

# The Attorney-Client Privilege and Public Relations Firms

BY ROY SIMON

When a corporation (or individual) learns that it is being investigated by the government, its first call is likely to be to a lawyer – and the lawyer’s first call may well be to a public relations firm. Although DR 7-107 of the Code of Professional Responsibility (“Trial Publicity”) seeks to prohibit lawyers from trying cases in the press, the Code does not apply to clients or to public relations firms, who may make whatever extrajudicial statements they see fit. However, a public relations firm does not want to make statements in defense of its client that later turn out to be false (*e.g.*, “I did not have sexual relations with that woman”), or that undermine the lawyer’s legal strategy. Consequently, the lawyer may need to communicate frequently with the public relations firm to make sure that its public statements are legally proper and don’t interfere with the lawyer’s strategy.

A lawyer’s communications with a public relations firm can raise two crucial questions: (1) Are the lawyer’s communications with the public relations firm protected by the attorney-client privilege? (2) Are the client’s communications with the public relations firm protected by the attorney-client privilege if the lawyer is not present? This article deals with these questions.

Judge Lewis Kaplan of the United States District Court for the Southern District of New York recently addressed these questions in a thoughtful opinion entitled *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, — F.Supp.2d —, 2003 WL 21262645 (S.D.N.Y. June 2, 2003). In that 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 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. (Judge Kaplan also held that certain documents were protected by the work product doctrine, but work-product protection is beyond the scope of this article.) I will discuss Judge Kaplan’s opinion in detail later, but first I want to review the three main cases on which he relied – *Kovel*, *Calvin Klein*, and *Copper Market Antitrust Litigation*.

## ***United States v. Kovel:***

### **Accountants as Interpreters**

Perhaps the earliest case to extend 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. A 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. (Sample question: "Did you ever discuss with Mr. Hopps or give Mr. Hopps any information with regard to treatment for capital gains purposes of the Atlantic Beverage Corporation sale by him?") The district court judge ruled that Kovel had no privilege and directed Kovel to testify. When Kovel refused, the court held him in contempt, sentenced him to a year in jail, and denied bail. After the grand jury indicted Hopps, the court released Kovel pending appeal. On appeal, Kovel argued that his status as a law firm employee automatically made all communications to him from clients privileged. The Government argued that the attorney-client privilege could never extend to communications with an accountant.

Judge Friendly struck a sensible balance. On one hand, attorneys could not invest all communications between clients and accountants, scientists or investigators with the protection of the attorney-client privilege simply by placing those nonlawyers on law firm payrolls when the law has not seen fit to extend the privilege to nonlawyers "operating under their own steam." On the other hand, in contrast to Tudor times when the privilege was first recognized, "the complexities of modern existence" prevent attorneys from effectively handling clients' affairs without the help of secretaries, file clerks, messengers, clerks not yet admitted to the bar, and other nonlawyers. Because the assistance of these nonlawyer agents is "indispensable" to the lawyer's work, and because attorney-client communications must often be channeled through these nonlawyers, "the privilege must include all the persons who act as the attorney's agents." As an example, Judge Friendly considered the case of foreign language interpreters. He saw "no significant difference" between situations in which (1) an attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story; (2) an attorney with some knowledge of a foreign tongue has a more knowledgeable nonlawyer employee in the room to help out; (3) the client brings along her own interpreter; and (4) "the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice." The situation at bar apparently resembled the fourth situation.

Judge Friendly then applied the interpreter analogy to Kovel's case:

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." He recognized that this drew a seemingly "arbitrary line" between a case where the client communicates first to his own accountant and a case where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present. But "that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help." The court then remanded to the district court to find out how Hopps came to be communicating with Kovel rather than with Kamerman. (Unfortunately, the decision on remand is not reported.)

### ***Calvin Klein: The First Case on PR Agents***

Judge Friendly's decision in *Kovel* made clear that the attorney-client privilege could extend to nonlawyers in certain circumstances, but the opinion said nothing about 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). 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 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." RLM's services for BSF consisted of such activities as "reviewing press coverage, making calls to various media to comment on developments in the litigation, and even finding friendly reporters." Those activities may also have helped BSF formulate legal strategy, but that was irrelevant if RLM's work and advice simply assisted counsel in "assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice."

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 they had been hired directly by CKI. "It may be that the modern client comes to court as prepared to massage the media as to persuade the judge," the court said, "but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status."

### **Copper Market Antitrust Litigation Blazes a Narrow Trail**

After *Calvin Klein* things did not look bright for an attorney-client/public relations firm privilege. But then came *In Re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), the first case to recognize 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 hired RLM (the same RLM that CKI had hired) "because it had no prior experience in dealing with issues relating to publicity arising from high profile litigation, and because Sumitomo lacked experience in dealing with the Western media." In fact, even the executives in Sumitomo's Corporate Communications Department barely spoke English. RLM was therefore hired to act as Sumitomo's agent and its 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.'" RLM's primary goal in representing Sumitomo was to help the Company keep the press statements "within the necessary legal framework--all with the realization, indeed the expectation, that each such statement might subsequently be used by Sumitomo's adversaries in litigation." 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, in collaboration with Paul Weiss, RLM drafted public relations documents, press releases, talking points, and Questions and Answers to be used as a framework for press inquiries. The press releases were intended for different audiences, including regulators and other parties with whom Sumitomo anticipated litigation. When drafting these documents, RLM incorporated legal advice from Paul Weiss and Sumitomo's in-house counsel, and all documents prepared by RLM relating to legal issues "were vetted with Sumitomo's in-house counsel and/or outside 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," and even had authority to seek and receive legal advice from Sumitomo's counsel with respect to 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 produced about 15,000 pages of documents, but Paul Weiss discovered 17 documents that it claimed were protected by 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 a 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. Accordingly, the court held that "confidential communications between RLM and Sumitomo's counsel, or between RLM and Sumitomo, or among RLM, Sumitomo's in-house counsel and Paul Weiss that were made for the purpose of facilitating the rendition of legal services to Sumitomo can be protected from disclosure by the attorney-client privilege." The court expressly rejected plaintiffs' argument (based on Kovel) that third-party consultants come within the scope of the privilege only when acting as conduits or facilitators of attorney-client communications. Because RLM was the "functional equivalent of a Sumitomo employee," 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."

### **Judge Kaplan's Opinion in Grand Jury Subpoenas**

The stage was now set for Judge Kaplan to decide, in Grand Jury Subpoenas, the "troublesome question" whether the attorney-client privilege extends to "communications between and among a prospective defendant in a criminal case, her lawyers, and a public relations firm hired by the lawyers to aid in avoiding an indictment." The public relations firm's "primary responsibility was defensive...to communicate with the media in a way that would help restore balance and accuracy to the press coverage." Target's objective was to "reduce the risk that prosecutors and regulators would feel pressure from the constant anti-Target drumbeat in the media to bring charges..." No doubt well aware that Calvin Klein had denied privileged status to communications with a public relations agent who was doing nothing that it would not have done if the client itself had hired it, the public relations firm claimed that its "target audience" was not the public at large, but rather "the prosecutors and regulators responsible for charging decisions in the investigations concerning... Target."

In performing her duties, the public relations agent had at least two conversations directly with Target out of the presence of her attorneys, and sent at least one e-mail directly to her. Other times, the public relations firm interacted with Target's attorneys – and still other times, communications involved 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. The public relations firm's activities were not limited to advising Target and her lawyers. In addition, the public relations firm "spoke extensively to members of the media, in some instances to find out what they knew and, where possible, where the information came from. And it conveyed to members of the media information that the Target defense team wished to have disseminated."

The court began its 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 found "no reason to question the stated rationale for her lawyers' hiring of Firm – that the lawyers viewed altering the mix of public information as serving Target's interests by creating a climate in which prosecutors and regulators might feel freer to act in ways less antagonistic to Target than otherwise might have been the case." The

Court also accepted the claim that "this was a situation in which the lawyers, in the words of Kovel, 'need[ed] outside help,' as they presumably were not skilled at public relations."

The question, Judge Kaplan said, was therefore 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 this was not dispositive, because it is "common ground that the privilege extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law." For example, a client's confidential communications to a non-testifying expert retained by the lawyer to assist the lawyer in preparing the client's case — essentially the situation in *Kovel* — probably are privileged. Indeed, the government conceded

that consultants engaged by lawyers to advise them on matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, how a client should behave while testifying in order to impress jurors favorably and other matters routinely the stuff of jury and personal communication consultants come within the attorney-client privilege, as they have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body.

The "ultimate issue" therefore resolved to "whether attorney efforts to influence public opinion in order to advance the client's legal position — in this case by neutralizing what the attorneys perceived as a climate of opinion pressing prosecutors and regulators to act in ways adverse to Target's interests — are services, the rendition of which also should be facilitated by applying the privilege to relevant communications which have this as their object." Traditionally, the proper role of lawyers in shaping public opinion had been viewed "rather narrowly, perhaps primarily out of concern that extra-judicial statements might prejudice jury pools." For example, DR 7-107 in the New York Code of Professional Responsibility and Rule 3.6(c) in the ABA Model Rules of Professional Conduct limit a lawyer's right to influence public opinion through extra-judicial statements concerning pending litigation. But in recent years courts have shown "a strong tendency to view the lawyer's role more broadly." Even the United States Supreme Court, in Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), has spoken to this new reality:

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. *A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.* [Emphasis added.]

Reflecting the same trend, many courts have compensated lawyers, in making fee awards under civil rights and other statutes, for public relations efforts.

But a lawyer's right to engage in public relations efforts on behalf of a client facing indictment did not answer the privilege question. Nor did the Copper Antitrust decision 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." Answering that question, the court said, required consideration of the policies that inform the attorney-client privilege.

The main purpose of the privilege, according to *Upjohn Co. v. United States*, 449 U.S. 383 is "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." Here, extending the privilege to cover communications involving the public relations consultants would not materially serve the purpose of promoting observance of law because the case involved "the consequences of Target's past conduct, not an effort to conform her present and future actions to the law's requirements." Rather, any justification for extending the privilege would have to be found in the proposition that encouraging frank communication among client, lawyers, and public relations consultants enhances "the administration of justice."

The court found that it does. 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, decisions often of great consequence in this Sentencing Guidelines era." 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." Indeed, in *In re Incomnet, Inc.*, Exchange Act of 1934 Release No. 40281, 1998 SEC Lexis 1614 (July 30, 1998), the SEC charged a company with violating federal securities laws because its public statements concerning a pending investigation were misleading. 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

the ability of lawyers to 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 – would be undermined seriously if lawyers were not

able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants.....

And there was "no practical way" for the lawyers to hold such discussions with public relations consultants unless the lawyers could "inform the consultants of at least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions." 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."

But since Target would not have enjoyed a privilege if she had simply hired the public relations firm herself, what about Target's own communications with the consultants, some of which took place in the presence of the lawyers and some of which did not? The Court held that "both types of communications are covered by the privilege provided the communications were directed at giving or obtaining legal advice." (However, on examining the conversations between Target and the public relations firm outside the presence of the lawyers, the court found that neither conversation was privileged.)

### **Conclusion: Lessons from the Cases**

We live in a media era. To ignore public relations is to ignore reality. Many lawyers, especially those in high profile cases, will want to sway public opinion, and will need the help of public relations professionals to do that well. This applies not only to the Martha Stewarts and Mark Belnick's of the world but also to big fish in small ponds – what is routine in Manhattan may qualify as "high profile" in Poughkeepsie. But preserving the privilege, especially during an ongoing criminal investigation or civil suit, will be crucial. *Calvin Klein* shows how not to preserve the privilege, while *Kovel*, *Copper Market* and *Grand Jury Subpoenas* provide a road map for preserving it. Here are five important signposts on that map:

1. The lawyers, not the client, should hire the public relations agent.
2. The client should not talk with the public relations firm alone. Although Judge Kaplan held that conversations excluding the lawyers could in theory be privileged, he did not find any such conversations privileged. It is much harder to show that public relations services are part of legal services when the lawyers are not even present.
3. The lawyers should couch the public relations work in legal terms as much as possible – the idea should be not simply to influence public opinion, but rather to influence the decision-makers, especially the prosecutors who have discretion to wield or not wield the vast power of the government. In short, the public relations firm should not do its usual stuff. (For this reason, it may not be a good idea to hire the client's usual public relations agent – that's what happened in *Calvin Klein*, and the court couldn't see why the same-old/same-old should suddenly be viewed as "legal services.")
4. The lawyers should shape the public relations work in a legal direction, and be actively involved in discussing and directing the tasks the public relations firm performs for the client. Hiring the public relations firm and letting it operate independently isn't likely to preserve the privilege.
5. The client may want to give the public relations firm authority to speak for the client when talking with the attorney, the press, and the public, as Sumitomo did in *Copper Antitrust*, so that the public relations firm becomes the "functional equivalent" of the client. When that happens,

we are no longer talking about third party communications with a lawyer, but rather about the client's own communications with the lawyer.

Of course, nothing can guarantee that communications between lawyers and a public relations agent will qualify for the attorney-client privilege. Indeed, Judge Kaplan's decision may not even survive on appeal. (When we finished this article, the government had not decided whether to appeal.) Moreover, since DR 1-102A()(2) makes it improper for a lawyer to circumvent a Disciplinary Rule through the actions of another, lawyers may not use public relations firms to do what lawyers themselves are forbidden to do under DR 7-107. Accordingly, if Judge Kaplan's decision remains good law, lawyers should take advantage of it only with great care and with constant and close attention to the precepts and purposes of the attorney-client privilege.

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