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PR THAT'S PROTECTED

Media advice may sometimes be covered by attorney-client privilege.

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WHEN A LITIGATION CRISIS IS LOOM-ing, corporate counsel frequently turn to outside public relations experts to assess and mitigate risks. But this can present problems. Media consultants are not lawyers dispensing legal advice. Communications with them may become the subject of discovery or subpoenas—even when they relate to litigation strategy. In addition, companies often have outside media consultants in place for business reasons. The introduction of new advisers may blur the lines of communication.

So how can in-house counsel maximize the chance that their communications with a PR team will receive the protection of the attorney-client privilege or attorney work product?

THE LEGAL LANDSCAPE

The bad news is that there are relatively few cases on point. Those that exist are from lower courts, and none have laid down black-letter law adopted by a majority of jurisdictions. These cases do, however, supply key considerations used to assess whether a given media adviser was retained to, and in fact does, facilitate the lawyers' provision of legal advice to their client, or whether the media adviser is merely fulfilling more traditional public relations functions.

Under one approach, communications with a media firm may be protected if the communications are conducted in a confidential manner and for the purpose of helping counsel formulate and render legal advice. This seems in keeping with Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct, which require counsel to refer "not only to law, but to other considerations such as moral, economic, social and political factors" when advising a client.

The insider trading prosecution of celebrity homemaking guru Martha Stewart is one example of this approach. In that case, Martha Stewart's position was that her outside lawyers had retained the media firm not merely to influence general public opinion, but to balance the coverage of the issues with the hope of reducing the pressure prosecutors felt to bring charges against her. The court agreed that the practice of law can touch on public relations and media issues; that it is appropriate for attorneys to try to influence public opinion in the interests of their clients (within ethical boundaries); that public advocacy can be important to the client's ability to achieve a fair and just result; and that public relations work must take into account its effect on the legal case.

A judge overseeing Vioxx product liability cases likewise concluded that materials in the possession of a media firm retained by Merck & Co.'s outside lawyers were not discoverable. The court observed that "the ability of lawyers to perform some of their most fundamental client functions" such as "advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions" or "zealously seeking acquittal or vindication … would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants."

But the legal foundation is far from clear-cut. Judges presiding over other cases have declined to apply this reasoning. And even the Martha Stewart judge, when sitting on another case, described his earlier holding as "very narrow."

Other courts approach the issue differently, focusing on the connection between the media and the client. In older cases like *In re Copper Market Antitrust Litig.* and

more recent ones like *Hadjih v. Evenflo*, the issue has turned on whether the media firm is the functional equivalent of a corporate employee, performing an essential corporate function necessitated by a government investigation or litigation and resulting from the need for legal advice.

Cases in which courts have allowed discovery of communications with media consultants also are instructive, because they provide guidance on what not to do. For example, in recent litigation related to the collapse of the Interstate 35 bridge in Minnesota, the court was asked to protect communications between the defendant company and a public relations firm it hired in the wake of the accident. It refused because the company had a long-standing relationship with the media firm prior to the accident, and because the advice provided did not "rise to the level of communications made for the purpose of giving or receiving legal advice."

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In *NXIVM v. O'Hara*, the court similarly concluded that the media firm was not retained to assist the company in providing legal advice. Even though that was the stated purpose for the retention, the attorney had little involvement in communications after the contract was signed. And in *Calvin Klein Trademark Trust v. Wachner*, the court required the disclosure of certain documents as well. In part this was because the media firm also performed routine public relations work (and thus did not only help the lawyers in providing legal advice), and in part this was because some documents were not kept confidential in the first place.

PRACTICE TIPS

Inside counsel can maximize the chance that a court will recognize as privileged communications with a media firm by following these six tips:

1. The reason for hiring a media firm for current or threatened litigation must be different than the reason for hiring a media firm for everyday PR work. The purpose must be to facilitate counsel's provision of legal advice, and the contract with the public relations firm should spell it out.

2. Wherever possible, the company's outside law firm should retain the litigation public relations firm, and then stay directly involved. Retention of the media firm by the lawyers was critical in the Martha Stewart case, where the court stated that communications with the public relations firm would not have been privileged had Stewart hired the firm directly, even if the retention had the same purpose. And the NXIVM case makes clear that courts will see through retentions that fail to actually support the legal purpose.

One approach says communications may be protected if they're

FOR THE PURPOSE OF HELPING COUNSEL RENDER LEGAL ADVICE.

3. The media firm should, if possible, be different from the company's ordinary PR firm. This will minimize the chance that work related to the provision of legal advice will mix with ordinary work, leading to protection for none of it. In fact, consider a public relations firm specializing in crisis management to improve the odds that the company and its counsel will get the media advice needed, with the proper level of attention given to confidentiality and the legal purpose behind the retention.

4. If the company must continue with the same media firm for litigation-related work used for everyday work, both sides should take steps to keep the engagements separate and the litigation-related work confidential. This should include a new engagement letter, separate billing and walling off of files and employees. Setting up a separate working team specifically for legal communications is helpful.

5. Counsel and the media firm should prepare and follow a strict protocol regarding document confidentiality. It should include:

- Having counsel involved in drafting documents and communicating with the media firm;
- Marking privileged communications "Privileged and Confidential" and subject to the attorney-client privilege or work product protection (if applicable);
- Advising document recipients to limit dissemination. Since this is not always instinctive to corporate employees or media advisers, ongoing counsel is important on this point;
- Including an explanation of how the document pertains to the provision of legal advice; and
- Having the media firm submit its bills directly to the attorney, with generalized entries that can facilitate a privilege review should it be needed. Compliance may be improved if the consequences are specified in advance: that the media firm will be dismissed and responsible for any damages if it violates the protocol.

6. The public relations firm and its employees should sign an agreement that outlines confidentiality obligations, and notes that any inadvertent disclosure will not waive privilege and work-product protections.

While media communications during a crisis are always fast-moving, a corporate counsel's proactive attention to these tips on the front end can make all the difference in preserving privilege at a later date, should litigation arise.

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