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WHITE-COLLAR CRIME

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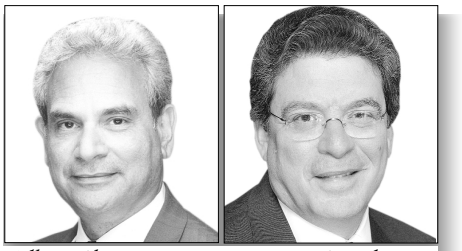
# *The Attorney-Client Privilege in the Age of Public Relations*

With the recent spate of high-profile white-collar criminal cases in the U.S. District Court for the Southern District of New York and elsewhere, two interesting and related issues have arisen: what is the role of a public relations firm in such a case, and what communications with these firms are covered by the attorney-client privilege?

Twenty years ago, the hiring of a public relations firm, an image consultant or even a jury consultant, was not standard operating procedure in a high-profile criminal case. Before CNN and CNBC, even up until the time of the O.J. Simpson trial, these cases did not generate the media frenzy they do now. Jurors did not hold court on the courthouse steps minutes after delivering a verdict, or on the morning talk shows the next day. Nor did they hire their own press agents. Indeed, jurors typically remained unnamed and unknown outside of the courtroom.[1]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## The New Role of Public Relations

All of that has changed. A high-flying CEO accused of committing white-collar criminal offenses will be under constant media scrutiny from the time the press gets even an inkling of a pending investigation. A prominent white-collar defendant or investigatory target needs to have a plan to respond — or in some cases not to respond — in the media to any charges that may be or have been brought against him as soon as they are known and must continue to have a plan with regard to the media through the investigation and any trial, sentencing or appeals.

Many of the recent criminal defendants subject to the barrage by the media have seen the need to hire public relations firms to assist their attorneys in preparing their defense. The legal team of former Credit Suisse First Boston banker, Frank Quattrone, included three law firms and two public relations agencies.[2] WorldCom enlisted at least three public relations companies.[3]

The role of the public relations firm has expanded with the media coverage of these investigations and trials. The firms, for whom white-collar "crisis management" cases have become a virtual cottage industry, now not only arrange press conferences and strategically timed defendant interviews with media outlets, but are also taking steps such as running full-page newspaper ads and setting up personal websites for individual defendants not only to get their views out to the public, but also to seek information about prospective witnesses or to obtain help in developing other investigative leads.

How much of a public relations effort, and when, where, and how to make it, are difficult decisions that a defendant and the lawyers and public relations experts face. This is much like the decision a defendant and the attorneys must make as to whether the defendant should testify at trial. For every effort that is successful in swaying public opinion in favor of a defendant, there seems to be an equally unsuccessful one.

In the case of Richard Scrushy, founder of HealthSouth, his interview with "60 Minutes" while a grand jury was hearing evidence about his actions at HealthSouth and shortly before he testified before Congress was widely considered to be a public relations

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failure. Similarly, when Linda Lay, the wife of former Enron chairman Kenneth Lay, appeared on the "Today" show, her efforts apparently backfired.[4] Sometimes, as in the case of Andrew Fastow, former CFO of Enron, and Scott Sullivan, former WorldCom CFO, a defendant and his advisers will determine that silence is the best path.

Last year, Southern District Judge Lewis A. Kaplan, in a thoughtful and well-written opinion, laid out the parameters for the types of communications involving a public relations firm that are covered by the attorney-client privilege. In *In re Grand Jury Subpoenas*,[5] the Court held that the privilege protects confidential communications between attorneys and public relations consultants hired to assist them in dealing with the media when the communications were "made for the purpose of giving or receiving advice . . . directed at handling the client's legal problems."

In *In re Grand Jury Subpoenas*, the United States Attorney's office, as part of a grand jury investigation of a former employee of a company (referred to within the case and hereafter by the pseudonym"Target"),[6] served grand jury subpoenas on a public relations firm to produce documents and on an employee of the firm to testify. The employee and the firm declined to comply with the subpoenas, arguing that because 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, it was protected by the attorney-client privilege and constituted work product.

## 'A High Profile Matter'

The case was characterized as "a high profile matter." The investigation had been "a matter of intense press interest and extensive coverage for months," the court noted. The public relations employee/witness claimed that Target's attorneys hired the firm out of a concern that "unbalanced and often inaccurate press reports about Target created a clear risk that the prosecutors and regulators . . . would feel public pressure to bring some kind of charges against" Target.

The firm's primary responsibility, as noted in the decision, "was defensive — to communicate with the media in a way that would help restore balance and accuracy to the press coverage." A significant aspect of the firm's assignment — one that distinguished it from standard public relations work — was that its "target audience was not the public at large" or the potential jury pool. Rather, the firm "was focused on affecting the media-conveyed message that reached prosecutors and regulators responsible for charging decisions in the investigations concerning . . . Target."

*. . . counsel should be prepared to demonstrate that communications with a public relations firm were made for the purpose of obtaining legal advice and not merely conducting a 'media campaign.'*

After reviewing *United States v. Kovel*[7] and other cases and articles, and distinguishing two cases, *Calvin Klein Trademark Trust v. Wachner*[8] and *In re Copper Markets Antitrust Litigation*,[9] the court turned to the merits of the case. Before reaching its holding, the court acknowledged that "the media, prosecutors and law enforcement personnel in cases like this often engage in activities that color public opinion, certainly to the detriment of the subject's general reputation but also, in the most extreme cases, to the detriment of his or her ability to obtain a fair trial." The court then noted that, "in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation." Such advocacy may not "prudently be conducted in disregard of its potential legal ramifications."

The court clearly was convinced that, for a high-profile criminal defendant or target, dealing with the "legal ramifications" of this "public forum advocacy" is of utmost importance, and must be allowed to proceed unfettered by concerns about whether such communications are privileged. In making this point, the court took a practical approach and used strong language. The court found that media-related issues confronting an investigatory target or criminal defendant such as "whether the client should speak to the media at all, whether to do so directly 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."

As an example of the "extreme peril" a client might face, the court referred to the possibility that a defendant might be charged with a securities law violation based on a public statement — a prescient observation in view of subsequent events. Judge Kaplan pointed out that the Securities and Exchange Commission "in at least one case" had charged that a company that was the subject of an investigation had violated the securities laws because its public statements concerning a pending investigation were misleading.[10] Within a week, federal prosecutors, in a novel application of the securities laws, charged a defendant with securities fraud for making allegedly false public statements about the reasons

she sold stock — charges that were later dismissed.[11]

The court then stated that it "was persuaded that the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants." Displaying its practical frame of reference, the court again gave examples of what these types of functions might include: "advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions"; "seeking to avoid or narrow charges brought against the client"; and "zealously seeking acquittal or vindication."

The court concluded that "there simply 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 strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions."

The court then set forth the factors necessary for application of the attorney-client privilege to communications with public relations firms: "(1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege."

The court's holding went beyond protecting discussions between lawyers and public relations consultants. Relying on *Kovel*, the court also extended the privilege to Target's communications with the consultants, even those that took place outside of the presence of the lawyers, as long as they were "directed at giving or obtaining legal advice." Applying that standard, however, the court found that the privilege did not protect the two conversations Target had alone with the public relations firm employee: one concerning Target asking the employee for her view of some media coverage, and another about a problem with a wire service story. Nor did the privilege extend to a portion of an email to Target from the employee concerning a Wall Street Journal posting.

The court also limited its holding by finding that, as with accountants under *Kovel*, had Target hired the public relations firm directly, Target would not have enjoyed any privilege for her own communications with the firm, "even if her object in doing so had been purely to affect her legal situation."

At least one Southern District judge has questioned the rationale of *In Re Grand Jury Subpoenas*, if not the decision itself. In *Haugh v. Schroder Investment Management North America*,[12] Judge Denise L. Cote, after stating that "[t]here is no need here to determine whether *In re Grand Jury Subpoenas* was correctly decided," wrote: "A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice." Finding that the movant had failed to show that the communications to the public relations firm "were made for the purpose of obtaining legal advice from her attorney, as opposed to public relations advice," Judge Cote held that the communications were not protected by the attorney-client privilege.

## Conclusion

Attorneys who use public relations firms should welcome the evolving legal landscape in the Southern District concerning the attorney-client privilege. Care must be taken in order for communications to be protected. They should hire the public relations consultants directly, and they should be present at any conversation between the client and the consultants. In addition, they should discourage the client and consultants from engaging directly in email, telephone or any other communications with each other. Most importantly, counsel should be prepared to demonstrate that communications with a public relations firm were made for the purpose of obtaining legal advice and not merely conducting a "media campaign."

1. For more on the history of reporting on jury deliberations, see Daniel Okrent, "The Juror, the Paper and a Dubious Need to Know," N.Y. Times, April 11, 2004. In a sign of the recent backlash against news outlets identifying jurors by name, Southern District Judge Richard Owen ordered the news media not to report the names of jurors serving at the second trial of Frank Quattrone, the former Credit Suisse First Boston banker. See Jonathan D. Glater & Andrew Ross Sorkin, "Media Told Not to Name Jurors in Retrial of Quattrone," N.Y. Times, April 14, 2004.

2. See Landon Thomas, "Credit Suisse Banker Quits Amid Inquiries," N.Y. Times, March 5, 2003.

3. See Christopher Stern, "WorldCom Crafting PR Campaign," Wash. Post, July 4, 2003.

4. See Carrie Johnson, "Going Public in a Pinch; Corporate Defendants Adopting Risky Strategy," Wash. Post, Oct. 24, 2003.

5. F.Supp. 265 2d 321 (SDNY 2003).

6. The original opinion was filed under seal. The published opinion is a redacted version, which substitutes pseudonyms such as "Target" for names and omits or changes other identifying information, including gender.

7. 296 F2d 918 (2d Cir. 1961).

8. 198 FR.D. 53 (SDNY 2000).

9. 200 FRD. 213 (SDNY.2001).

10. See *In re Incomnet, Inc*., 1998 WL 429063 (July 30, 1998).

11. See Kara Scannell & Matthew Rose, "Executives on Trial: Stewart Case, Now Narrowed, Soon Will Be In Jury's Hands," Wall St. J., March 1, 2004.

12. No. 02 Civ. 7955, 2003 WL 21998674 (Aug. 25, 2003).