My Publicist Will Now Make a Statement on My Behalf:

Use of Public Relations Firms During Litigation

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I. Introduction

2010 was a year marked by one of the most publicized product recalls in recent history and one of the largest environmental disasters to date. In 2010, Toyota recalled numerous makes and models of vehicles for problems related to sticking accelerators, while BP faced the largest offshore oil spill in history. Each of these events has already, or will likely, result in high-profile litigation in which the defendant companies will be tried not only in courts of law but in the court of public opinion.

Assume that you represent a client in similar high-profile litigation, that your client will be swarmed by the media and expected to make statements regarding the litigation. How do you control the message conveyed by the client so it remains consistent with your legal position and strategy and does not damage your case? You may decide you need assistance and seek the help of a public relations consultant. But can you claim attorney-client privilege or work product if your opponent attempts to secure copies of communications between you and the consultant or documents created by or for the consultant? The answer will depend on your purpose in hiring the consultant, the type of case involved, and the work the consultant ultimately performs. When representing a company in a high-profile case that may require the services of a public relations consultant, it is important to understand when privilege and work product protection will apply to communications made to—and documents authored by or shared with—that consultant before you engage her services.

II. The Attorney-Client Privilege as Applied to Communications with Public Relations Consultants

The attorney-client privilege protects from disclosure confidential communications between a lawyer and her client that are made for the purpose of obtaining or rendering legal advice. In appropriate circumstances, the privilege also extends to communications involving persons assisting the lawyer in rendering legal services, such as legal assistants, law clerks, and paralegals. See *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 325 (S.D.N.Y. 2003). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1967).

Courts agree that the attorney-client privilege should be narrowly applied; however, courts have applied the privilege more broadly to include public relations consultants under appropriate circumstances. See *Grand Jury Subpoenas*, 265 F. Supp. 2d 321; *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000). Available case law demonstrates that communications with public relations consultants are privileged if the primary purpose of the communication was to aid in the rendering of legal advice. *Grand Jury Subpoenas*, 265 F. Supp. 2d at 325. A communication aids in the rendering of legal advice if (1) the consultant provides services necessary to promote the attorney's effectiveness in the client's legal representation, which would require an understanding of privileged information; or (2) the consultant is essentially an extension of the client under agency principles. See *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, 2003 U.S. Dist. Lexis 14586, 8 (S.D.N.Y. 2003); *FTC v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002).

A. Services Necessary to the Client's Legal Representation

Courts have applied the attorney-client privilege to communications with a public relations consultant where the consultant provides specialized advice necessary to promote an attorney's effectiveness in a client's legal representation. While some courts define *necessity* as whether a close nexus exists between the consultant's role and the attorney's role in the client's representation, most courts generally perform a similar examination of the circumstances, including (1) the consultant's role, (2) the motivation for hiring the consultant, (3) and the information shared. See *Calvin Klein*, 198 F.R.D. at 55; *Haugh*, 2003 U.S. Dist. Lexis 14586, at *9; *Grand Jury Subpoenas*, 265 F. Supp. 2d at 326. To retain the privilege, a consultant's services must be materially different from those of any ordinary public relations consultant. See *Calvin Klein*, 198 F.R.D. at 55; *Haugh*, 2003 U.S. Dist. Lexis 14586, at *8. Services rendered by a consultant that are beneficial to the client, yet unrelated to the legal services of the attorney, are not protected. See *Haugh*, 2003 U.S. Dist. Lexis 14586, at *9; see also *In re N.Y. Renu with Moistureloc Prod. Liab. Litig.*, 2009 U.S. Dist. Lexis 80446, *7 (D.S.C. July 1, 2009) (holding consultant's services must be necessary to promote the attorney's effectiveness and not merely beneficial to the client). Finally, in order to enjoy the protection of the privilege, the consultant's services must be retained by the attorney and not by the client. See, *e.g.*, *Grand Jury Subpoenas*, 265 F. Supp. 2d at 331.

In *Grand Jury Subpoenas*, the court concluded that communications between the target of a federal investigation, the target's attorneys, and a public relations firm ("the firm") hired by said attorneys were protected by the attorney-client privilege. Following the initiation of its investigation, the government served the firm with a subpoena, which sought the substance of conversations the firm had with both the target of the investigation and the target's attorneys. *Id*. at 322. The firm refused to testify or to produce documents based on the attorney-client privilege and work product protection. *Id*. at 323.

The court held that the attorney-client privilege applied to communications with the firm because the target's lawyers hired the firm to aid them in achieving a primarily legal objective. *Id*. at 325. That objective was to communicate with the media in a way that would reduce the risk of indictment of the target by neutralizing the "media-conveyed message that reached the prosecutors and regulators responsible for charging decisions in the investigations" *Id*. at 323-24. The court reasoned that in some circumstances the "advocacy of the client's case in the public forum will be important to the client's ability to achieve a fair and just result in threatened or pending litigation." *Id*. at 330. It further recognized the peril of advocating one's case to the public without careful legal input and stated:

> [T]he 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.

Id. Thus, the firm's objective was legal in nature; the objective was not to offer run-of the-mill services and merely influence the public. *Id*. at 326-29. This high-profile case warranted professional public relations advice, and because the public relations firm's services bore "a nexus sufficiently close to the provision or receipt of legal advice," the at-issue communications were protected as privileged. *Id*. at 332. The court emphasized, however, that the application of the privilege was limited to situations where the *attorney* required outside assistance. *Id*. Thus, had the target hired the firm directly, she would not have enjoyed the privilege for her own communications with the firm. *Id*. Recognizing the artificiality of saying that the privilege applied so long as the attorney did the hiring of a public relations consultant, the court quoted *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961):

> That is the inevitable consequence of having to reconcile the absence of a privilege for [consultants] and the effective operation of the privilege of a client and lawyer under conditions where the lawyer needs outside help.

In *Haugh v. Schroder Investment Management of North America, Inc.*, 2003 U.S. Dist. Lexis 14586, *8 (S.D.N.Y. 2003), the court concluded that communications sent to a public relations consultant were not protected by the attorney-client privilege because the consultant's advice was not necessary to promote the attorney's effectiveness in the client's legal representation. The consultant was hired by the plaintiffs' attorney pursuant to a written agreement to assist in "providing legal services" to the plaintiff. *Id*. at *2. The agreement further stipulated that all communications were confidential and privileged. *Id*. at *2-3. Although the consultant herself was a licensed attorney, she was hired to handle only "media strategy as it impacted … litigation." *Id*. Thus, the consultant performed services that included: (1) preparing a press release when plaintiff's lawsuit was filed; (2) advising plaintiffs' attorney as to potential public reactions regarding the lawsuit; (3) answering inquiries from the media; and (4) participating in meetings with plaintiff and plaintiffs' attorney, held for the dual purpose of developing litigation and media strategies. *Id*. at *3. The court noted that the documents in question contained no requests for legal advice. *Id*. at *5.

The court stated that the consultant's services were nothing more than standard public relations services that were consistent with the design of a public relations campaign and were not necessary in order for the plaintiffs' attorney to provide her with legal advice. *Id*. at *8. The plaintiff failed to identify a nexus between the consultant's work and the attorney's role in preparing her case and, thus, the consultant's services constituted nothing more than a media campaign. *Id*. at 9. Accordingly, the communications with the public relations consultant were not necessary to promote the attorney's effectiveness in the plaintiff's legal representation, and the attorney-client privilege did not apply. *Id*. at 10.

Similarly, in *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000), the court concluded that the communications with a public relations consultant were not privileged because they were not necessary to promote the attorney's effectiveness in the plaintiffs' legal representation. The plaintiffs' attorneys retained a public relations consultant in anticipation of filing a potentially high-profile civil suit against a licensee and its well-known executive. *Id*. The plaintiffs argued that the privilege applied because the consultant was hired to assist the attorney in understanding the reactions of the client's various constituencies to the litigation, providing legal advice, and responsibly handling the media. *Id*. However, the services actually rendered by the consultant consisted of (1) reviewing press coverage; (2) making phone calls to various media to comment on developments in the litigation; and (3) finding friendly reporters. *Id*. The court concluded that the consultant, who had a preexisting relationship with the plaintiffs, performed services not materially different from those that an ordinary public relations consultant would have performed, had it been hired directly by the plaintiffs. *Id*. Further, none of the documents over which plaintiffs claimed privilege contained confidential communications made for the purposes of obtaining legal advice. *Id*. at 54. Although the consultant's services may have been helpful to plaintiffs' attorney in developing a legal strategy, the services were not necessary to enable the attorney to properly represent plaintiffs. *Id*. at 55. Thus, the attorney-client privilege did not apply.

B. The Consultant as an Extension of the Client

Courts have also applied the attorney-client privilege to a document or communication shared with a consultant by applying agency principles. Under such circumstances, many courts refer to the consultant as the functional equivalent of the client. See, *e.g.*, *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 218-19 (S.D.N.Y. 2001). Analogous to determining whether a consultant's advice is necessary to aid an attorney in representing a client, the court's determination of whether a consultant is essentially an extension of the client involves an

examination of all relevant circumstances, including (1) the consultant's role, (2) the motivation for hiring the consultant, (3) and the information shared. See generally *id*.; *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002).

In *Copper Market,* the court applied agency principles to find that communications with a public relations firm regarding a high-profile antitrust lawsuit were protected by the attorney-client privilege. 200 F.R.D. at 215. Before the lawsuit, defendant Sumitomo Corporation ("Sumitomo") hired public relations firm Robinson Lerer & Montgomery ("RLM") to handle public relations arising from a copper trading scandal because Sumitomo anticipated litigation and a federal investigation. *Id*. Further, Sumitomo hired RLM because it lacked experience in dealing with public relations issues stemming from high-profile litigation and because it lacked experience dealing with the Western media. *Id*. When an opponent served RLM with a subpoena demanding all documents relating to work for Sumitomo, Sumitomo claimed privilege. *Id*. at 216.

The purpose of RLM's engagement was the management of press statements in the context of anticipated litigation. *Id*. at 215-16. Specifically, RLM was to ensure that statements made by the company did no damage to its legal position. *Id*. at 216. RLM prepared press releases for public dissemination as well as internal documents, which informed Sumitomo employees about what could and could not be said publicly about the scandal. *Id*. at 216. RLM also prepared press releases for regulators and other parties with whom Sumitomo anticipated litigation. *Id*. RLM's personnel conferred frequently with Sumitomo's in-house and outside attorneys, incorporated the advice of in-house counsel into documents and assisted Sumitomo in making the statements it needed to make with the expectation that each such statement might subsequently be used against it in litigation. *Id*. at 215-16.

In assessing whether to compel production of RLM's documents, the court recognized that courts—including the U.S. Supreme Court—have consistently held that the attorney-client privilege protects communications between lawyers and agents of a client where such communications are for the purpose of rendering legal advice. *Id*. at 217. "[T]here is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice." *Id*. In holding that communications between RLM and Sumitomo were privileged, the court concluded that RLM was the functional equivalent of an in-house public relations department of Sumitomo and thus part of the client for purposes of applying the privilege. *Id*.

Likewise, in *GlaxoSmithKline*, 294 F.3d at 141, the U.S. Court of Appeals for the D.C. Circuit relied on agency principles in finding that communications with a public relations firm were protected by the privilege. GlaxoSmithKline ("GSK") resisted a Federal Trade Commission ("FTC") subpoena to GSK's public relations firm, claiming attorney-client privilege. *Id*. at 143, 148. The FTC argued that GSK waived the privilege when it shared the sought documents with its public relations firm. *Id*. at 148. Although the case failed to discuss specific details relating to the communications shared with the consultant, the court emphasized that GSK worked with the consultant "in the same manner as they did with full-time employees regarding their particular assignments." *Id*. at 148. Relying on the rationale applied in *Copper Market*, the court concluded that the consultant became an "integral member of the team assigned to deal with the issues [that] … were completely intertwined with [the client's] litigation and legal strategies." *Id*. Communications with the public relations firm were protected by the attorney-client privilege. *Id*.

If you represent a client in litigation and you deem the assistance of a public relations consultant necessary, in order for your communications with that consultant to receive protection under the privilege you need to ensure (1) that you, the attorney, are the person who hires the consultant; (2) that the purpose of the consultant's engagement is to assist you, the attorney, in rendering legal advice; and (3) that the work performed by the consultant bears a close nexus to the rendering of legal advice and is necessary to the represen-

tation of your client. Even if you hire a public relations consultant and specify in an engagement letter that she has been hired to provide legal advice, if the nature of the consultant's work is nothing more than run-of-the mill public relations work and requires no review of confidential information, then the privilege will not attach to communications with the consultant. Examples of what may constitute public relations services that are necessary to the legal representation of your client might include assistance in conveying a message consistent with your client's legal position, the creation of internal documents advising employees about that message and what may or may not be said to the media based on your client's legal position and the framework of your defense, and the consultant's analysis of how certain alternative statements or phrasing may affect your client's case.

III. The Work Product Doctrine

The work product doctrine provides protection for documents and materials prepared in "anticipation of litigation or for trial." Fed. R. Civ. P. 26(3). "The concept of 'anticipation of litigation' embodies both a temporal and motivational aspect." *Amway Corp. v. Procter & Gamble Co.*, 2001 U.S. Dist. Lexis 4561, *18-19 (W.D. Mich. 2001). Thus, to be prepared in anticipation of litigation a document must have been created before or during the time of litigation. *Id*. at *19. The party seeking protection must also demonstrate that the documents at issue were created for the purpose of litigation thereby serving the purpose of the doctrine. *Id*.; *Grand Jury Subpoenas*, 265 F. Supp. 2d at 332 (holding "the work product doctrine is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries") (quoting *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) [internal quotations omitted]).

Materials created by public relations consultants will qualify for protection under the work product doctrine so long as they meet these two elements. The work product doctrine does not apply to materials that strategize about the effects of litigation on the client's customers, the media, or the public generally. *Calvin Klein*, 198 F.R.D. at 5.; *Burke v. Lakin Law Firm*, 2008 U.S. Dist. Lexis 833, *9 (S.D. Ill. 2008). Nor does the work product doctrine apply to materials prepared in the ordinary course of business (materials that would have been created regardless of anticipated litigation). See, *e.g.*, *Copper Market*, 200 F.R.D. at 221; *De Espana v. American Bur. of Shipping*, 2005 U.S. Dist. Lexis 33334, *9 (S.D.N.Y. 2005).

In *Amway Corp.*, the court considered and rejected Procter & Gamble's argument that in-house public relations documents were covered by the federal work product rule. 2001 U.S. Dist. Lexis 4561, *7. The documents at issue reflected the work of a group of Procter & Gamble employees who were dealing with the public relations aspects of rumors that the company donated money to the Church of Satanism. *Id*. at *15-16. In its evaluation of the documents, the court noted that "[a]lthough pending and prospective lawsuits are mentioned in these documents, or the redacted portions thereof, the purpose of the discussion was to assess the public relations aspect of the lawsuits, not their legal import or merit." *Id*. at *16. The documents at issue "were produced for public relations and other business purposes." *Id*. When considering whether the documents were prepared in anticipation of litigation, the court stated:

> To be in anticipation of litigation, a document must have been prepared before or during the time of litigation. That temporal element, standing alone is not sufficient, however. *The document must also have been prepared for purposes of the litigation and not for some other purpose*.

Id. at *19 [emphasis added]. The court also noted that in-house counsel appearing as one of many recipients of some of the documents was not conclusive evidence that work product protection applied. The court stated that "for the privilege to be applicable, the proponent must demonstrate that the lawyer has acted in a legal capacity rather than in any of the other functions that legally trained individuals perform in our society." *Id*. at *17.

Ultimately, the court held that the context of the documents "was public relations and other business strategizing" was not legal in nature, notwithstanding that the lawsuits or the prospect of lawsuits were under discussion. *Id*. at *26. Procter & Gamble thus failed to demonstrate that the documents were created in connection with the request for, or the rendering of, legal advice. *Id*. Further, disclosure of the documents would expose only Procter & Gamble's public relations strategy, not its legal strategy. *Id*. at 27. Therefore, the documents were entitled to protection under neither the attorney-client privilege nor the work product doctrine. *Id*. at 26-27.

Similarly, in *Burke*, the court concluded that the documents exchanged between an attorney and a public relations consultant were not prepared in anticipation of litigation because the documents discussed public relations and not legal strategy. 2008 U.S. Dist. Lexis 833, at *9. The e-mails at issue discussed ways in which the defendant law firm and partner could distance themselves from the legal troubles of a different partner at the firm. *Id*. at *7. The e-mails included (1) attachments that outlined strategies for communicating with employees, clients, and the media and (2) proposed letters to be sent to the employees and clients of the law firm as a means of reassurance of the firm's stability. *Id*. The court concluded that the contents of the e-mails did not involve preparation or legal strategies for conducting litigation itself; rather, the e-mails discussed strategy for minimizing the fallout from the pending litigation. *Id*. at *8. "[T]hough the work product doctrine may protect documents that were prepared for one's defense in the court of law, it does not protect documents that were merely prepared for one's defense in the court of public opinion." *Id*. Accordingly, documents that merely strategize about the effects of litigation on a client's "customers, the media, or on the public generally" were not prepared in anticipation of litigation. The work product doctrine did not apply to the e-mails at issue.

In *De Espana*, the court concluded that handwritten notes created by the defendant company's spokesperson were not protected by the work product doctrine. *De Espana*, 2005 U.S. Dist. Lexis 33334, at *2. Although the company claimed that the notes were prepared in anticipation of litigation, the court determined that the defendant did not show that the notes "would not otherwise have been prepared in a substantially similar form." *Id*. at *9. The court found that the defendant would have created the notes regarding press and public relations strategies during the normal course of its business--without the threat of litigation--and, therefore, the documents were not created in anticipation of litigation. *Id*. As a result, the work product doctrine did not apply.

By contrast, the court concluded in *Calvin Klein* that certain documents drafted or selected by the plaintiffs' attorney and submitted to its public relations consultant were protected work product. 198 F.R.D. at 55. The consultant was hired by the plaintiffs' attorney in anticipation of filing a potentially high-profile civil suit. *Id*. In determining whether the documents were prepared in anticipation of litigation, the court emphasized that the documents were submitted to the consultant before plaintiffs' filing a complaint, and that after receiving the documents, the consultant followed up with the attorneys to discuss the complaint. *Id*. The court also noted that even though some of the documents were prepared by the consultant, the contents "implicitly reflect[ed]" the attorneys' work product. *Id*. The court stated that the work product doctrine does not apply to communications that strategize about the effects of litigation on the client's customers, the media, or the public generally. However, a limited exception exists when "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." *Id*. The court concluded that the evidence presented demonstrated the need for the exception. *Id*. Thus, absent a demonstration of substantial need or undue hardship, the court concluded that the documents were drafted in anticipation of litigation and protected by the work product doctrine. *Id*.

In *Copper Market*, the court concluded that materials delivered to or prepared by Sumitomo's publications firm, RLM, were protected by the work product doctrine. 200 F.R.D. at 221. In determining whether the

materials were prepared in anticipation of litigation, the court emphasized that (1) Sumitomo hired RLM to deal with publicity issues arising out of ensuing civil litigation by shielding the client from further exposure in the litigation; (2) RLM specialized in litigation-related management; and (3) the materials were prepared in collaboration with the Sumitomo's attorney in the context of the ensuing litigation. *Id*. Consequently, the materials were prepared in anticipation of litigation and were protected by the work product doctrine. *Id*.

Like communications that relate purely to public relations strategy, documents and materials created before or during the litigation that focus only on public relations strategy will fail to qualify for work product protection. Only those documents authored by a public relations consultant or an attorney for a public relations consultant for the purpose of litigation will qualify for protection under the work product doctrine.

IV. Conclusion

Understanding when communications with a public relations consultant are protected by the attorney-client privilege and when documents created by or for that consultant are considered work product is essential before you hire a consultant on a case. By carefully considering whether a consultant is necessary to assist you in rendering legal advice and ensuring that the work performed by the consultant is for the purpose of assisting you in your representation, you help insure that you can vigorously defend your client in court and in the press while protecting communications or materials shared with the consultant.