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To Share or Not to Share: Avoiding Privilege Waiver When Working with PR Consultants

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In today's environment, clients are increasingly interested in retaining public relations (PR) firms, crisis managers or media consultants—especially when a potential scandal is about to break or an investigation is underway or on the horizon.

Indeed, sometimes those responsible for internal or external PR are the first to get wind of a brewing crisis. The fast-paced news cycle and social media pressure often create a need for "instant" responses, and shareholders, boards of directors and news outlets expect an immediate reaction to the possibility of a negative story.

As part of that process, clients often ask their attorneys to share with the PR team information about legal risks and strategy—and potential investigations or litigation—and to do so quickly. Moving forward without careful consideration and analysis, however, could result in a dangerous, and often unanticipated, consequence: waiver of the protections of the attorney-client privilege. Even if the communication between the consultant and counsel might otherwise qualify for work product protection, the risk of a potential privilege waiver remains—and should be carefully evaluated.

How Do Courts Approach the Issue?

There are generally two exceptions that could protect against waiver of the attorney-client privilege when working with a PR consultant: (1) the *Kovel* exception; and (2) the "functional equivalent" doctrine.

First, although not involving a PR consultant, *U.S. v. Kovel, 296 F.2d 918* (2d Cir. 1961), has become the seminal case supporting an exception for third parties who assist attorneys in providing legal advice. In *Kovel*, an accountant who had been employed by a law firm tried to invoke the attorney-client privilege in the course of a grand jury investigation. The Second Circuit

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sought to reconcile the absence of a privilege protecting communications between clients and their accountants with the reality that lawyers often consult with other professionals in the course of representing their clients. The court concluded that the critical question in determining whether communications with third parties result in waiver is whether those communications were made in confidence for the purpose of assisting the lawyer in understanding complex principles so the lawyer could render appropriate legal advice.

Courts have generally accepted *Kovel's* key holding but have grappled with the precise contours of the exception and the specific role the consultant must play to qualify as, essentially, an agent or extension of counsel. As to PR consultants specifically, some courts have been receptive to preserving the privilege for confidential communications with a PR firm that was retained by counsel for the purpose of helping provide legal advice related to media considerations.

See, e.g., *In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321* (S.D.N.Y. 2003); *Stardock Systems, Inc. v. Reiche, 2018 WL 6259536* (N.D. Cal. Nov. 30, 2018).

But other courts have declined to extend the privilege where, for example: (1) the PR firm provided "ordinary public relations advice," *Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54* (S.D.N.Y. 2000); (2) the PR firm's role was limited to helping the client determine the nature of publicity it should seek, *Universal Standard Inc. v. Target Corp., 331 F.R.D. 80* (S.D.N.Y. 2019); or (3) communications with the PR firm bore "too tenuous a connection to the provision of legal advice or confidential preparations for litigation," *U.S. v. Coburn, 2022 WL 357217*, at *6 (D.N.J. Feb. 1, 2022). And some courts have limited the waiver exception to a situation in which the consultant's advice was not just helpful to, but was necessary for, the provision of legal advice. See, e.g., *In re Riddell Concussion Reduction Litig., 2016 WL 7108455* (D.N.J. Dec. 5, 2016); *Anderson v. SeaWorld Parks & Entertainment, Inc., 329 F.R.D 628* (N.D. Cal. 2019).

Second, even without reliance on *Kovel*, communications with PR consultants may still enjoy the protections of privilege if the consultant is a "functional equivalent" of a client employee. But the decisions discussing functional equivalence reflect disparate positions, making the risk of waiver difficult to assess. Some courts, for example, apply a multi-factor test to determine whether, practically, the consultant is the equivalent of a company employee. See, e.g., *In re Bristol-Myers Squibb Sec. Litig., 2003 WL 25962198* (D.N.J. June 25, 2003); *Target Corp., 331 F.R.D.* at 87. Others have rejected the multi-factor test in favor of a "broad practical approach" that assesses the nature of the consultant's integration into, and work as part of, the client team. See, e.g., *In re Flonase Antitrust Litig., 879 F. Supp. 2d 454, 460* (E.D. Pa. 2012). And other courts have declined to adopt the functional equivalent test altogether due to the uncertainty and potentially expansive scope of privilege it would create. See, e.g., *BSP Software, LLC v. Motio, Inc., 2013 WL 3456870* (N.D. Ill. July 9, 2013). Of note, some courts have viewed "functional equivalent" arguments with skepticism where outside counsel, and not the client itself, hired the consultant. See, e.g., *Reiche, 2018 WL 7348858*, at *8.

Practical Tips

So, what is a practitioner to do in the face of this fluid state of the law? Although there is no one-size-fits-all approach, here are a few tips to mitigate the risk of waiver when engaging with a PR consultant:

1. Ideally, outside counsel, rather than the client, should retain the PR consultant. And the engagement letter with the consultant should specify the purpose of the engagement and explain why that consultant's services are necessary to enable counsel to provide legal advice to the client. Courts tend to disfavor a simple "to assist with media coverage" or "to help rehabilitate [client's] reputation."

2. Exercise caution when considering the retention of a consultant who has previously worked with the client in a business capacity. Although such engagements have received more attention in the context of work product challenges, courts may scrutinize whether the new work is really just an extension of prior activity to which the privilege does not extend. See, e.g., *In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230* (D. Or. 2017).

3. Even with an engagement whose scope would satisfy the most rigorous application of *Kovel*, not all actions by or communications with the PR consultant will be in aid of legal advice. To that end, the lawyers, consultants and client should clearly mark as "confidential" and "attorney-client privileged" all communications that convey or facilitate legal advice. But merely affixing such a label to a communication with a consultant does not make it so. Counsel and clients should avoid reflexively copying the PR consultant on privileged communications without thinking through the potential privilege waiver consequences.

4. A PR firm retained by counsel should understand the importance of protecting privileged information and the risks of waiver, and should be instructed not to share protected information with anyone outside the scope of the privilege.

In the age of instant news and social media, PR consultants can play a vital role in business success and help clients navigate challenging legal circumstances. Attorneys and clients should be mindful of the legal parameters governing the scope of privilege in the context of these relationships and proceed with caution to avoid the unintended consequence of waiver.

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