

The Role of Attorney-Client and Work- Product Privileges in Public Relations Engagements

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The Attorney-client privilege and the work-product privilege doctrine may both be issued that legal counsel must address with the client and a potential public relations firm in order to determine the extent to which certain communications and documents prepared with and by public relations firms may be protected from further disclosure. However, that protection is not absolute.

In the 21st Century, US Courts have recognized that the attorney-client privilege and work-product privilege an potentially apply to engagements with public relations firms. The below cases exemplify the extent—and limitations—of the protection afforded by these privileges.

Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000)

In the trademark infringement suit of *Calvin Klein Trademark Tr. v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000), defendants challenged plaintiff's assertion of attorney-client privilege and work-product protection with respect to documents and testimony sought by defendants from a public relations firm hired by plaintiff's counsel. Plaintiff's counsel hired the public relations firm in anticipation of litigation to act "as a consultant to [counsel] for certain communications services in connection with [counsel's] representation of Calvin Klein, Inc."

The court held that none of the communications were protected by the attorney-client privilege. For one, the court found that few, if any, of the documents in issue appeared to contain or reveal confidential communications from the underlying client, Calvin Klein, made for the *purpose* of obtaining legal advice. Although there was a possibility that the communications between counsel and the public relations firm would help counsel formulate legal advice, that was not sufficient to implicate attorney-client privilege.

Similarly, the court found that if the public relations firm had been hired by Calvin Klein, as opposed to Calvin Klein's counsel, the work performed would have been no different. Applying attorney-client privilege to the documents in question would therefore expand the scope of the privilege, which is intended to be narrowly construed. The court balked at permitting such an expansion.

In contrast, the court found that some of the communications at issue were protected by the work-product privilege. The court held that, "as a general matter public relations advice, even if it bears on anticipated litigation, falls outside the ambit of protection" of work-product privilege. The work-product privilege is intended to protect strategizing for the litigation itself, not strategizing about the effects of the litigation on the client's customers, the media, or on the public generally. However, certain communications may be privileged to the extent that an attorney shares their own work-product with a public relations firm whom the attorney has hired. In the case at issue, the court explained that

“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.” The court held that such documents were protected by the work-product doctrine.

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

In *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001) the Southern District of New York once again examined the role of attorney-client privilege and work-product privilege in public relation engagements. Here, Plaintiffs alleged that a foreign company, Sumitomo, conspired to manipulate global copper prices. Plaintiffs requested that Defendant's public relations firm produce documents relating to its work with Defendant, which Defendants resisted on the basis of attorney-client privilege and work-product privilege. The public relations firm acted as Defendant's spokesperson when dealing with the Western press and conferred frequently with the company's U.S. litigation counsel, preparing drafts of press releases and other materials which incorporated the lawyers' advice.

The court held that the documents at issue were protected by the attorney-client privilege, reasoning that the public relations firm, in the circumstances of this case, was the functional equivalent of an in-house department of Defendant and thus part of the “client.” The communications between the firm and the lawyers were therefore confidential attorney-client interactions. In so holding, the court rejected the argument that third-party consultants came within the scope of the privilege only when acting as conduits or facilitators of attorney-client communications.

The court also held that the documents were protected by the work-product doctrine because they were prepared in anticipation of litigation. Notably, Defendant hired the public relations firm, which specialized in litigation-related crisis management, after an employee made a confession that Defendant feared would result in an enforcement action. Further, Defendant retained the firm to make sure that its public statements would not result in further exposure in the litigation which grew out of the copper trading scandal.

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

In *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), a target of a “high profile” grand jury investigation hired a public relations firm to assist in influencing the outcome of the investigation. The target feared that press reports would pressure prosecutors and regulators to bring a charge. When subpoenaed by the government to produce documents and testify before the grand jury regarding communications with the target, the public relations firm asserted the attorney-client privilege on behalf of the target.

The court considered whether public relations fell within the realm of legal advice, asking “whether 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 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.”

The court upheld the privilege, recognizing the need for lawyers to be able to engage in frank discussion of facts and strategies with the lawyers' public relations consultants. 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.”

***Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558 (6th Cir. 2015)**

In *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558 (6th Cir. 2015) a former Ohio Department of Public Safety (ODPS) employee filed suit against his former employer, current and former ODPS directors, and a former Ohio Homeland Security (OHS) director, alleging, inter alia, discrimination on the basis of national origin, religion, and race, and retaliation against his exercise of protected First Amendment speech. The United States District Court for the Southern District of Ohio granted summary judgment for defendants. The employee appealed on a number of bases, including an argument that the district court improperly denied his motions to compel discovery.

Plaintiff sought discovery of communications at a meeting between the Director of the ODPS, in-house counsel, and Plaintiff. The district court denied Plaintiff's motion to compel discovery of communications from that meeting, concluding that the attorney-client privilege protected those communications because the record indicated that the purpose of the meeting was for in-house counsel to ask Plaintiff questions in order to legally advise ODPS on how to respond to media inquiries concerning Plaintiff's employment history. The Sixth Circuit agreed, holding that “[a]dvising a client on how to respond to media inquiries has important legal implications when that client will issue a public statement about an employee.”

***Bloomington Jewish Educ. Ctr. v. Vill. of Bloomington, New York*, 171 F. Supp. 3d 136 (S.D.N.Y. 2016)**

In *Bloomington Jewish Educ. Ctr. v. Vill. of Bloomington, New York*, 171 F. Supp. 3d 136 (S.D.N.Y. 2016), two Hasidic Jewish residents, a religious school, and several businesses brought action against the local governments and public officials of the Village of Bloomington and the Town of Mamakating, alleging that defendants attempted to prevent Jewish people from moving to vicinity of village and town by impeding opening of religious school. Plaintiffs filed a motion to overrule the town's blanket objection to Plaintiffs' document subpoena served on a non-party public relations firm that was retained by the town at the behest of the town's counsel in a related action. The town argued that all communications with the public relations firm were protected by both attorney-client privilege and work-product privilege.

The court held that neither the attorney-client privilege nor work-product privilege applied, in part because defendants had not presented the court with “competent evidence and targeted arguments” to allow the court to determine whether the privileges applied. Defendants did not submit a privilege log, provide copies of any documents for in camera review, or describe the documents with any particularity. The court noted that while attorney-client privilege and work-product privilege may apply to some communications with public relations firms, they do not apply to all communications. It was therefore inappropriate for defendants to make a blanket objection for all documents and communications.

Furthermore, the court held that the communications were not protected by the attorney-client privilege because there was no basis to find that the public relations firm performed functions essential to enable defendants' counsel to provide defendants with legal advice. The court noted that although work-product privilege may have applied to some of the documents and communications, the court could not rule that the privilege applied because defendants did not submit the necessary evidence and arguments for the court to make such a ruling.