Attorney-Client Privilege Logs and Public Relations Firms: A Recent Warning in the SDNY on Maintaining the Privilege

By Rachel Maimin and H. Gregory Baker

On May 6, 2019, U.S. Magistrate Judge Gabriel W. Gorenstein of the Southern District of New York issued an opinion in *Universal Standard, Inc. v. Target Corporation*, 18 Civ. 6042 (LWS) (GWG), holding that the attorney-client privilege in that case was destroyed when public relations professionals were copied on certain emails—and that the privilege log listing those communications so flagrantly violated local rules that a waiver probably existed as a matter of law. As such, *Universal Standard* reinforces the rules about proper privilege logs and how to protect the privilege when public relations experts are employed by a company.

The Privilege Log

Judge Gorenstein's decision arose in the context of a trademark dispute. In discovery, plaintiff Universal Standard produced a privilege log. In the course of events relevant to the dispute, Universal Standard had been working with an outside public relations firm—some of whose employees had been copied on relevant emails involving company counsel listed on Universal's log.

As Judge Gorenstein noted, Local Rule 26.2 requires privilege logs to list not only all senders and recipients of communications, but also, if not "apparent," "the relationship of the author, addressees, and recipients to each other."[1] Where "flagrant," failure to do so can result in automatic waiver of the privilege.[2] Here, Universal Standard's log did not identify all the participants on each email; notably, the names of employees of the public relations firm had been omitted from certain emails listed on the log. Universal Standard argued, among other things, that the omissions had been inadvertent because some of the email addresses of the public relations employees referenced "universalstandard" and thus were confused for internal company addresses.[3] Judge Gorenstein wholly rejected this argument, holding that it was "nonsensical" because the employees' titles at the public relations firm appeared in "easily visible type" in the text of the emails.[4]

As a result, Judge Gorenstein found, the facts "strongly suggest[ed] that this is a situation where there has been a 'flagrant' violation of Local Rule 26.2" that should result in an automatic waiver of the attorney-client privilege or work product doctrine.[5] Judge Gorenstein elected not to rule on that question because, as discussed below, he concluded on the merits that the emails in question were not privileged.

The Privilege Waiver

Judge Gorenstein went on to hold that the attorney emails copying public relations professionals, under the particular circumstances of this case, were not privileged as a matter of law. The court did acknowledge three exceptions where copying such professionals may not destroy the privilege, namely (1) where the public relations professional's communication was necessary for the attorney-client communication, *e.g.*, the professional also acts as a foreign-language interpreter; (2) where the public relations professional was an employee of the company or its "functional equivalent"; and (3) where the public relations company was used to aid in legal tasks.[6] In the case of *Universal Standard*,

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[1] *See* Local Rule 26.2(a)(2)(A)(iv).
[2] *See Universal Standard, Inc. v. Target Corporation*, 18 Civ. 6042 (LWS) (GWG), Opinion and Order (SDNY May 6, 2019), at 5-6 (collecting cases).
[3] Id. at 7.
[4] Id.
[5] Id. at 8.
[6] Id. at 10-22.

however, Judge Gorenstein found that none of these exceptions applied and, thus, the public relations professional's presence on the email—as a third party to the attorney-client relationship—destroyed the privilege.

Key Takeaways

- **Privilege Logs**: Privilege logs must be prepared very carefully: Counsel must ensure that all parties to communications are listed, and the text of communications must be thoroughly reviewed so that the business relationships among the parties to the communication are clearly reflected on the log. If such care is not taken, courts may find "flagrant" violations of the local rules and an automatic waiver.
- **Waiver in the Context of Public Relations Professionals**: Counsel should take care not to copy public relations professionals—or those in similar capacities, such as other outside consultants—on attorney-client emails except in the most limited situations. The safest course is to avoid ever copying such third parties except where the company would be able to prove—as would ultimately be its burden—that the third party is providing or receiving information necessary for the legal advice, *e.g.*, if a public relations consultant is being copied in order to assist with a legal strategy that requires the use of a public relations professional, such as providing legal advice as to the advisability of making a public statement in the hopes of avoiding an indictment.[7] That being said, before producing emails where such third-party consultants are copied, counsel producing discovery should analyze whether the three exceptions discussed above apply, and document this analysis if a document is to be withheld. And, again, if a document is withheld where such a third party is copied, that person's relationship to the others on the communication must be explicitly reflected on the privilege log.

[7] See In re Grand Jury Subpoenas Dates March 24, 2003, 265 F. Supp. 2d 321 (SDNY 2003).

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