

Securities Litigation

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Handle With Care: Communications With PR Firms Not Guaranteed Privilege

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What You Need To Know:

- Communications between public relations firms and in-house counsel face uncertain privilege protection.
- Proceed with caution before disclosing information to PR firms.
- Consider involving outside counsel as soon as a crisis breaks out.

A crisis breaks out at your company. Customers, investors, and social media are outraged. The accusations are significant, and they present a clear legal problem for you and your department. Even if litigation is years away, the public pressure is now. So, understandably, you reach for the phone and call a public relations firm. Quickly engaging them, you email the firm all about the crisis, including your thoughts, critical internal details, a road map of people to speak to, and more. Twenty emails later, as the crisis still smolders and the PR firm's strategy is just starting to take effect, you call counsel to let them know you might need assistance. You copy the PR firm and your counsel on the same email chain. Things seem to be more stable. Except these actions may well have created a ticking time bomb that will explode as the litigation progresses.

Were the communications with the PR firm protected as your communications with counsel would be? Unfortunately, the answer, based on recent case law, is that it "will depend" not only on facts within your control but also on where you and your company are located.

Communications between public relations firms and attorneys (especially in-house attorneys) face uncertain attorney-client privilege treatment and work product protection. Given the uncertainty, clients should proceed with caution before hiring or disclosing information to PR firms.

The Circuit Split: Do Communications With Public Relations Firms Destroy Privilege?

Attorney-client privilege, a relative bedrock of Anglo-American law, is born from the policy concern that clients and attorneys should enjoy true, open, and honest communications. The privilege belongs to the client and prevents the disclosure of confidential communications between attorneys and their clients (subject to certain exceptions). But the privilege is not guaranteed to protect every communication involving a lawyer. When an attorney-client communication involves certain third parties, rather than, for example, agents of the attorney, the privilege may be waived. But is a PR firm a third party that destroys the attorney-client privilege?

The federal courts have not reached a consensus. Cases within the past several months reveal a circuit split as to whether communicating with a PR firm destroys the privilege between attorney and client. Recently, the U.S. District Court for the District of Oregon and the U.S. District Court for the Southern District of California ruled that client communications with PR firms did not destroy the attorney-client privilege. See *NECA-IBEW Pension Tr. Fund v. Precision Castparts Corp.*, 2019 WL 4750251, at *6 (D. Or. Sept. 27, 2019); *Stone Brewing Co., LLC v. Molson Coors Brewing Co.*, 2019 WL 2176792, at *4 (S.D. Cal. May 20, 2019). By contrast, the Southern District of New York and the District of Kansas found that similar PR

communications were not protected by privilege and ordered the production of these documents. See *In re Signet Jewelers Ltd. Sec. Litig.*, 2019 WL 4197201, at *6 (S.D.N.Y. Sept. 5, 2019); *Pipeline Prods., Inc. v. Madison Cos., LLC*, 2019 WL 1900341, at *4-5 (D. Kan. Apr. 29, 2019); *Universal Standard Inc. v. Target Corp.*, 331 F.R.D. 80, 83 (S.D.N.Y. 2019).

Unfortunately, for those looking for certainty and consistency in the law, it is not just the court's location that divide these privilege issues, but the privilege depends on the facts and circumstances of the PR relationship. The different outcomes in the circuits are confounding given the common goal of the PR firms—to improve a client's reputation. To help navigate the muddy waters, we have highlighted the ways in which these communications can be protected.

The Possible Exceptions That Could Save PR Communications From Waiver of Privilege

Normally, the privilege protecting communications between attorney and client is waived when communications are disclosed to a third party. However, there are several exceptions to this waiver doctrine that could potentially protect communications with PR firms from disclosure: (1) if the communication is necessary to allow the client to communicate information to the attorney; (2) if the PR firm is the “functional equivalent” of a corporate employee; and (3) if the PR firm was used by the lawyers to aid in legal tasks.

The takeaway from these exceptions: The closer the PR firm's activities are to legal advice or the legal dispute, the more likely they are to be protected.

1. PR Firm Necessary for Communications Between Client and Counsel

The necessity test equates the PR firm's role to that of a foreign language interpreter or accountant who allows the attorney to understand the client's situation. Recently, courts, including the Southern District of New York, have rejected the notion that communications with PR firms are necessary for the client to communicate with its attorneys. See *Universal Standard*, 331 F.R.D. at 88.

2. The “Functional Equivalent” Test

The functional equivalent exception considers whether the PR firm acted as an agent of the corporation. This exception has been accepted in a few cases where the PR firm worked with and took clear instructions from the company during the course of ongoing legal disputes. See *Precision Castparts*, 2019 WL 4750251, at *6; *Grand Canyon Skywalk Dev. LLC v. Cieslak*, 2015 WL 4773585, at *17 (D. Nev. Aug. 13, 2015), *aff'd*, 2016 WL 890921 (D. Nev. Mar. 7, 2016).

3. PR Consultants Used by Lawyers to Aid in Legal Tasks

This exception was invoked in *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003), where the court found that the engagement of the PR firm was necessary for the lawyers to perform client functions such as advising the client of the legal risks of speaking publicly, avoiding charges brought against the client, and zealously seeking acquittal or vindication.

Some District Courts Have Not Provided Any Protection for PR Communications

While some courts have found communications with PR firms privileged under these exceptions, some courts have denied them protection altogether. Courts refusing protection have found that the communications were made for the purpose of burnishing the company's image and not for obtaining legal advice. See *In re Signet*, 2019 WL 4197201, at *4.

When running a PR strategy without the involvement of outside counsel, particular care needs to be taken. In the *Universal Standard* case, the court found that although the emails involved a PR strategy *regarding the lawsuit at issue*, the message could have been communicated without the PR consultant's involvement. *Universal Standard* also found the fact that the PR consultant worked closely with the client on a continuous basis to be of no great significance for the functional equivalent test. Of note, the PR firm in *Universal Standard* was hired by the client, not the attorney, and PR functions were not “entirely outsourced” to the consultant. 331 F.R.D. at 91-92.

Courts have similarly denied PR communications protection under the work product doctrine, which can extend to documents not otherwise protected by the attorney-client privilege. For instance, in *Universal Standard*, the court noted that “many cases” have rejected work product protection for material relating to public relations activities. *Id.* at 93. The court also found that the PR firm's activities did not aid counsel in preparing for litigation. *Id.*

Practical Guidelines to Help Preserve Privilege With Respect to Communications With PR Firms

Given this uncertainty, clients should operate under the assumption that communications with PR firms will likely be disclosed during litigation. However, to better protect these communications, clients should take the following steps:

1. Consult with counsel before involving the PR firm, and have counsel do the hiring.

If consulted, counsel can help weigh the benefits of a PR strategy against the risk of disclosure of legal communications. The court is also more likely to find that the PR

communications are privileged if the attorney hired the PR firm.

2. Once the PR firm is hired, have counsel work closely with the PR firm.

The communications are more likely to be protected if counsel is actively involved in the PR firm's activities. Counsel can help determine whether the PR consultant is necessary to include in legal discussions and, when necessary, ensure the consultant is focusing on legal tasks.

3. Limit written communications with the PR firm, and loop in counsel.

Limiting communications with the PR firm can reduce the number of documents that are challenged in court. Copying counsel on those communications you do have with the PR firm may help preserve the privilege, and also provide evidence that the PR firm was involved in legal assistance. And obviously, do not discuss any legal analysis with the PR firm unless your counsel is present.

Conclusion

When a crisis presents itself, our natural reaction may be to respond to negative publicity immediately, while worrying about legal consequences in the future—but this may be a critical mistake. It is *not* automatic under the law that communications with a PR firm—even by in-house counsel—are privileged. If you bring in outside counsel early, counsel can advise on how to keep communications privileged, and can also assist in hiring a PR firm and taking other significant steps to help limit disclosure in litigation.

If you have any questions regarding whether communications with third parties are protected, or likely to be protected by the attorney-client privilege, or would like assistance reviewing your policies and procedures with respect to PR firms, please contact the authors of this alert.

Disclaimer: Lowenstein Sandler represents clients involved in litigation with Precision Castparts Corp. and Signet Jewelers Inc. but does not represent parties in the particular cases cited.

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