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Public relations confidentiality: An analysis of pr practitioner–client privilege in high profile litigation

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ABSTRACT

This article explores the legal protection given to confidential information between public relations practitioners and their clients under U.S. law. Increasingly, federal courts have recognized the importance of having a media strategy during high profile litigation. However, courts have a mixed approach for protecting confidential information divulged to PR practitioners during litigation. This article analyzes recent U.S. court decisions extending attorney–client privilege to non-lawyers and provides suggestions on when attorney–client privilege may extend to PR practitioners.

1. Introduction

Perhaps nothing is so captivating to the media and the American public as high profile cases. These courtroom dramas involve celebrity parties and well-known corporations whose potential fall from grace is fodder for both the Internet chattering class and talking heads of cable news. What results from this frenzied attention is both an actual trial and a trial by media. Litigation strategy is interwoven with a media strategy because jurors sit in both the courtroom and the court of public opinion. While the outcome of the actual trial is of immediate importance to the organization or person, the media trial potentially has longer effects. Given this new legal reality, many lawyers now employ media specialists in public relations agencies to guide a media strategy for litigation.

Media-savvy attorneys recognize this new reality that trial by media can result in a public relations nightmare if the media and the client's image are not properly managed. However, this use of public relations is not without risk. In some cases opposing parties subpoena PR work product done for a client involved in litigation. What ensues is a battle over whether this PR work actually is confidential and protected under the larger body of law concerning attorney–client privilege.

While attorney–client privilege has been a cornerstone of American legal practice for over a century, privileged client communications by non-lawyer professionals has been the subject of legal debate for over 50 years. Beginning in 1961, the United States Court of Appeals for the Second Circuit in United States v. Kovel (1961) held that non-attorney professionals can claim attorney–client privilege in cases where their work was related to a lawsuit. This right has been extended to several fields that do work in relation to legal services such as accountants, experts, and even interpreters. However, the issue of extending attorney–client privilege to public relations work still remains unsettled since confidentiality issues surrounding litigation PR largely depend on the venue where the case occurs.

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Because the United States Supreme Court has never ruled on extending attorney–client privilege to public relations work product there is no single approach followed in all federal and state trial courts. The Second Circuit, which covers New York, Connecticut, and Vermont, is arguably the most willing to extend attorney–client privilege to public relations firms. However, most trial courts outside the Second Circuit follow a mixed approach. This study examines cases in a variety of jurisdictions where parties argue the extension of attorney–client privilege applies to public relations work product. From this research, current trends in extending this privilege status to public relations work are analyzed, with particular focus on jurisdictional trends in privileging PR work product. This analysis highlights the limitations of confidentiality within public relations and provides questions that practitioners should ask themselves when they become involved in PR litigation.

2. Lawyers in the court of public opinion: practicing pr without a license

Since the eighteen century attorneys have been aware of the power the press has in shaping the public perception of their clients (Ferguson, 2008). Impact of trial by media can even be employed as a litigation strategy for attorneys suing corporate entities because damaging corporate image can motivate corporate defendants to settle lawsuits. Moreover, coverage of litigation is increased when a well-known person or company loses in court. This fact places corporate and individual defendants in a situation where public relations is probably the most valuable to stave off negative media attention that damages their reputation and image among their key publics.

Until the mid-twentieth century the idea of a lawyer engaging with the media about an ongoing lawsuit was considered unethical. In fact, the practice of attorneys engaging in media relations was deemed so unethical that the ABA issued Disciplinary Rule 7-107 in 1969 which forbade lawyers from speaking to the press concerning the merits of a case. However, this viewpoint fell out of favor with the recognition of the role media plays in court cases. In 1991 the United States Supreme Court in Gentile v. State Bar of Nevada held that a Nevada law prohibiting lawyers from speaking to the press was unconstitutionally vague. Moreover, writing for the majority of the court, Justice Kennedy noted the public relations role lawyers play in litigation. He wrote:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for a 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 . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried. (Gentile, 1991, p. 1043)

In the context of this new recognition of role the media played in litigation, the legal attitude toward public relations changed. One consequence of this changing environment was the ABA gradually backed away from its more restrictive approach toward media relations and allowed lawyers to communicate with the press concerning various aspects of a case (ABA Model Rule of Professional Conduct 3.6, 1983).

The new reality trials with high levels of media attention caused the ABA Model Rules for Professional Conduct to amend their position on attorneys engaging with the media. Since 1994 the Model Rules allow attorneys to engage in media strategy, including direct communication with the press, to protect their clients from unjust media characterizations (Model Rules 3.6(c), 2012). Currently the ABA interprets this rule as prohibiting lawyers from engaging in communication that has a potential to prejudice the public. This leaves attorneys in a difficult ethical position in relation to the media because they must adhere to their professional code of ethics while also protecting their client's interest, which includes public perception. Given this situation, public relations firms have regularly been used since the 1990s to represent high profile clients and organizations that are engaged in high-profile litigation.

Even though lawyers consider themselves capable of handling media, frequently they are not suited to navigating the complex waters of media relations. Additionally, the professional culture of attorneys is one where being risk-adverse in communicating with the media is viewed as tactically smart. However, public relations practitioners know this is not necessarily the case. Often silence is viewed as evidence of guilt as shown in *PR Week*'s survey on perceptions of corporations using "no comment" during litigation (Hood, 2002). The survey revealed that 62% of those polled viewed the use of "no comment" as proof that the company was guilty and engaging in a cover-up (Hood, 2002). Many lawyers view the use of "no comment" as a method to eliminate potentially damaging statements that can be used as evidence during a lawsuit. However, the issue with the "no comment" approach is can cause collateral damage outside of the courtroom in the form of decreased public confidence, low stock prices, or alienated publics.

Public relations practitioners engage in litigation PR because some in the legal community recognize media relations is a specialized expertise. This type of PR, whether done for an individual or corporation, can be categorized as a form of crisis communication. Because litigation public relations practitioners must serve as a media liaison among the litigant, the litigant's attorney, and the press, these practitioners must be privy to the same confidential information as the client's lawyer. While public relations have long thought of itself as a stand-alone profession with its own ethical codes, practitioners' decision to keep clients' information confidential is not recognized as binding by U.S. courts. That means the only way for litigation PR practitioners to keep their clients' information legally confidential is to take cover under attorney–client privilege.