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Southern District Civil Practice Roundup

Expert Analysis

Cautionary Tales When Communicating With Public Relations Consultants

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Lawyers frequently retain media or public relations consultants to assist in their representation of clients in high-profile or complex litigations or investigations, generally taking steps to protect their communications with these consultants from disclosure. Efforts to obtain such communications are infrequently litigated, but a handful of reported decisions make clear that not all communications between attorneys and their public relations consultants are discovery-proof.

We discuss below a decision earlier this year by Southern District Judge Katherine B. Forrest ordering disclosure of litigation-related communications with a public relations firm. That decision surveys the relevant case law and underscores both the substantive and procedural requirements for maximizing the chances that such communications will not be delivered into the hands of a litigation adversary.

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'Bloomingburg'

Judge Forrest's decision was entered in *Bloomingburg Jewish Educational Center v. Village of Bloomingburg*, 2016 WL 1069956, ____ F.Supp.3d _____ (S.D.N.Y. March 18, 2016), one of several litigations between members of the Hasidic Jewish community and two political subdivisions in Sullivan County. Plaintiffs sought to compel discovery of communications between certain of the defendants and a PR firm they had hired in connection with a related civil RICO action brought by those defendants that had since been dismissed.

> Protection of communications with public relations firms is by no means automatic.

The defendants asserted a blanket objection to plaintiffs' subpoena for those documents and opposed the motion to compel, broadly asserting that the communications at issue were protected by the attorney-client privilege and the work-product doctrine because the PR firm "was hired at the behest of" their counsel in the RICO case "to assist in litigation strategy for the purpose of conveying legal advice and planning litigation."

Judge Forrest rejected the defendants' argument that they should not have to collect or review the documents, let alone create a privilege log, calling that position "sweeping and rather brazen." In ordering production of all of the communications involving the PR firm, she highlighted both procedural and substantive deficiencies in the defendants' efforts to establish that the communications were protected from disclosure. As such, her opinion serves as a cautionary guide to counsel who introduce PR firms into the attorney-client relationship with the expectation that communications

with the PR firm can be protected from disclosure.

Legal Standards

Two strands of case law in the Southern District of New York permit attorneys to bring PR consultants within the protective cloak of the attorney-client privilege without resulting in the usual waiver attendant to exposing client confidences to third parties. The first traces back to Southern District Judge Laura Taylor Swain's decision in *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001), which held that a PR crisis management firm hired by the Japanese company Sumitomo to help it deal with western media in connection with a scandal relating to copper trading, was effectively incorporated into Sumitomo's staff to provide skills the company otherwise lacked. The court found that for purposes of the attorney-client privilege the PR firm could "fairly be equated" with the company itself, such that it was not a third party for purposes of waiver analysis.

The second strand of case law permitting consultation with a PR firm without resulting in a waiver grows out of the exception to the rule that disclosure of client confidences to third parties waives the privilege, carved out in the seminal case of *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). *Kovel* held that no waiver occurs when the presence of a third party, in that case an accountant, is necessary, or at least highly useful, for the effective consultation between attorney and client.

The touchstone of *Kovel* was that the communication involving the third party was for purposes of the client obtaining legal advice from the lawyer. Relying on *Kovel*, Southern District Judge Lewis A. Kaplan held in *In re Grand Jury Subpoenas dated March 24*, 2003, 265 F.Supp.2d 321 (S.D.N.Y. 2003) that communications with a PR firm retained by defense lawyers to help "alter[ ] the mix of public information" so as to create "a climate in which prosecutors and regulators might feel freer to act in ways less antagonistic" to their client were covered by the attorney-client privilege.

Protection of communications with PR firms is by no means automatic. A number of courts have rejected efforts to treat communications with PR firms as privileged, primarily based on the finding that the PR firm was engaged in traditional public relations work related to the litigation, rather than in helping the attorney render legal advice. See, e.g., *Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. 2013) (Gorenstein, M.J.); *Haugh v. Schroder Inv. Mgmt. N. Am.*, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003) (Cote, J.). These cases can best be summed up by Judge Denise Cote's observation in *Haugh* that "a media campaign is not a litigation strategy."

Even where communications with a PR firm are found not to be privileged, courts have recognized that certain communications involving PR firms are nevertheless protected under the work-product doctrine, which permits a broader zone of confidentiality for communications prepared in anticipation of litigation, even when shared with third parties. When assessing whether communications with a PR firm are entitled to work-product protection, courts have drawn a distinction between materials prepared by attorneys and shared with a PR firm, and those prepared by the PR firm that relate to PR strategy, finding that the former fall within the ambit of the work-product doctrine while the latter do not. See *Egiazaryan*, 290 F.R.D. at 435-6 (collecting cases); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000) (Rakoff, J.).

Relying on these and other authorities, Judge Forrest found that the defendants in *Bloomingburg* had not met their burden of establishing that their communications with the PR firm could be withheld as protected under the attorney-client privilege or work-product doctrine.

Procedural Deficiencies

Defendants submitted an attorney's declaration of just over two pages to provide the factual basis for their invocation of privilege. That declaration explained that the PR firm was retained in connection with the RICO litigation, to help "distill [ ] the complex set of facts that would comprise the allegations of the complaint into succinct and digestible pieces of information,"

and that once retained the PR firm had assisted counsel in "facilitating the communications about the facts and nature of the case, and formulating the message by which municipal officials could accurately explain it to the public."

Judge Forrest held that in relying almost exclusively on this "vague and highly generalized declaration" to support their assertion that their communications with the PR firm were protected from disclosure, the defendants had failed to present competent evidence to meet their burden of showing that either the attorney-client privilege or the work-product doctrine applied. She noted, by contrast, that litigants in other cases seeking to assert privilege or work-product protection over such communications had presented evidence such as privilege logs and specific documents for in camera inspection, and had made target arguments permitting courts to make particularized determinations as to whether the communications were protected.

By contrast, the Bloomingburg defendants had not collected and reviewed the documents in question and had not included them in a privilege log. As such, Judge Forrest concluded that the defendants "had failed to conduct the basic work" that would have allowed the court to understand the communications at issue in order for it to rule in their favor. She rejected the argument that because some courts in some instances have found that certain communications with a PR firm are entitled to protection from disclosure, the defendants should not be required to disclose any communications between themselves, their counsel and their PR firm. She concluded that by failing to take the steps to permit them to make the particularized showing required, defendants had forfeited their opportunity to do so.

Substantive Deficiencies

Judge Forrest went on to find that based on the limited information she had been provided concerning the nature of the PR firm's role, the circumstances in *Bloomingburg* resembled those in which courts had rejected claims that communications with PR firms fell within the attorney-client privilege. Specifically, she found that the role of the PR firm in this case was similar to the role of the PR firms in *Calvin Klein* and *Haugh*, in which the PR firms were found to have been engaged in ordinary public relations advice rather than the type of advice in *In re Grand Jury Subpoenas* found necessary to assist the lawyers in their provision of legal advice to their client. She concluded that even though the PR firm may have been useful to counsel for the defendants, such a showing was not sufficient to support a finding that communications with the PR consultants retained their protection as privileged communications.

Finally, Judge Forrest recognized that some of the communications between the lawyers and the PR firm might qualify as work-product that could be shared with the PR firm without resulting in waiver. She concluded, however, that because the defendants had not presented information from which the court could make a case-by-case determination as to each document, all documents and communications in the possession of the PR firm responsive to the subpoena had to be disclosed immediately.

Conclusion

Had the defendants created a privilege log, provided the documents for in camera review, and made detailed, fact-based arguments as to how the PR firm assisted the lawyers in providing legal advice, as distinct from PR advice, the defendants might have been able to meet their burden of showing that communications with the PR firm were privileged and protected from disclosure. They almost certainly could have established that at least some of those communications were entitled to protection under the work-product doctrine. Having failed to conduct a document-specific analysis before asserting the privilege or defending against the motion to compel, they forfeited their ability to do so.