

The Attorney-Client Privilege And Third-Party Consultants: An Update

BY ROY SIMON

More than six years ago, in July of 2003, I published an article in this newsletter entitled *The Attorney-Client Privilege and Public Relations Firms*. The article reviewed a number of cases addressing whether the attorney-client privilege can apply to a lawyer's communications with public relations agents and other third-party consultants. The decisions were mixed.

Since 2003, federal and state courts in New York have issued six more opinions on this subject, so it's time for an update. This article will first review the cases analyzed in my 2003 article, and will then discuss the six cases considering third-party privilege issues since then. For a more extended treatment of cases involving the third-party privilege, see Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Party Doctrine for Third-Party Consultants*, 62 SMU L. Rev. 727 (2009) (68 pages, 380 footnotes).

United States v. Kovel: Extending The Privilege to Nonlawyers

The seminal decision extending the attorney-client privilege to conversations with a nonlawyer was *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), written by the great Judge Henry Friendly. In *Kovel*, a federal grand jury had investigated alleged federal income tax violations by a man named Hopps, who retained a tax law firm named Kamerman & Kamerman. An accountant and former IRS agent named Louis Kovel, who had been employed by the law firm for almost twenty years, worked with the lawyers on the Hopps matter and sometimes communicated directly with Hopps to discuss tax issues.

When Kovel was subpoenaed to testify before the grand jury, he refused to answer questions on grounds of attorney client privilege. The district court rejected Kovel's privilege claim, directed Kovel to testify, and threw him in jail when he refused. Kovel appealed, arguing that his status as a law firm employee automatically made all of his communications with clients privileged. The Government countered that the attorney-client privilege could never extend to communications with an accountant.

Judge Friendly struck a sensible balance, analogizing Kovel to a foreign language interpreter. In a passage which is often quoted, Judge Friendly said:

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege ...; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the

accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. ...

Judge Friendly summed up by saying: "If what is sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists."

Calvin Klein: Thumbs Down On Public Relations Agents

Judge Friendly's decision in *Kovel* said nothing about communications with public relations agents. The first case to address that issue was a trademark infringement action, *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000) (Jed S. Rakoff, J.). In May, 2000, in anticipation of filing a lawsuit on behalf of Calvin Klein, the law firm of Boies, Schiller & Flexner LLP ("BSF") retained the public relations firm of Robinson Lerer & Montgomery ("RLM") to act as a "consultant" to BSF for certain communications services related to BSF's representation of Calvin Klein, Inc. ("CKI"). Defendants contended that BSF had retained RLM solely "to wage a press war against the defendant," but plaintiffs said that they had retained RLM to help BSF "to understand the possible reaction of CKI's constituencies to the matters that would arise in the litigation, to provide legal advice to CKI, and to assure that the media crisis that would ensue – including responses to requests by the media about the law suit and the overall dispute between the companies – would be handled responsibly...." The court denied Calvin Klein the protection of the attorney-client privilege, for at least three reasons.

First, the documents in issue did not contain or reveal confidential communications from the underlying client, CKI, made for the purpose of obtaining legal advice. Quoting *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir.1999), the court noted that "the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client."

Second, even if the documents had contained "nuggets of client confidential communications" that were originally made to enable CKI to seek legal advice, their disclosure to RLM waived the privilege. The documents in question clearly established that "RLM, unlike the 'translator' in *Kovel*, was simply providing ordinary public relations advice so far as the documents here in question are concerned."

Third, because the attorney-client privilege hindered "the search for truth," it must be "narrowly construed." CKI's approach would instead "broaden the privilege well beyond prevailing parameters." RLM was simply performing functions that any ordinary public relations firm would have performed if it had been hired directly by CKI. Even if modern clients need public relations help, nothing in the client's communications with RLM "constitutes the obtaining of legal advice or justifies a privileged status."

Copper Market Antitrust Litigation: Thumbs Up on PR Agents

The following year, however, in *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001) (Laura Taylor Swain, J.), the court recognized a privilege for communications between a lawyer and a public relations firm. The defendants, including the Japanese company Sumitomo, were accused of conspiring to manipulate global copper prices. Sumitomo, which "had no prior experience in dealing with issues relating to publicity arising from high profile litigation" and "lacked experience in dealing with the Western media," hired RLM (the same firm that Calvin Klein had hired) to act as Sumitomo's

agent and spokesperson when dealing with the Western press on issues relating to the copper trading scandal. “The chief object of RLM’s engagement was damage control, *i.e.*, the management of press statements in the ... context of anticipated litigation ‘to ensure that they do not themselves further damage the client.’”

Accordingly, RLM conferred frequently with Sumitomo’s outside counsel, Paul, Weiss, Rifkind, Wharton & Garrison (“Paul Weiss”) and with Sumitomo’s in-house counsel. RLM also prepared internal documents “designed to inform Sumitomo employees about what could and could not be said about the scandal.” And, together with Paul Weiss, RLM drafted public relations documents, press releases, talking points, and Questions and Answers to be used as a frame-work for press inquiries. When drafting these documents, RLM incorporated legal advice from Paul Weiss and Sumitomo’s in-house counsel. Crucially, RLM also had authority to make decisions on behalf of Sumitomo concerning its public relations strategy, and therefore was “the functional equivalent of an in-house public relations department with respect to Western media relations.” Sumitomo even gave RLM authority to seek and receive legal advice from Sumitomo’s counsel regarding the performance of its duties.

When plaintiffs served a subpoena requesting that RLM produce “all documents relating to RLM’s public relations consulting work for Sumitomo in connection with the copper trading scandal,” RLM withheld 17 documents based on the attorney-client privilege. Plaintiffs naturally contended that the attorney client privilege did not apply because RLM, a third party, was involved in the communications as to which the privilege was asserted.

Persuaded by the reasoning in an influential case called *In re Bieter Co.*, 16 F.3d 929 (8th Cir.1994), the court found “no reason to distinguish between a person on the corporation’s payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice.” RLM had essentially been “incorporated into Sumitomo’s staff to perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny obtaining at the time.” Sumitomo’s internal resources were insufficient to cover the task, and “RLM’s independent contractor status provides no basis for excluding RLM’s communications with Sumitomo’s counsel from the protection of the attorney-client privilege.” The court therefore found that, for purposes of the attorney client privilege, RLM could “fairly be equated with” Sumitomo itself. And because RLM was the “*functional equivalent* of a Sumitomo employee” (emphasis added), the analysis in *Kovel* regarding whether the privilege applies to communications made to third parties for the purpose of facilitating attorney-client communications was “inapposite.”

Twentieth Century Fox: Independent Hollywood Contractors are Privileged

Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc., 2002 WL 31556383 (S.D.N.Y. Nov. 15, 2002) (Henry Pitman, Magistrate Judge) – a case I unintentionally omitted from my 2003 article – originated as a copyright and licensing dispute over the “X-Men” characters. Fox withheld about 15 documents that Fox had shown to certain independent contractors. In opposition to a motion to compel, Fox argued that the independent contractors to whom disclosure was made were directly involved in the production of X Men 2 and that disclosure to them did not operate as a waiver of the privilege because “they functioned as employees and Fox’s economic decision to conduct its business through independent contractors as opposed to employees should not affect the scope of its privilege.”

Relying on an “uncontradicted affidavit” from Fox, the court agreed that the independent contractors were the functional equivalent of employees. The court said:

Fox’s determination to conduct its business through the use of independent contractors is a result of the sporadic nature of employment in the motion picture industry.... The fact that the nature of the industry dictates the use of independent contractors over employees should not, without more, create greater limitations on the scope of the attorney-client privilege.

In re Grand Jury Subpoenas: PR Agents Win Again

In *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp.2d 321 (S.D.N.Y. 2003), (Lewis Kaplan, J.) the court addressed two questions: (1) Are a *lawyer’s* communications with the public relations firm protected by the attorney client privilege? (2) Are a *client’s* communications with the public relations firm protected by the attorney-client privilege if the lawyer is not present? In the case, the target of a “high profile” federal grand jury investigation (referred to in the opinion only as “Target”) hired a public relations firm out of concern that “unbalanced and often inaccurate press reports about Target created a clear risk that the prosecutors and regulators conducting the various investigations would feel public pressure to bring some kind of charge....” When the United States Attorney for the Southern District of New York found out about the public relations firm, he subpoenaed a person from the PR firm to testify before the grand jury, and he subpoenaed documents reflecting communications between Target’s lawyer and the public relations firm. Target intervened to assert claims of attorney-client privilege. With minor exceptions, Judge Kaplan held that communications between Target’s lawyers and the public relations firm were protected by the attorney-client privilege.

In performing her duties, the public relations agent had two conversations directly with Target out of the presence of Target’s attorneys, and sent at least one e-mail directly to Target. Other times, the public relations firm interacted with Target’s attorneys – and still other times, communications involved all three – the public relations firm, Target, and the attorneys (and, in a few cases, Target’s spouse). Some of the documents produced for in camera inspection included discussions about “defense strategies,” and the court assumed that many oral communications about which the public relations agent had been asked to testify also included discussions of defense strategies.

Judge Kaplan began his analysis with an extended look at *Kovel*. No one suggested that communications between Target and the public relations firm would have been privileged “if she simply had gone out and hired [the public relations] Firm as public relations counsel.” On the other hand, the court did not question the stated rationale for her lawyers’ hiring of Firm, and the court accepted the claim that the lawyers, in the words of *Kovel*, needed “outside help,” as they presumably were not skilled at public relations. The key question, therefore, was whether the problem with which the lawyers needed outside help related to their provision of what *Kovel* spoke of as “legal advice.”

The court immediately recognized the “obvious” point that the lawyers did not hire the public relations firm to help them understand “technical matters” they had to know to advise their client regarding the law, as had been the case in *Kovel*. But the privilege also “extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law.”

The “ultimate issue” thus became “whether attorney efforts to influence public opinion in order to advance the client’s legal position ... are services, the rendition of which also should be facilitated by applying the privilege to relevant communications which have this as their object.”

The *Copper Market* case was not dispositive because, unlike the defendant there, Target here did not argue that the public relations firm “in substance was part of the client...” Nor had *Calvin Klein* answered the privilege question, because the public relations firm there, unlike the public relations firm hired by Target’s lawyers, was “simply providing ordinary public relations advice.”

In any event, the deeper question before the court – not answered in any previous case – was “whether a lawyer’s public advocacy on behalf of the client is a professional legal service that warrants extension of the privilege to confidential communications between and among the client, the lawyer, and any public relations consultant the lawyer may engage to advise on the performance of that function.” After analyzing the policies that inform the attorney-client privilege – especially “to encourage full and frank communication between attorneys and their clients and thereby *promote broader public interests in the observance of law and administration of justice*” (emphasis added) – the court found justification for extending the privilege in order to enhance “the administration of justice.” The media, prosecutors, and law enforcement personnel in high profile cases often engage in activities that color public opinion, not only to the detriment of the subject’s general reputation but also, in extreme cases, to the detriment of his or her ability to obtain a fair trial. Moreover, prosecutors are sometimes “influenced by an assessment of public opinion in deciding whether to bring criminal charges ... or in deciding what particular offenses to charge ...” Thus, advocacy of a client’s case in the public forum is sometimes “important to the client’s ability to achieve a fair and just result in pending or threatened litigation.”

But advocacy in the public forum cannot prudently be conducted without regard to its potential legal ramifications. “Questions such as whether the client should speak to the media at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others can be decided without careful legal input only at the client’s extreme peril.” Finally, dealing with the media in a high profile case probably is “not a matter for amateurs.” Target and her lawyers understandably concluded that they needed professional public relations advice. For all of these reasons, the court was persuaded that unless the lawyers could engage in frank discussions of facts and strategies with the lawyers’ public relations consultants, they could not perform some of their most fundamental client functions, such as “(a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication.”

The court therefore held that “(1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client’s legal problems are protected by the attorney-client privilege.” Moreover, Target’s own communications with the consultants, some of which took place in the presence of the lawyers and some of which did not, were also “covered by the privilege provided the communications were directed at giving or obtaining legal advice.”

Now I will turn to the six cases that have been decided since my 2003 article.

Currency Conversion Fee Antitrust Litigation: Transaction Processing Companies Don't Qualify

In *In re Currency Conversion Fee Antitrust Litigation*, 2003 WL 22389169 (S.D.N.Y. 2003) (William Pauley, J.), a class action alleging a price-fixing conspiracy by Visa and Mastercard and their member banks with respect to currency conversion fees, plaintiffs moved to compel a bank (First USA) to produce documents that First USA had disclosed to employees of a third party, First Data Resources, Inc. ("First Data"), which provided "computing services, consulting services, and other support services to credit card issuers." First USA, citing *In re Copper Market Antitrust Litigation* and other cases, claimed that the First Data Documents remained privileged because the First Data employees were the "functional equivalent" of First USA employees.

After reviewing the cases, Judge Pauley rejected First USA's argument. The court did not perceive any need to pass upon the validity of the so-called "functional employee" exception to the doctrine of third-party waiver in the privilege context because the facts of this case were "materially different" from the cases in that line. First Data was "merely a transaction processing and computer services corporation that provided standard trade services to First USA and a vast number of other credit card companies." First Data's role was therefore "akin to that of an accountant or other ordinary third party specialist, disclosure to whom destroys the attorney-client privilege."

Since the attorney-client privilege stands in derogation of the public's right to every man's evidence, it should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." Applying a "narrow construction" of the "functional employee" exception, Judge Pauley found that First Data's employees were not "functional employees" of First USA and that disclosure of the First Data Documents to First Data employees destroyed any privilege that may have existed.

Asia Pulp & Paper: Financial Consultant Was Not a Privileged Person

Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103 (S.D.N.Y. 2005) (James C. Francis IV, Magistrate Judge), was a suit brought by the Export-Import Bank of the United States ("Ex-Im") against Asia Pulp & Paper ("APP"), one of the largest paper manufacturers in the world, to recover funds due under several promissory notes. During discovery, APP submitted a 450-page privilege log. The log revealed that a number of privileged documents had been sent by APP's lawyers to Nicky Tan, a financial consultant that APP had engaged to help the company restructure its debt, or to employees of Mr. Tan's consulting business. APP withheld these documents based on the "functional equivalent" doctrine, which extends the attorney-client privilege to communications between a corporation's counsel and corporate consultants who are *de facto* employees. Ex-Im moved to compel.

The court noted that Mr. Tan "occupied a broad role that reflected a considerable degree of responsibility." The company's own management did not have restructuring experience, so it engaged Mr. Tan as an independent contractor to negotiate on behalf of APP, to help formulate the company's financial strategies, and to articulate APP positions to the creditor community.

APP relied upon two doctrines to protect the attorney-client communications that included Mr. Tan and his associates. First, the company claimed the communications were privileged because Mr. Tan's

participation helped APP's lawyers understand the complicated accounting principles undergirding the restructuring of the company's massive debt. Under *Kovel*, communications with a financial advisor are covered by the attorney-client privilege "if the financial advisor's role is limited to helping a lawyer give effective advice by explaining financial concepts to the lawyer." The court rejected the *Kovel* argument out of hand. "If this were APP's only argument," the court said, "Ex-Im's request could be granted without further analysis: Mr. Tan was by the company's own reckoning a major participant in APP's financial affairs, not a mere interpreter."

However, APP also argued that Mr. Tan "was so thoroughly integrated into APP's corporate structure that he should be treated as though he were a corporate employee for privilege purposes." According to the Eighth Circuit's decision in *Beiter, supra*, and some district courts in the Second Circuit, "communications between a company's lawyers and its independent contractor merit protection if, by virtue of assuming the functions and duties of full-time employee, the contractor is a *de facto* employee of the company."

To determine whether a consultant should be considered the functional equivalent of an employee (*i.e.*, a *de facto* employee), courts should look to three factors: (1) "whether the consultant had primary responsibility for a key corporate job," (2) "whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation," and (3) "whether the consultant is likely to possess information possessed by no one else at the company." The party claiming privilege has the burden of showing that the third party in question meets this standard of integration into the corporate structure. Here, APP failed to meet this burden. The court explained as follows:

APP has demonstrated that Nicky Tan was intimately involved in APP's restructuring talks, yet Mr. Tan's efforts are precisely those that any financial consultant would likely make under the circumstances. APP reports that the company provided Mr. Tan with an office in its Jakarta, Indonesia, premises ... but, notably, the company does not assert that Mr. Tan or any of his associates ever used the office. In fact, his office was in Singapore. Mr. Tan stated that during the most intense months of negotiations with App.'s creditors he spent eighty to eighty-five percent of his time on the restructuring deal, yet there were times he was free enough of his APP obligations to start and build a successful consulting business. Mr. Tan's schedule, the location of his head offices, and the success of his consulting business all contradict the picture of Mr. Tan as so fully integrated into the APP hierarchy as to be a *de facto* employee of APP. ...

The court repeated the fundamental premise that the attorney-client privilege should not be expanded without considerable caution because the privilege "stands in derogation of the public's 'right to every man's evidence.'" Caution was "especially apt here" because companies in financial crisis often need to hire outside financial experts. "If the functional equivalent doctrine were extended to every situation where a financial consultant worked exhaustively to guide a company through a restructuring deal," the court said, "the exception would swallow the basic rule ... that there is no privilege protecting communications between clients and their accountants." The court therefore rejected APP's claim of privileged under the "functional equivalent" doctrine.

In re Adelpia Communications Corporation: Credit Consultants Pass Muster

In the bankruptcy proceeding entitled *In re Adelpia Communications Corporation*, 2007 WL 601452 (Bankr. S.D.N.Y. 2007) (Cecelia Morris, Bankr. J.), Adelpia moved to compel Lucent to disclose 29 documents (the “Pacchia Documents”) as to which Lucent claimed the attorney-client privilege. Lucent had transmitted these documents to a man named Anthony Pacchia, an employee of Traxi, LLC. Adelpia claimed that Lucent used Traxi employees as consultants “in the ordinary course of its business to manage Lucent credit risks generally and to otherwise assist Lucent’s Global Asset Recovery group.” Adelpia argued that disclosure to Pacchia forfeited the privilege because “the presence of third-party independent contractors destroys the attorney-client privilege, even though the third-party had a ‘working relationship’ with the party seeking to assert the privilege.”

In response to the Motion to Compel, Lucent submitted an affidavit from its assistant treasurer, John McCord, who had supervised the Traxi employees. McCord’s affidavit stated that Pacchia and at least three other Traxi employees “devoted three years of full-time work to Lucent matters,” that Mr. Pacchia was given “substantial responsibility” for relations with Adelpia, and that he “was essentially the primary contact between Lucent and Adelpia for matters pertaining to the companies.” In that capacity, Mr. Pacchia “was authorized to speak and act on behalf of Lucent in connection with these matters,” interacted with Lucent’s attorneys as part of his job, and “received legal advice and communicated with counsel just like any other employee of Lucent would have.” At a hearing, Lucent’s bankruptcy counsel further explained that Mr. Pacchia’s company was hired to render “short-term assistance” so that when Lucent’s credit problems were resolved Lucent would not have to deal with employment issues like a pension.

Adelpia argued that Lucent had not proven Mr. Pacchia was the “functional equivalent” of a Lucent employee, but Adelpia did not dispute McCord’s assertions that Mr. Pacchia (1) had “substantial responsibility” for Lucent’s relations with Adelpia and Devon, (2) was “essentially the primary contact” between Lucent and Adelpia, (3) was “authorized to speak and act on behalf of Lucent” in connection with the Adelpia matters, and (4) interacted with Lucent’s attorneys as part of his job requirements “just like any other employee of Lucent.” Based on McCord’s “uncontested affidavit” the court had no cause to doubt that Mr. Pacchia was the functional equivalent of a Lucent employee who was “precisely the sort of person with whom a lawyer would wish to confer confidentially.”

Adelpia also argued that Traxi and Mr. Pacchia were not retained by Lucent to assist with litigation, but rather with “global problems in the telecommunications industry.” When Mr. Pacchia’s deposition testimony did not resolve this question, the court required Lucent to submit 20 of the Pacchia Documents for the court’s consideration *in camera*. The court noted that the attorney-client privilege extends only to “legal advice” as distinguished from “business advice.” Thus, the court said, “if a party or its attorney prepares a document in the ordinary course of business, the attorney client privilege will not protect that document from discovery even if the party is aware that the document may also be useful in the event of litigation.” Using this litmus test, the court concluded that 12 of the documents were made for the purpose of obtaining legal advice and were therefore privileged, but the court could not determine whether the other 8 documents were privileged, so it gave Lucent (which bore the burden of proving privilege) two options – either (1) file supplemental information explaining why each document was made for the purpose of obtaining legal advice, or (2) produce the documents.

Sieger v. Zak: Business Consultants Qualify for the Privilege

Sieger v. Zak, 18 Misc.3d 1143(A) (Nassau County Supreme Ct. 2008) (Stephen Bucaria, J.) – one of two state court cases on the subject – was a suit alleging breach of fiduciary duty by the majority shareholder and principal manager of PowerSystems International, Inc., which manufactured specialized trailers sold primarily to the military to service command posts and mobile hospitals. Plaintiffs were minority shareholders who had each invested \$25,000 in 1995 to get the company started. By early 2004, the company was making more than \$1.2 million a year in profits, and plaintiffs suggested to Zak that he sell the entire company in order to liquidate their investment. Zak then met with a business consultant named John Magee who offered to make recommendations to PowerSystems' board of directors concerning the current and future value of the company. Magee and PowerSystems entered into a confidentiality agreement whereby Magee agreed to keep confidential pricing, customer and supplier lists, operating data, and other information obtained in the course of providing consulting services to the company. Magee also prepared an "engagement letter," which formally outlined the services he intended to perform for PowerSystems. In the engagement letter, Magee undertook to develop a strategy and time line for "monetizing the shareholders' investment" in PowerSystems.

During the litigation, plaintiffs sought all communications between the corporation's lawyers and Magee, but defendants objected on grounds of attorney-client privilege, asserting that Magee was acting as an agent of the corporation. Citing the Eighth Circuit's influential opinion in *In re Bieter Co.*, *supra*, Judge Bucaria noted that a corporation's attorney-client privilege includes communications not only with its employees but also to communications with independent contractors or consultants if a consultant has "a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of the legal services."

Applying these criteria (which seem oversimplified to me in light of the nuanced, multi-factored analysis in *Copper Market* and *Asia Pulp & Paper*), Judge Bucaria said: "Magee clearly had a significant relationship with PowerSystems by virtue of his engagement letter. Furthermore, Magee had a significant relationship to PowerSystems' involvement with the stock purchase agreement, regardless of whether he was working on behalf of the corporation or simply on behalf of the majority shareholder." Thus, communications between Magee and PowerSystems' attorneys were covered by the attorney-client privilege.

Payton Lane Nursing Home: Construction Supervisors Make the Grade

In *American Manufacturers Mutual Insurance Co. v. Payton Lane Nursing Home, Inc.*, 2008 WL 5231831 (E.D.N.Y. 2008) (A. Kathleen Tomlinson, Magistrate Judge), plaintiffs (the insurers) withheld 2,400 emails and 80 hard-copy communications between plaintiffs' counsel and representatives of a non-party consultant named Greyhawk, N.A. Defendants moved to compel.

"In order for a communication to be privileged under New York law," Magistrate Judge Tomlinson noted, "it must ...have been made principally to assist in obtaining or providing legal advice or services for the client." Plaintiffs argued that they had retained Greyhawk to act as their agent and as their "eyes and ears" on the construction project at issue. Plaintiffs contended that Greyhawk had acted on plaintiffs' behalf "and always held itself out as the [Plaintiffs'] agent." According to plaintiffs, Greyhawk's involvement "was necessary and indispensable given that the [Plaintiffs] had no onsite presence and no in-house construction expertise." Defendants countered that Greyhawk simply provided "construction

management services” to plaintiffs as an independent contractor and that the services Greyhawk provided to plaintiffs were identical to the services Greyhawk has provided on thousands of other projects.

Magistrate Judge Tomlinson then reviewed the analyses in *In re Beiter Co.*; *In re Copper Market Antitrust Litig.*; *Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*; and *Sieger v. Zak*. Relying on those cases, the Court found that plaintiffs had met their burden to demonstrate that they had satisfied the factors set forth by the courts in those cases. Specifically, the court said:

Plaintiffs did not have resources to oversee the day-to-day operations of the construction project as they had no on-site representatives and no in-house construction experience. Plaintiffs have also demonstrated that Greyhawk had the authority to make decisions related to the construction project on Plaintiffs’ behalf. Greyhawk’s involvement (on Plaintiffs’ behalf) in the negotiation of the various contracts with contractors and subcontractors had clear legal ramifications for Plaintiffs. Moreover, Greyhawk’s services in connection with pursuing payment from Payton Lane, including articulating positions on behalf of Plaintiffs, required consultation with and the receipt of legal advice from Plaintiffs’ counsel. Finally, because Greyhawk served as Plaintiffs’ “eyes and ears” in connection with the day-to-day supervision of the construction project, Greyhawk representatives likely possessed information which was not possessed by anyone else employed by Plaintiffs.

Based on all of these considerations, the court (quoting *Copper Market*) found that Greyhawk “can fairly be equated” with plaintiffs “for purposes of analyzing the availability of the attorney-client privilege” regarding email communications between Greyhawk and plaintiffs or their counsel. (The court went on, however, to state that the privilege log produced by plaintiffs did not provide sufficient information to allow the court to determine whether the communications at issue were made in confidence and for the purpose of soliciting or receiving legal advice -- but those concerns are separate from the more abstract issue of accepting the “functional equivalent” doctrine for third parties.)

Magistrate Judge Tomlinson also made a helpful observation about the significance of the decision in *Export-Import Bank v. Asia Pulp & Paper*. Plaintiffs in *Payton Lane Nursing Home* (the party claiming privilege) urged Magistrate Judge Tomlinson to disregard the *Asia Pulp & Paper* decision, which had rejected privilege claims based on the “functional equivalent” theory. Plaintiffs argued that *Asia Pulp & Paper* had applied a “heightened level of scrutiny” (*i.e.*, was less likely to sustain a claim of privilege) because the non-party at issue was a financial advisor, as opposed to some other type of independent contractor. In dicta, Magistrate Judge Tomlinson acknowledged that the *Asia Pulp & Paper* court had noted that “[c]aution is especially apt here because companies in financial crisis will often find it necessary to obtain the services of outside financial experts.” But Magistrate Judge Tomlinson did not find that this language distinguished *Asia Pulp & Paper* from situations in which (as in *Payton Lane Nursing Home*) the non-party consultant was not a financial advisor. In other words, Magistrate Judge Tomlinson believed that the demanding criteria that led the court to reject the privilege claim in *Asia Pulp & Paper* should be applied to all third-party consultants, not just to financial advisors. Conversely, her view implies that communications involving financial consultants should not be treated more harshly than communications with other types of consultants for purposes of analyzing the attorney-client privilege under the “functional equivalent” theory.

Mt. McKinley Insurance: Insurance Brokers Fail the Test

The most recent case in the third-party consultant line is a state court case, *Mt. McKinley Insurance Co. v. Corning Inc.*, 602454/2002 (N.Y. County Supreme Ct, Dec. 13, 2009) (Eileen Bransten, J.). That case asked whether a lawyer's talks with an insurance broker to get advice and information to help a client were protected by the attorney-client privilege.

The *Mt. McKinley Insurance* case arose after thousands of insurance claimants alleged injury from Unibestos, a high temperature pipe-insulation product containing asbestos manufactured by Pittsburgh Corning Corporation ("PCC"). Several of Corning's insurers sued Corning. During discovery, Corning refused to produce approximately 50 confidential communications between and among Corning, its attorneys, and its insurance brokers, Johnson & Higgins ("J&H"). Specifically, Corning asserted that the attorney-client privilege entitled it to withhold documents related to: (1) certain asbestos-personal-injury actions; (2) asbestos-related bodily injury actions; (3) coverage disputes resulting in handling agreements; and (4) PCC's bankruptcy.

Plaintiff moved to compel production of these documents, arguing that the attorney-client privilege does not extend to communications in which neither party is an attorney or acting on behalf of an attorney. Plaintiff also argued that even if documents were initially privileged because they were exchanged between attorney and client, Corning had waived the protection by knowingly disclosing the documents to a third-party. Corning countered that employees of J&H (the insurance broker) were Corning's "agents" and that their communications were therefore protected under the attorney-client privilege. All of this squarely raised the question: "Does the attorney client privilege cover communications between a lawyer and a client's insurance brokers?" This was a question of first impression. Neither party offered any New York case law directly on point.

Corning urged the court to follow the decision in *In re Copper Market Litigation*, in which the court had stretched the attorney-client privilege to cover a public-relations firm retained by a corporation. The court in *Copper Market*, in turn, had relied on the United States Supreme Court decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which held that the attorney-client privilege protected communications between a corporation's lawyer and all of the corporation's employees, top to bottom, not just those in an elite "control group." Here, in *Mt. McKinley Insurance*, the relevant question thus became whether the insurance brokers should be treated as corporate employees for purposes of analyzing the availability of the attorney-client privilege.

Reviewing the decisions in *Copper Market*, *Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, and *Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, Judge Branston analyzed five factors that warranted treatment of a non-party as a de facto employee: (1) "whether the corporation had the resources to conduct the activity completed by the third-party on its behalf"; (2) "whether the third-party had authority to make decisions on the corporation's behalf"; (3) "whether the third-party's actions, on behalf of the corporation, carried legal implications"; (4) whether the third-party's services were "substantially related to obtaining legal advice"; and (5) whether the third-party, as a result of its services for the corporation, "uniquely possessed information that the corporation did not have."

Based on these five factors, the court held that Corning had failed to meet its burden of establishing that the attorney client privilege covers communications with its insurance brokers. In conclusory fashion,

Corning had claimed that J&H employees “acted as agents of Corning and Corning’s attorneys both as ‘functional employees’ and as ‘translators’ to assist Corning’s Legal Department in rendering legal advice.” But Corning’s motion papers lent no support to these “bare-bones statements.” Rather than submit an affidavit from any J&H employee to substantiate its claims, Corning offered only the affidavit of its counsel, who merely alleged that J&H employees were “responsible for communicating Corning’s position to the Insurers regarding coverage matters, negotiating written agreements in the coverage disputes, and for reporting to Corning and Corning’s Legal Department.” That conclusory assertion was not enough.

Corning also failed to show that J&H was “necessary to fulfill a function that Corning was incapable of handling, that J&H’s services were substantially for the purposes of obtaining legal advice — and not simply for insurance-brokerage services — or that J&H uniquely possessed information that Corning did not have.” Judge Branston quoted *National Education Training Group, Inc. v. Skillsoft Corp.*, 1999 US Dist LEXIS 8680, 1999 WL 378337, *4 (S.D.N.Y. 1999) (construing the so-called “agency” exception to waiver), for the proposition that “[t]he necessity element means more than just useful and convenient but requires the involvement be indispensable or serve some specialized purpose in facilitating attorney client communications.”

Given that the attorney-client privilege “should not be expanded without considerable caution,” and given Corning’s failure to satisfy its burden of demonstrating the existence of a valid privilege, the court granted plaintiff’s motion to compel and ordered Corning to turn over the documents in question.

Conclusion: Two Routes to Privilege – But Nuances Matter

This article has examined eleven cases – nine from New York federal courts and two from New York State courts – that have analyzed claims of attorney-client privilege for communications involving third party consultants. The cases have considered two different routes to privilege – the “translator” theory and the “functional equivalent” theory – and the decisions show mixed results. Seven of the cases have upheld a claim of privilege for the third-party consultants (subject to satisfaction of the other elements of attorney-client privilege), while four have rejected the claim of privilege. This indicates that nuances matter.

Therefore, lawyers whose clients plan to hire outside consultants (whether in the ordinary course of business or in the heat of litigation) should study the third party cases carefully and should, if possible, tailor the engagement letter and the job description for the third-party consultants so that the lawyer’s communications with them come under the protective umbrella of the attorney-client privilege. That can be done in two ways. Under one theory (epitomized by *Kovel*), the third-party consultant must function as a “translator” who helps the lawyer understand non-legal concepts like accounting so that the lawyer can give better legal advice to the client. Under the other theory (illustrated by *Copper Market Antitrust Litigation* and *Payton Lane Nursing Home*), the third party consultant must serve as the “functional equivalent” of a company employee (*i.e.*, a “*de facto*” employee), performing work that the company lacks in-house resources or expertise to perform on its own.

As long as other factors necessary to the attorney-client privilege are present, either the “translator” theory or the “functional equivalent” theory will entitle a party to claim the attorney-client privilege for communications between (a) the party’s counsel and the third-party consultants, or (b) the

client and the third-party consultant in the lawyer's presence, or (c) the client and the third-party consultant outside the lawyer's present if the lawyer has instructed the client to relate the facts to the third party so that the third party can translate those facts to assist the lawyer in providing legal advice to the client.

If it is not possible to tailor the job and the engagement letter to mesh with the factors in the cases that have upheld a claim of privilege, then lawyers should be cautious in communicating with the third-party consultants (in the same way that lawyers are cautious when communicating with witnesses and other non-clients). Lawyers should also caution their clients not to show any privileged materials to the third-party consultants, and lawyers should emphasize to clients that communications directly between the clients and the third-party consultants will probably not be protected by the attorney-client privilege.

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