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Celebrity clients and the attorney-client privilege

By Mathew Rosengart

Contrary to conventional wisdom, celebrities and high-profile corporations are generally not afforded "favorable" treatment from the press, regulatory or prosecutorial authorities. To the contrary, they are subject to far more scrutiny than ordinary litigants in the civil context, and in the regulatory or criminal context, they must confront extra pressure placed by the media on the government to bring charges or enforcement actions as a result of a target's celebrity status. These challenges have been exacerbated by the emergence of the Internet and the proliferation of gossip and celebrity "news" websites that have converted the 24-hour news cycle into a 24-*minute* news cycle, often forcing high-profile clients to fight on two fronts: in the courtroom and in the court of public opinion.

Put simply, the *Kovel* doctrine may protect communications [with PR consultants] where attorneys "need outside help" regarding the rendering of "*legal advice*" to the client.

Accordingly, whether it is a celebrity concerned about her image or a corporation concerned about its stock price, when crises strike — involving litigation, regulatory or criminal investigations, or general media fallout — attorneys are increasingly turning to public relations experts to help defend their clients. Indeed, recognizing this reality and the broadening role of counsel to include dealing with the media under appropriate circumstances, the U.S. Supreme Court has itself observed that "[a] n attorney's duties do not begin inside the courtroom door." See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

The attorney-client privilege, of course, was designed to encourage "full and frank communication" between attorneys and clients, without fear that such confidential communications could be disclosed in litigation, *Upjohn v. United States*, 449 U.S. 383 (1991). Like experienced counsel, sophisticated PR firms will typically want to learn the truth from their clients so they can most effectively formulate and implement strategic decisions. But while there is now some legal authority extending the attorney-client privilege to cover communications with PR firms, there is no discrete "publicist-client" privilege. Counsel must, therefore, exercise great care in communicating with PR consultants and controlling the flow of information between the client and such consultants, lest their collaborative efforts destroy the privilege — leading to the disclosure of sensitive communications, including potentially-damaging admissions.

Although the law is still evolving, in protecting PR-based communications from disclosure, courts generally employ two rationales. First, courts may apply *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961), where the 2nd Circuit held that a client's communications with an accountant *employed by his attorney* were privileged, *where they were made for the purpose of enabling the attorney to understand the complex accounting issues at stake*. As the Kovel court stated, "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service — or if the advice sought is the accountant's rather than the lawyers, no privilege exists." Put simply, the *Kovel* doctrine may protect communications where attorneys "need outside help" regarding the rendering of *"legal advice"* to the client. If, however, a consultant is retained to render garden-variety accounting (or PR services), no privilege would apply.

Second, the privilege may apply to PR experts who function as "employees" of the client, with special expertise not possessed by the client. In *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), for example, Japanese-based Sumitomo was faced with a high-profile U.S.-based "copper trading scandal," with civil, regulatory and criminal overtones. Sumitomo had limited experience with crisis management in the U.S. litigation context and in dealing with Western media, and its corporate communication executives were Japanese. Therefore, it hired a PR firm (RLM) to provide "crisis management," interact with its counsel, and act as its spokesperson.

In upholding Sumitomo's assertion of the privilege, the court observed that RLM (which worked primarily out of Sumitomo's Tokyo headquarters) "was the functional equivalent of an in-house public relations department" The court, therefore, equated RLM with Sumitomo itself (or an *employee* of Sumitomo within the meaning of *Upjohn*.)

In contrast, in *CK Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000), the court refused to extend the privilege to documents and testimony sought from a PR firm retained by plaintiffs (CKI), for three essential reasons. First, the communications at issue did not "contain or reveal confidential communications from the underlying client ... made for the purpose of obtaining legal advice." Second, unlike the "translator" function provided by the accountant in *Kovel* (or the specialized, "legal" services provided by RLM to Sumitomo), the services provided by plaintiffs' PR firm — with which it had a pre-existing relationship — amounted to "simply providing ordinary public relations advice," such as reviewing press coverage

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and calling journalists to discuss developments in the litigation. Third, because the attorney-client privilege "stands in derogation of the search for the truth so essential to the effective" operation of our justice system, on the facts at issue in that case, the court found no compelling justification for broadening the privilege to include functions "not materially different from those that any ordinary public relations firm would have performed if they had been hired directly by CKI (as they also were) instead of by CKI's counsel."

In *In re Grand Jury Subpoenas Dated March 24, 2003,* 265 F. Supp.2d 321 (S.D.N.Y. 2003), the court attempted to reconcile *Copper Market* and *Calvin Klein*, and employed the *Kovel* doctrine to grant the most expansive protection to date for communications between and among a client, attorney, and PR firm. In that case, counsel for the target of a very high-profile grand jury investigation hired a PR firm to counter the "unbalanced and often inaccurate press reports ... [that] created a clear risk that the prosecutors and regulators [investigating her] would feel public pressure to bring some kind of charge against her." Focusing on DOJ's prosecutorial discretion to decline to bring charges, the PR firm's objective was primarily to neutralize the "constant ... drumbeat in the media to bring charges."

In upholding the privilege, the court analogized Kovel's attorneys' retention of accountants to explain the nuances of complex accounting issues to the target's attorneys' retention of PR experts to help discharge "fundamental client functions," such as advising the client of the legal risks of speaking publicly, versus offering a "no comment" response to questions; seeking to avoid or narrow charges against the client; and "zealously seeking acquittal or vindication."

The key component in both *Kovel* and *Grand Jury Subpoenas*, was that counsel needed "outside help" in specialized areas where they lacked expertise, and the consultants were retained, by counsel, for that purpose to address legal problems, rather than to provide "ordinary" accounting or PR services.

Although many hailed *Grand Jury Subpoenas* as a watershed case creating a new "publicist privilege," e.g., PR Week proclaimed that the "Extension of the attorney-client privilege is a resounding judgment for every PR counselor" and the New York Law Journal announced, "Privilege Applies to Attorney's Conversation With PR Firm," there is presently no such "privilege." At best, if certain criteria are met, communications with PR firms may fall within the already-existing attorney-client privilege. Until the law further develops to provide greater clarity in this complex area, to help defeat attacks on privilege assertions, counsel should heed the following:

* The PR firm should be retained by counsel, not by the client.

* There should be a nexus between the PR firm's work and counsel's representation, i.e., the PR firm should be retained for legal services.

* Where possible, keep communications verbal; where e-mail communications are absolutely necessary, counsel should be copied.

* As the caselaw currently exists, the privilege will more likely be extended in the criminal rather than the civil context.

* Notwithstanding the above, while counsel should take these steps, she should assume that her communications will not be privileged and act accordingly.