "standard public relations services." Accordingly, the court found that the attorney-client privilege did not protect against disclosure of the written communications. In distinguishing the case from *Grand Jury Subpoenas*, the *Haugh* court observed that "[plaintiff] has not identified any legal advice that required the assistance of a public relations consultant. For example, she has not identified any nexus between the consultant's work and the attorney's role in preparing Haugh's complaint or Haugh's case for court." Thus, the court left open the possibility that communications between public-relations consultants and attorneys could be covered by the attorney-client privilege, but drew the boundaries of that possibility narrowly.

Similarly, the court in *In re New York Renu* narrowly applied the attorney-client

privilege to communications between attorneys and public-relations consultants. 2008 WL 2338552, at *6-7. The plaintiffs sought production of a number of emails

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between the defendant, its attorneys, and others. One of the email strings pertained to a contact with the Food and Drug Administration regarding a statement about the product at the center of the litigation. The first email string was sent from a representative of the defendant to counsel and public-relations consultants. In finding that this email string was not protected by the attorney-client privilege, the court noted that, to invoke the privilege, "the services performed by the non-lawyer [must be] necessary to promote the lawyer's effectiveness; it is not enough that the services are beneficial to the client in some way [but] unrelated to the legal services of the lawyer." As in *Haugh*, the court in *New York Renu* emphasized that the defendant had failed to identify any nexus between the consultant's work and the attorney's representation of the client.

Significantly, the *New York Renu* court stated that the first email string would have been privileged if not for the inclusion of the public-relations consultants among its recipients. The court noted that the email implicitly sought legal advice and was sent

to counsel, but because it was also sent to a non-lawyer third party, the privilege was waived. Thus, not only were communications with the public-relations consultants excluded from the protection of the attorney-client privilege, but inclusion of those consultants on otherwise privileged communications waived the privilege.

Practice Points

The narrowing of *Grand Jury Subpoenas* in recent years indicates that, from the outset, communications with public-relations consultants need to be handled carefully to avoid the many pitfalls that exist in this area. Young lawyers can take some steps to ensure that they are not caught in these pitfalls.

First, counsel can attempt to bring the work of the public-relations consultant within the bounds of the narrowed *Grand Jury Subpoenas* test. This would include limiting the consultant's work to tasks that have a nexus with counsel's representation or that are necessary to the representation. The public-relations consultant's work may also be more likely to be construed as "legal advice" if counsel retains the consultant, manages his or her fees, and ensures that counsel is copied on any communications between the client and the consultant.

However, given the current state of the case law, lawyers should assume that their communications with public-relations consultants are potentially not protected by attorney-client privilege. Accordingly, counsel should proceed with a public-relations consultant in a manner consistent with a testifying expert, i.e., expecting that any written communications will be subject to disclosure to the opposing party.

Finally, in light of the court's reasoning in *New York Renu*, lawyers should be particularly careful to avoid having any confidential conversations or communications with the client in the presence of the public-relations consultant. While this may make working with the public-relations consultant more challenging, it will prevent any inadvertent waiver of the attorney-client privilege. ♻️

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