

Public Relations Firms Can Gain Protection of Attorney-Client Privilege for their Work

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A recent Federal District Court decision applies the attorney-client privilege to protect the confidentiality of certain communications in which a public relations firm is involved in representing a client. Specifically, the Court held that communications (oral and written) between and among a public relations firm representing the target of a grand jury investigation, lawyers representing the target and the target are protected by the attorney-client privilege, provided such communications relate to obtaining or providing legal advice for the target.

This could well become an important development in light of the increasing involvement of public relations firms in corporate and executive "crisis management" situations, especially relating to criminal and other government investigations.

The Court was at great pains not to disclose the names of the parties involved, referring to the target of the grand jury as the "Target," the Target's former employer as the "Company," and the public relations concern as the "Firm." Readers were even cautioned not to draw any conclusions from the gender of the pronouns used in the opinion. It was the Court's concern over confidentiality that led to a cumbersome case name - *In re Grand Jury Subpoenas Dated March 24, 2003 to (a) Grand Jury Witness Firm and (b) Grand Jury Witness, 2003 WL 21262645* (S.D.N.Y. June 2, 2003).

As described in the Court's opinion, the United States Attorney's Office had begun a grand jury investigation of Target, a former employee of the Company. As part of the investigation, the Office had subpoenaed the testimony of Witness, a Firm employee, and documents from the Firm. Witness had declined to testify and the Firm

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had declined to provide the subpoenaed documents on the ground that the information sought by the grand jury had been generated in the course of the Firm's engagement by Target's lawyers, as part of their defense of Target, and was therefore protected by the attorney-client privilege and constituted work product. It was the Government's attempt to have the Court enforce the subpoenas and thus compel the testimony and document production that resulted in the decision.

In setting forth the facts, the Court noted that the investigation of Target was "a high profile matter" which had been the subject of "intense press interest and extensive coverage for months." According to Target's attorneys, they had hired the Firm "out of concern" that

unbalanced and often inaccurate press reports about Target created a clear risk that the prosecutors and regulator conducting the various investigations would feel public pressure to bring some kind of charges.

Accordingly, the Firm's "primary responsibility" was thus "defensive," "to communicate with the media in a way that would help restore balance and accuracy to the press coverage." In particular, the

objective . . . was to reduce the risk that prosecutors and regulators would feel pressure from the constant anti-Target drumbeat in the media to bring charges . . . [and thus] to neutralize the environment in a way that would enable [them] to make their decisions and exercise their discretion without undue influence from negative press coverage.

Witness claimed that "a significant aspect" of the Firm's assignment "that distinguished it from standard public relations work was that [its] target audience was not the public at large." Instead, according to Witness, the Firm was "focused on affecting the media-covered message that reached the prosecutors and regulators responsible for charging decisions in the investigations concerning . . . Target."

As phrased by the Court, the issue to be decided was "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 [that] should be facilitated" by applying the attorney-client privilege to communications which have that objective.

The Court found that "encouraging frank communications among clients, lawyers, and public relations consultants enhances the administration of justice." Advocacy of a client's position cannot be conducted without regard for the potential legal ramifications. The Court recognized:

Questions such as whether the client should speak to the media at all, whether to do so discreetly or through representatives, whether and to what extent to comment on specific allegations and a host of others can be decided without careful legal input only at the client's extreme peril.

The Court was thus persuaded that the lawyers' ability to perform "some of their most fundamental client functions" would be undermined if they were unable to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. Such functions include (i) advising the client of the legal risks of

speaking publicly and of the likely impact of possible alternative expressions, (ii) seeking to avoid or narrow charges brought against the client, and (iii) seeking acquittal or vindication.

The Court acknowledged that lawyers require the skilled advice of public relations consultants regarding, for example, whether and how possible statements to the press - ranging from "no comment" to detailed factual presentations - likely would be reported in order to advise a client whether particular statements would be in the client's legal interest. According to the Court, "there is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' defense tactics, free of the fear the consultants could be forced to disclose those discussions."

The Court thus held the following communications to be protected by the attorney-client privilege:

- (i) Confidential communications
- (ii) Between lawyers and public relations consultants
- (iii) Hired by the lawyers to assist them in dealing with the media in cases such as this
- (iv) That are made for the purpose of giving or receiving advice
- (v) Directed at handling the client's legal problems

According to the Court, the communications between the Target and the Firm do not need to take place in the presence of lawyers to be protected, so long as the communications are directed at giving or obtaining legal advice.

After applying this test, the Court protected all but two conversations between the Target and the Firm - one where the Target asked the Firm for its opinion of a day's particularly heavy media coverage and the second when the discussion concerned a problem with a wire service story.

The Court also applied the attorney-client privilege to documents which constituted communications among Target, the Firm and Target's lawyers, or some combination thereof, for the purpose of giving or receiving legal advice.

With respect to the work product doctrine, the Firm had withheld 19 documents from production based in whole or in part on the grounds they constituted work product. The Government initially challenged the characterization of the documents as work product, claiming it was seeking "no materials that reveal Target's attorneys' mental impressions" but offering to make an *ex parte* showing of substantial needs if the Court concluded otherwise. The question before the Court, therefore, was whether remaining portions of the documents were protected and, if so, whether the Government had made or should be permitted to make an *ex parte* showing of substantial need.

In the Court's view, there was "no serious question" whether such materials constituted work product because the Government did not dispute that they were prepared in anticipation of litigation and the Court's review confirmed that the documents were prepared for that purpose. To address the substantial need issue, the Court offered the Government the opportunity to make an *ex parte* showing both of such need and the necessity of preserving the confidentiality of its submission in order to protect grand jury survey.

Under this procedure, if the Court concluded that disclosure of the Government's submission would not compromise grand jury secrecy, the submission would be disclosed to Target's counsel who would then be permitted to address substantial need before the Court decided whether the Government had shown such need for the non-opinion work product. If the Court agreed that disclosure would compromise secrecy, the Court would proceed directly to decide the sufficiency of the Government's showing of need.

The decision gives attorneys some comfort that, in appropriate circumstances, they can communicate (orally and in writing) with public relations firms and gives public relations firms some assurance that, in the same circumstances, they can similarly communicate with the law firm and its client - and such communications can be protected by the attorney-client privilege.

However, the decision should not be interpreted by any means to suggest that law firms may indiscriminately hire public relations firms and assume that all communications will fall within the attorney-client privilege. This case had peculiar facts - for example, the extensive media coverage and the Firm's goal of neutralizing the impact of negative press coverage on prosecutorial decision-making. In addition, the forum and status of a particular matter may affect the Court's view of the privilege. This case was a criminal matter in the investigatory/grand jury phase, when the Target and the public are largely in the dark as to the details of the potential prosecution. Advice on inaccurate and unbalanced press reports may well help to level the playing field at that stage. By contrast, a different decision could conceivably be made in the context of civil or congressional matters. *See, e.g., Calvin Klein Trademark Trust v. Wacher*, 198 F.R.D. 53 (S.D.N.Y. 2000) (in civil litigation, Court held documents not protected by attorney-client privilege where documents did not contain confidential communications from client for purpose of obtaining legal advice; if privilege applied, it was waived by disclosure to public relations firm because firm served only to provide "ordinary public relations advice."

Accordingly, the closer a particular situation comes to the circumstances of the recent decision and meets the five-part test set forth therein, the better the chances that a court will uphold the privilege in matters involving public relations firms.