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Protecting Privilege when Working with Outside Public Relations Consultants

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Everyone Needs Help in a Crisis

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July 3, 2002

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By Bill Melugin | **Published** June 10, 2020 | Coronavirus in SoCal | FOX 11

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Agenda

I. Overview – Attorney-Client Privilege; Attorney Work-Product Doctrine; and Waiver

II. Exceptions to Third-Party Waivers – Kovel Doctrine; Functional Equivalent Doctrine; Common Interest Doctrine

III. Best Practices/Lessons Learned

IV. Q & A

Part I: Overview

Attorney-Client Privilege, Work-Product Doctrine, and Waiver

Attorney-Client Privilege – The Basics

Four key elements are required to establish the existence of the privilege:

1. A communication
2. Made in confidence
3. Made between privileged persons
4. For the purpose of seeking, obtaining, or providing legal assistance to the client

Who is a Privileged Person?

Privilege attaches to communications between the Company's attorneys and the Company's:

- Directors and Officers;
- Management (the "Control Group"); and
- Maybe lower-level employees who have relevant information that the attorney needs to provide legal advice to the Company
  - *Upjohn Co. v. United States,* 449 U.S. 383 (1981), rejected the "control group" test
  - Less than half of the states follow *Upjohn*
  - Alabama is an *Upjohn* state
  - Georgia is almost an *Upjohn* state (uses a modified "subject matter" test)

Upjohn Factors

Privilege attaches when:

1. Communications with lower-level employees occur at the direction of corporate counsel;
2. Communications are made to attorney acting in a legal capacity;
3. Information is not available from “control group” management;
4. Information is within the scope of the employee’s duties; and
5. Employee is aware that he or she is providing information in order for the Company to obtain legal advice.

Attorney Work-Product Doctrine

The work-product doctrine is a qualified immunity from the discovery of an attorney's written statements, private memoranda, and personal recollections that are made in anticipation of litigation.

- The immunity is qualified in that protected information may be subject to discovery upon a special showing of undue hardship or injustice.
- Attorney mental impressions or opinions reached in anticipation of litigation are never subject to discovery.

Waiver of Privilege or Protection

Attorney-Client Privilege

- The attorney-client privilege is waived when the communication is made in the presence of, or communicated to, a third party.
- The question is whether confidential communications were disclosed.

Attorney Work-Product

- Work-product protection is waived when protected materials are disclosed in a way that substantially increases the opportunity for potential adversaries to obtain the information.
- The question is to whom was the disclosure made.

Part II: Exceptions to Third-Party Waivers

The *Kovel* Doctrine; Functional Equivalent Doctrine; Common Interest Doctrine

A. The *Kovel* Doctrine

- ***United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961)**
- **A law firm specializing in tax law hired an accountant, who had prior experience working as an IRS agent, to aid in providing legal advice to clients on tax issues.**
- **The accountant was then subpoenaed to testify at a grand jury investigation of one of the law firm's clients. At the hearing, the accountant refused to answer several questions on the grounds of attorney-client privilege.**
- **Court analogized the law firm's reliance on Kovel to an attorney's need for an interpreter when his or her client speaks only a foreign language.**
- **The "presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and lawyer which the privilege is designed to permit." 296 F.2d at 922.**
- **Emphasized that the privilege was maintained only when seeking legal advice, not accounting advice.**

• *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002)

- A company sought advice from Price Waterhouse on the structure of a transaction.
- The company's legal department discussed structure, purpose, and tax consequences of the transaction with employees of Price Waterhouse.
- Later, the IRS sought to obtain documents reflecting communications between Price Waterhouse and the company, including communications between in-house counsel at the company and Price Waterhouse.
- *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002)
- Magistrate judge distinguished between an accountant being hired merely to give additional legal advice about complying with the tax code from being hired to assist in understanding financial information.
- Recommended the court hold that *Kovel* only applied if the consultation with the third party was necessary to effectuate legal advice.

Scott v. Chipotle Mexican Grill, Inc., 94 F. Supp. 3d 585 (S.D.N.Y. 2015)

- The company reached out to legal counsel for guidance the classification of "apprentices" in relation to potential violations of the Fair Labor Standards Act ("FLSA") and class action claims under the New York Minimum Wage Act. After obtaining guidance, the company retained a human resources consultant to conduct a "job function analysis."
- In a later collective action by the employees of the company under the FLSA, the employees sought production of notes and communications with the human resources consultant. The company produced some of consultant's interview notes without asserting privilege objection, but objected to production on privilege grounds the results/conclusions of job function analysis, which were communicated in memorandum to counsel.
- Court held the attorney-client privilege did not protect the memorandum.
- None of the communications between HR consultant and employees were designated privileged. Defendant's own HR team could have easily performed the analysis.
- Legal counsel did not use the HR memorandum to render legal advice as the law firm's legal advice was provided before receiving HR memorandum.

Application of *Kovel* Doctrine to Other Third-Party Consultants

- **Communications with other third-party consultants may still be privileged as long as the consulting service is rendered for legal rather than business advice.**
- Communications with the consultant must be kept confidential.
- Reports or statements made by or to the consultant without an attorney's direction or supervision are presumably made in the ordinary course of business and so are not privileged.
- **Translation analogy still applies – the consultant must be translating information or facilitating the communication between the lawyer and client so that the lawyer can render legal advice.**

In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003)

- Target of grand jury investigation hired a PR firm to assist in influencing the outcome of the investigation.
- Government subpoenaed the PR firm to produce documents testify before the grand jury regarding communications with the target.
- PR firm asserted the attorney-client privilege on behalf of the target, arguing that the purpose of its public relations campaign was to counter unbalanced and inaccurate press reports about the target.
- Court upheld the privilege, recognizing the need for lawyers to be able to engage in frank discussion of facts and strategies with the lawyers' public relations consultants.
- Court held communications between target and PR firm without the attorney may be privileged but only if made for purpose of obtaining legal services.

B. Functional Employee Equivalent Doctrine

- **Protects communications between organizations and non-employees who are the "functional equivalent" of employees.**
- **Factors that courts consider in applying the test are whether:**
- consultant had primary responsibility for a key corporate job
- consultant filled role for organization that was understaffed
- there was a "close and continuous working relationship" between consultant and organization's principals on issues interrelated with legal issues
- consultant was sole source of important information
- people inside and outside organization treated consultant as if consultant represented organization
- is the consultant integrated into organization's structure

In re Bieter Co., 16 F.3d 929 (8th Cir. 1994)

- A partnership was formed between two parties to develop a parcel of farmland in Minnesota. Because one party lived outside the state, a third party was retained as an independent contractor to provide advice and guidance regarding commercial and retail development.
- The vendor's primary responsibility was to secure tenants for the development, working with architects, consultants, and counsel, and appearing at public hearings. He attended meetings with counsel, alone or with one of the partners, and received communications from attorneys.
- After running into various obstacles with government and competitors, the partnership sued the competitors, alleging RICO claims and sought communications shared with the vendor.
- Court summed the legal question as whether communications either between consultant and counsel or merely disclosed to consultant necessarily fell outside of the scope of the attorney-client privilege because consultant was neither the client nor an employee.
- Court cited *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D. Cal. 1990), where court held that under Supreme Court's analysis in *Upjohn*, the privilege would apply to communications between independent consultants hired by the client and the client's lawyers, if those consultants were the functional equivalents of employees.

In re Bieter Co., 16 F.3d 929 (8th Cir. 1994) (continued)

- **Court held the vendor was functional equivalent of an employee of the partnership:**
- Vendor involved on daily basis with the principals of the partnership.
- Partnership was formed with a single objective and vendor had been intimately involved in the attempt to achieve that objective.
- As sole representative at meetings with potential tenants and with local officials, likely possessed information possessed by no one else.
- Retained to provide advice and guidance just as one would retain an outside accountant.
- No basis to distinguish vendor's role from that of an employee.
- His involvement in the subject of the litigation made him precisely the sort of person with whom a lawyer would wish to confer confidentially.

• *In re Signet Jewelers Ltd. Sec. Litig.*, 332 F.R.D. 131 (S.D.N.Y. 2019)

- **Investor brought securities fraud action against corporation alleging violations of Securities Exchange Act arising out of company's misrepresentations of its alleged pervasive culture of sexual harassment.**
- **PR firms and outside counsel, along with members of the corporation's management including in-house counsel, formed a strategic communications steering committee to discuss a communications strategy to neutralize the climate of negative and often inaccurate media coverage in light of the legal and reputational risks facing the company, including Washington Post articles.**
- **In response to Plaintiff's discovery requests, the corporation withheld from production documents reflecting what they referred to as "privileged communications among the company, its counsel, and the counsel-retained PR firms."**

In re Signet Jewelers Ltd. Sec. Litig., 332 F.R.D. 131 (S.D.N.Y. 2019) (continued)

- **Court found that communications between the corporation and its PR firms are not covered by the attorney-client privilege.**
- "It may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status."
- **The Court found the reasoning for protecting such communications in *In re Grand Jury Subpoenas Dated March 24, 2003* was not applicable here:**
- "The PR firms here were not called upon to perform a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals. Rather, the PR firms were involved in public relations activities aimed at burnishing [corporation]'s image."

In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213 (S.D.N.Y. 2001)

- **Foreign corporation was embroiled in high profile scandal involving both regulatory and civil litigation aspects. Corporation had no experience with publicity issues in high profile cases. Further, only 2 of 3 executives in corporation's communications department spoke English and their language skills were not sufficient for media relations. Corporation hired PR firm to assist with media relations in connection with the scandal and litigation. PR firm conferred frequently with the corporation's U.S. litigation counsel and general counsel in preparing press releases and other materials which incorporated the lawyers' advice.**
- **Finding *In re Bieter* persuasive, Court held that the PR firm was the functional equivalent of the corporation's employee.**
- **Court rejected the argument that third party consultants came within the scope of the privilege only when acting as conduits or facilitators of attorney-client communications:**
- [I]n this case, RLM is the functional equivalent of a Sumitomo employee. Accordingly, the analysis set forth in Kovel and its progeny concerning whether the privilege applies to communications made to third parties for the purpose of facilitating attorney-client communications is inapposite.

• *United States ex rel. Wollman v. Massachusetts Gen. Hosp., Inc.*, 475 F. Supp. 3d 45 (D. Mass. 2020)

- Former employee, who was anesthesiologist, brought qui tam action under False Claims Act and the Massachusetts False Claims Act against hospital and related defendants, alleging that defendants fraudulently billed Medicare and Medicaid for concurrent surgeries.
- The hospital retained a PR firm litigation communications support, including communications related to an investigation by the Boston Globe's Spotlight Team.
- Former employee moved to compel production of documents related to report by hospital's outside counsel regarding investigation of prior complaint by another employee regarding concurrent surgeries that had subsequently been shared with the PR firm.
- Court found that communications were not protected and that the defendants' disclosure of the Report to the PR firm did not satisfy any of the requirements of *Kovel*. The PR firm did not assist in consultations between the client and the lawyer, nor was the firm's involvement relating to obtaining legal advice.

Universal Standard Inc. v. Target, 331 F.R.D. 80 (S.D. N.Y. May 6, 2019)

- **Lawsuit alleged trademark infringement and unfair competition and related state law claims.**
- **Dispute involved emails sent among Universal Standard, its attorneys, and BrandLink, the PR firm retained by Universal. Target argued privilege had been waived when sent to BrandLink.**
- **BrandLink was not needed to translate for lawyer, so *Kovel* did not apply.**
- **Court distinguished *In re Grand Jury Subpoenas*, where the public relations function being performed was necessary to achieve a circumscribed litigation goal: specifically, influencing the decision whether or not to indict, from this case, holding that BrandLink was not used by Universal's lawyers to aid in legal tasks, so that exception did not apply.**
- **With regard to functional equivalent doctrine, Court concluded:**
- Universal had not shown that BrandLink performed functions materially different from those that any ordinary PR firm would have performed.
- The evidence contradicted the assertion that BrandLink was so fully integrated into Universal's hierarchy as to be a de facto employee.

Anderson v. Seaworld Parks and Entm't., Inc., 329 F.R.D 628 (N.D. Cal. 2019)

- Following the premiere of Blackfish, a film critical of SeaWorld, SeaWorld retained counsel to consider legal responses to the film, including potential litigation.
- SeaWorld and its outside counsel retained two "crisis" PR firms to work with counsel in developing legal strategy, including potential litigation.
- In litigation, SeaWorld redacted documents and withheld others based on attorney-client privilege and attorney work product.
- The court, relying on *Behunin v. Superior Court*, 9 Cal.App.5th 833, 215 Cal.Rptr.3d 475 (App. 2d Dist. 2017), held that the standard of "reasonably necessary" had not been met:
- "Instead, the third party must facilitate communication between the attorney and client. Here, the evidence submitted and documents lodged for in camera review show at most that SeaWorld and its counsel sought advice from public relations firms to better predict the public reaction to legal activities and other efforts it considered in response to Blackfish, and to determine how best to present such activities to the public and other entities."

C. Common Interest Doctrine

- **AKA –**
- "Community of interest" rule; "Co-client" privilege; "Joint prosecution" privilege; "Joint defense" privilege.
- **"The joint defense privilege was adopted as an exception to [the] waiver rule, under which communications between a client and his own lawyer remain protected by the attorney-client privilege when disclosed to co-defendants or their counsel for purposes of a common defense." United States v. Stepney, 246 F. Supp. 2d 1069, 1075 (N.D. Cal. 2003).**
- **Courts now recognize the doctrine as also applying to parties in civil litigation.**
- **Generally speaking, the common interest doctrine applies when the parties – 1) share a common interest; 2) the communication is confidential; 3) the communication is in furtherance of the common legal interest; and 4) the communication is related to pending or reasonably anticipated litigation.**

Common Interest Doctrine (cont'd.)

- **Courts have applied the Common Interest Doctrine inconsistently.**
- Hard line test requires that the parties' "common interest" is nearly "identical." More flexible test requires that the parties' "common interest" must be closely aligned.
- **Jurisdictions also differ as to whether litigation is necessary to invoke the common interest doctrine or whether the doctrine also applies in the transaction context.**

Egiazaryan v. Zalmayev, 290 F.R.D. 421 (2013)

- PR firm hired by counsel to "advise[] counsel for Mr. Egiazaryan [a Russian politician] as to what might be effectively done on the public relations front ... so [counsel] could properly advise their client as to the appropriate course of action in light of his wider litigation interests."
- The defendant sought production of email correspondence between the PR firm, Mr. Egiazaryan, and his counsel. Mr. Egiazaryan and his counsel asserted, among other theories, that the common interest doctrine protected these communications.
- The court disagreed that the plaintiff, Mr. Egiazaryan, and his PR firm had a common interest sufficient to prevent waiver as "the doctrine does not contemplate that an agent's desire for its principal to win a lawsuit is an interest sufficient to prevent waiver of privilege inasmuch as it does not reflect a common defense or legal strategy."

Behunin v. Superior Court, 9 Cal.App.5th 833 (2017)

- Counsel for Behunin hired a PR consultant to help with a social media campaign against the Schwabs, defendant in a lawsuit brought by Behunin.
- The defendant sought production of documents shared with the PR firm as well as the deposition of the PR firm consultant.
- The court affirmed the trial court's order to produce the documents and make the PR consultant available for deposition, finding that Behunin and the PR firm "do not have a common interest 'in securing legal advice related to the same shared matter.'"
- Although Behunin's counsel hried the PR firm, there was no evidence that the PR firm sought legal advice from the counsel or had established an attorney-client relationship.
- The court noted that the PR firm, "as a paid consultant, may have wanted its public relations campaign to succeed," but concluded "that is not the kind of common interest contemplated" for the common interest waiver exception to be applied.

Part III: Best Practices

- **Determine the applicable law, to extent possible. As the most recent cases demonstrate, despite the attorney client privilege being one of the oldest privileges, still being developed.**
- **When retaining consultants, either in-house or outside counsel should initiate the engagement.**
- **The engagement letter/agreement should make explicit that the consultant is being retained to assist counsel in providing legal advice.**
- **Counsel should emphasize at the outset of each consultant engagement that all communications and documents generated in the engagement should be considered confidential and only shared with individuals within the company who have a need for the information—and never with a third-party without approval of counsel.**

- **In-house or outside counsel and the consultant must regularly consult with each other about the engagement, and counsel should oversee the consultant's work.**
- **Simply retaining outside counsel to engage the consultant is probably not enough to ensure protection from subsequent discovery.**
- **Key meetings and communications should involve counsel.**
- **Counsel should be prepared to identify the specialized role that a consultant performed for the client and that that role involved working closely with the lawyers. (Consultant is the "translator.")**

- With respect to work-product, counsel must be mindful that only information prepared in anticipation of litigation will be protected. The anticipated litigation should be easily articulated.
- With respect to the common interest doctrine, make sure the "common" interest is easily articulated. The parties' interests must be closely aligned and, in some jurisdictions, identical.
- Make sure that each communication is made in the course of, and for the purpose of, furthering the common interest.
- Entering into a joint defense agreement may help but, in the end, the parties' course of conduct will drive the determination.
- Information should only be shared among the lawyers, not the clients.

Part IV: Questions?