Attorneys and public relations consultants: privileged or perilous communications?

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When a crisis strikes, spawning litigation and media woes, clients confronting the disclosure of 'bad news' seek the advice of both attorneys and public relations consultants to manage the ensuing multi-front fallout. The role of public relations in crisis management was a theme which ran through the excellent Litigation Committee specialist programme in Toronto on 18–19 June 2008 ('Crisis litigation: the role of the lawyer'). The public relations consultant is a key player whose advice and specialised knowledge counsel and the client often need to call upon, from proactive crisis planning through media briefing during trial. The role of the public relations consultant is unlikely to change any time soon, given the unavoidability of risk and the complexity of contemporary life, and particularly with the current drumbeat of economic difficulties.

Recent case law in the United States, however, suggests that clients, attorneys and public relations consultants need to be careful about sharing confidential information and strategy lest their collaborative efforts risk disclosure of attorney–client privileged communications and attorney work product. There is no bright line test to determine whether or not public relations consultants are in or out of the privileged group, but three of the four US federal district courts which have considered the matter since the beginning of 2008 have declined to sustain privilege claims in this setting.[1]

Differing perspectives

Attorneys and public relations consultants provide important, but very different, advice to their clients at times of crisis. While both will want to control the dissemination of information, they can have very different perspectives on the substance and timing of disclosures.

Litigation counsel generally seek to keep information confidential to avoid disseminating potential admissions that could damage the client in an anticipated or actual litigation. Public relations consultants, on the other hand, usually want to provide information, and quickly, to 'frame' public perception. Litigation attorneys will be focused on the particular anticipated or actual litigation while public relations

consultants are not likely to have the specifics of the actual or anticipated litigation as their primary focus. The client, who may have concerns transcending the perspectives of lawyer and publicist, may feel like Ulysses steering between Scylla and Charybdis.

A typical context

By way of example, suppose a multinational financial institution discovers that a rogue trader has created scores of millions of dollars in losses from unauthorised transactions. Regulatory enforcement action, civil litigation by counterparties and shareholder actions seem imminent. In a compressed time frame, the threatened company must unravel the facts, maintain its business operations, work with counsel to prepare for and defend the anticipated lawsuits and work with public relations consultants to reach out to critical constituents and shape media strategy. The media strategy must take into consideration the potential impact of any public statements on the pending or anticipated litigation; the litigation cannot proceed in isolation from the outreach and media strategy. It seems only logical to create a framework where these respective views can be shared, discussed and acted upon.

But there is no publicist–client privilege, as such, in the United States. Questions of privilege and protection are analysed in the context of the availability of the attorney–client privilege and attorney work product protections. These in turn hinge on the purpose for which the information is collected and exchanged. Does the exchange take place for the purpose of enabling the attorney to provide legal advice to the client, a privileged communication, or for the purpose of assisting the public relations consultant in formulating the media campaign, a business purpose? Is the public relations consultant's involvement necessary for the attorney to prepare for anticipated litigation? Or does it appear that the information exchange took place to prepare the public relations consultant to manage the *effects* of the litigation rather than to enable the attorney to take steps critical to the *conduct* of the litigation? These are some of the issues courts confront in deciding what is privileged because lawyers were involved and what circumstances could result in a waiver of that privilege.

Applicable privileges and protections

The US attorney–client privilege has old common law roots, although now embodied in statute in many states. The core concept is that the law should protect and encourage open sharing of information between clients and their attorneys. The attorney–client privilege generally protects from disclosure confidential communications between attorney and client for the purpose of securing or providing legal advice.[2]

The attorney work product protection is established by rule in the federal system[3] and statutory or common law in the states. It is intended to create a zone of privacy in which an attorney freely can prepare the client's case. The protection extends to attorneys and those working with them – including agents or consultants for client or attorney – but it only applies to work done in anticipation of litigation or for trial. It is broader but less absolute than the attorney–client privilege. Work product protection will yield where the adversary can show a substantial need for the requested materials. Courts afford extra protection to work product embodying attorney opinions.

The battleground issues in the application of attorney–client privilege and work product protections to communications or documents shared among client, attorney and public relations consultant have been: (1) whether the advice being given essentially is legal advice or media or business advice; (2) whether communications were confidential and whether confidentiality was maintained; (3) whether discussions or communications occurred in the context of anticipated or actual litigation; and (4) whether privilege was waived.

US federal courts[4] have reached inconsistent results on claims that attorney–client privilege protected disclosure of information by attorneys to public relations consultants. The most difficult hurdle for the party invoking privilege to surmount has been showing that the public relations consultant's participation assisted in the provision of legal advice to the client rather than furthering an ordinary public relations purpose.[5]

Review of cases analysing privilege claims in the public relations context reveals that courts upholding privilege have employed one of three rationales. The first basis is the traditional one, with the court sustaining privilege because the client seeks legal advice from the attorney in a confidential communication. The analysis is no different here than it would be in any other context. However, if the particular advice sought from the lawyer is non-legal public relations advice, privilege will be denied, even if the attorney was being consulted confidentially.[6]

In the second circumstance, courts have applied a doctrine originally developed in the context of accountant advice in the tax area in a case entitled *US v Kovel*.[7] *Kovel* recognised that the privileged relationship can extend to third parties performing an interpretative function necessary for the attorney to provide legal advice. However, it is not enough that the third party's involvement may be beneficial; it must be necessary to enable the attorney's performance of legal tasks to fall within the *Kovel* doctrine.

Third, the attorney–client privilege can extend to a public relations or other consultant performing the function of an employee of the client where there is

no individual or group within the client capable of doing so. In *In re Copper Market Antitrust Litigation*,[8] for example, Japan-based Sumitomo had no experience with publicity from high-profile litigation, had no experience dealing with Western public media and had weak English language depth in its corporate communications office; therefore, the court held that the outside public relations consultant functioned as an in-house public relations staff with respect to communications with US media. The communications were found to be within the attorney–client privilege.[9]

In re Grand Jury Subpoenas Dated March 24, 2003[10] granted the most expansive protection for communications among client, attorney and public relations firm on the first ground discussed above. In this 2003 decision, the government served a subpoena on a public relations firm that had provided assistance to the attorneys for Martha Stewart in connection with potential criminal charges arising from allegations of securities trading based on improper use of inside information. The attorneys argued public relations consultants were necessary to 'neutralise the environment' so that prosecutors and regulators would not be unduly influenced by widespread negative press coverage urging prosecution. The court adopted an expansive view of 'legal advice' to encompass zealous representation outside the courtroom in the wider court of public opinion. Because the attorneys had hired the public relations firm to assist them in providing legal advice on how best to handle the client's legal problems, including dealing with the media, the court concluded that the public relations firm was critical to achieve a fair and just result and found the attorney–client privilege to apply.

Legal commentators and courts have stated that *In re Grand Jury Subpoenas* should be limited to its unusual facts, presumably the extraordinary media attention and potential criminal exposure.[11] Indeed, in both *Copper Market* and *Grand Jury Subpoenas*, there was potential for criminal liability.

Courts have been more willing to apply attorney work product protection to documents created by or shared with public relations firms to assist attorneys to prepare their case. In *Calvin Klein Trademark Trust v Wachner*,[12] for example, the court refused to find attorney–client privilege for communications with a public relations firm but nevertheless found some of the attorney-drafted and publicist-drafted documents to be protected as work product. Similarly, in *Haugh v Schroder Investment Management North America Inc*,[13] work product protection was sustained for documents prepared in anticipation of litigation where the adversary could not establish a substantial need for them. The court so ruled after refusing to apply attorney–client privilege with the pointed observation: 'A media campaign is not a litigation strategy.'

Practitioner's points

Because there is substantial risk that privilege or protection may not extend to all communications among client, attorney and public relations firm – and particularly because the party claiming a privilege has the burden to establish its applicability – the attorney should consider carefully what information is disclosed to the public relations firm. After all, as one commentator notes: 'The client need not divulge incriminating information in order to receive effective media advice.'[14] Here are some points practitioners should keep in mind:

- An attorney should act as a gatekeeper for information shared with the public relations firm.
- An attorney should structure the tasks assigned to the public relations consultants to make plain that the assignments relate to anticipated or actual issues with respect to the conduct of the litigation.
- An attorney should direct the public relations consultant's work and ask that the public relations firm set up separate files for litigation work, maintain confidentiality of the files and communications relating thereto and mark documents as privileged where appropriate. Preservation obligations, for hard copy and electronic materials, will apply to publicist as an agent.
- It is advantageous for the attorney rather than the client to retain the public relations consultant but that may not be sufficient if the court perceives that the arrangement is a subterfuge in an effort to claim privilege not otherwise warranted.[15]
- Similarly, it is probably unhelpful for the attorney to 'adopt' as its public relations consultant the same firm the client recently has hired.[16]
- If multiple jurisdictions or transnational matters are involved, the scope of privilege may vary and extra caution is required. For example, if the matter involves countries in the EU, the extent to which in-house counsel enjoys privilege may be very different from what may apply in the United States. Accordingly, outside counsel may need to play the gatekeeper role in such communications.

As with any good team, the whole can be more than the mere sum of the parts when client, counsel and publicist work together. But prudence dictates that all involved assume a privilege claim may fail, and guide their conduct, their writing and especially their e-mailing accordingly.

Notes

1 *Burke v Lakin Law Firm, PC*, 2008 WL 117838 (SD Ill) (January 7, 2008); *JA Apparel Corp v Abboud*, 2008 WL 111006 (SDNY) (January 10, 2008) (Magistrate Judge Katz); *Lauth Group, Inc v Grasso*, 2008 WL 926631 (SD Ind) (April 4, 2008) (Magistrate Judge Baker); *In re New York Renu with Moistureloc Product Liability Litigation*, 2008 WL 2338552 (DSC) (May 3, 2008).

2 See, eg, *NXIVM Corp v O'Hara*, 241 FRD 109, 125 (NDNY) (2007) (Magistrate Judge Treece), offering this set of factors: '(1) where legal advice of any kind is sought, (2) from a professional legal advisor in

his or her capacity as such, (3) the communication relates to the purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived' (case citations omitted).

3 Fed R Civ P 26 (b)(3).

4 The overwhelming majority of US decisions on these issues have been rendered by the federal courts. Although our research has not been exhaustive, we have identified only one state court decision with a substantive discussion, *American Legacy Foundation v Lorillard Tobacco Co*, 2004 WL 2521289 (Del Ch) (November 3, 2004).
American Legacy sustained the application of attorney–client privilege 'in certain circumscribed situations', but they were unique. The Foundation was established under the multi-state tobacco litigation Master Settlement Agreement to create anti-smoking advertisements and retained an advertising firm to do so. Anticipating litigation, the Foundation and the ad firm entered into a joint defence agreement under the close supervision of counsel. Communications between the Foundation and the ad firm about advice from their lawyers were held to be privileged. By contrast, privilege was rejected for communications with another firm the Foundation used to write speeches and for crisis communication because there was no joint defence agreement and counsel was not involved.

5 For example, in *Amway Corp v The Procter & Gamble Co*, 2001 US Dist LEXIS 4561 at *21 (WD Mich) (April 3, 2001), the court sustained privilege claims for only a handful of public relations-related documents. It concluded 'the remainder of the documents… are not entitled to protection under the attorney–client privilege or work-product immunity. As noted, the documents on their face reflect intense public relations activity… . [The documents] sometimes discuss the pending or contemplated lawsuits, but the context of the comments is related to public relations, not legal matters'. The court sanctioned Proctor & Gamble for its privilege assertions.

6 *Lauth Group*, *supra* n 1; *Burton v RJ Reynolds Tobacco Co*, 200 FRD 661, 667 (D Kan 2001); *Ratner v Netburn*, 1989 WL 223059 (SDNY) (June 20, 1989) (Magistrate Judge Dolinger), *aff'd* 1989 WL 231210 (SDNY) (August 23, 1989). By contrast, legal advice sought or provided as to public relations matters can be protected by privilege. See, eg, *In re New York Renu with Moistureloc Product Liability Litigation, supra* n 1 (only portions of lawyer-reviewed draft of press releases which ultimately were disclosed to media need to be produced; others to be redacted); *Burroughs Wellcome Co v Barr Laboratories, Inc*, 143 FRD 611, 619 (EDNC 1991) (draft of press release submitted for legal review not privileged, but attorney's marginal notes are).

7 296 F2d 918 (2d Cir 1961); see also *HW Carter & Sons, Inc v The William Carter Co*, 1995 US Dist LEXIS 6578 (SDNY) (May 15, 1995) (no waiver by presence of publicist at discussion with counsel because publicist was present to assist attorney's provision of legal advice).

8 200 FRD 213 (SDNY 2001).

9 To similar effect, *see FTC v GlaxoSmithKline*, 294 F3d 141, 148 (DC Cir 2002) (no waiver of privilege where disclosure to public relations consultant was on a need to know basis).

10 265 F Supp 2d 321, 328 (SDNY 2003).

11 See Murphy, 'Spin Control and the High-Profile Client – Should the Attorney Client Privilege Extend to Communications with Public Relations Consultants?' 55 Syr L Rev 545 (2005); *In re New York Renu with Moistureloc Product Liability Litigation*, *supra* n 1; *NXIVM Corp*, *supra* n 2. Interestingly, in *NXIVM*, the argument that the public relations consultant's work was needed, inter alia, to 'create positive press to support our Supreme Court Cert Petition', 241 FRD at 121 n 19, was to no avail.
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 or criminal cases. See, eg, Watson, 'Litigation Public Relations: The Lawyer's Duty To Balance News Coverage of Their Clients', 7 *Communication Law and Policy* 77, 101 (Winter 2002) ('In short, there is a basis in the law of attorney malpractice for establishing in individual cases a lawyer's obligation, implicitly and explicitly, to practice litigation public relations on behalf of a client.') While Professor Watson found no case, statute or rule applying such an obligation, his thinking and that of the court in *In re Grand Jury Subpoenas*, *supra*, are kindred. It stands to reason that if public relations were regarded as part of the lawyer's duty, it ought to be easier to protect by privilege. For present purposes, however, this amounts to assuming the conclusion.

12 198 FRD 53 (SDNY 2000).

13 2003 WL 21998674 (SDNY) (August 25, 2003).

14 Murphy, *supra* n 11, 55 Syr L Rev at 587.

15 *NXIVM, supra* n 2.

16 This was the case in *Calvin Klein* and *NXIVM*; the privilege assertion failed in both cases.