



Keeping the PR in Privilege: Outside Public Relations and the Attorney-Client Privilege

Articles / Publications

03.24.2021

In an earlier edition of the TIPS newsletter, we discussed the importance of outside counsel acting in the role of counsel, and not the role of an insurance adjuster, to preserve the attorney-client privilege over communications between an insurance company and its outside counsel. Today, we're casting our net more broadly, discussing an issue that faces many businesses and sectors – Public Relations. While companies have always been tasked with looking after their public image, the COVID-19 pandemic has likely caused more companies to seek out external public relations help regarding the companies' responses to COVID-19 and associated litigation.

The need for PR assistance in the wake of COVID-19 is far-reaching. For instance, the World Health Organization has hired PR giant Hill+Knowlton to assist in getting clear, direct, and truthful information regarding the COVID-19 pandemic to the public.^[1] Companies like FOMO Corp. who are working with other entities to provide materials and testing solutions related to COVID-19 are also partnering with outside PR firms to try and expand their marketing opportunities and express clear stances on staying safe in the wake of COVID-19.^[2] Even Counties are hiring PR to address and explain their stances on providing safety in our “new normal.”^[3]

Moreover, as well-documented in our accompanying articles on the development of COVID-19 litigation, the number of COVID-19 related filings continues to grow. Some of those filings, despite companies' best intentions, actually take aim at some companies' PR materials or advertisements.^[4] If companies will continue to face these challenges, and those companies want counsel to

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engage with outside PR in responsibly advancing the companies' litigation interests regarding communications related to safety and customer care, it is perhaps now more important than ever that companies ensure that their attorneys' communications with outside PR remain privileged.

As with outside counsel acting in the role of an insurance adjuster, it is critical that any outside PR firm has a defined role and that this defined role falls squarely within the purview of the attorney-client privilege. For the attorney-client privilege to apply to communications between a company's attorneys and its outside PR team, the PR professionals will need to satisfy one of two known tests, either (1) the necessity test; or (2) the functional equivalent test.^[5] The necessity test provides that the PR professional is necessary for the facilitation of legal services, while the functional equivalent test is satisfied when the PR professional is sufficiently integrated into the client's business that he or she can be considered an employee when communicating with counsel.^[6]

Whether the attorney-client privilege will apply to contact with outside PR is a difficult and sparsely addressed question, and where it has been addressed, the bar is high. For example, courts have noted that to satisfy the necessity test, communications with third-parties such as PR professionals must be "more than just useful and convenient, but rather ... the involvement of the third party [must] be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."^[7] This high bar, and associated case law suggests that companies will have more success in protecting attorney communications with outside PR where the outside PR firm is hired to serve some "specialized purpose" related to the companies' ongoing legal matters.^[8]

Companies' counsel will need to consider, then, the companies' need for hiring outside PR. Is there an ongoing litigation interest for which PR is "indispensable," such as where public perception may affect a matter's just outcome?^[9] Where counsel believes that such indispensable assistance is needed, counsel should be careful in establishing that its communications with outside PR are for the purpose of providing effective legal counsel to the client in those ongoing matters. Moreover, counsel should be careful that the PR professionals are being engaged for work that only they are capable of performing.

Alternatively, the functional equivalent test looks to three factors that have been articulated by the courts, namely whether: (1) the consultant had primary responsibility for a key corporate job; (2) 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) the consultant is likely to possess information possessed by no one else at the company.^[10]

Applicability of the functional-equivalent test is also likely to turn on several of the factual factors highlighted by the necessity test. Particularly, as it relates to the second factor of the functional-equivalent test, it is still important that outside PR's involvement be related to the company's litigation interests. This standard is also set high, however, in that external PR will need to be in a "continuous and close" relationship with counsel in assisting with furthering the company's litigation interests. Counsel should therefore set clear parameters in any engagement or retention letter, noting that the PR professionals' involvement is related to ongoing litigation matters for which only the PR professionals' expertise can helpfully apply.

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In the interests of preserving the attorney-client privilege under either of the above-noted inquiries, counsel ought to adhere to a few other simple principles. First, counsel should be careful not to engage with outside PR except where outside PR is assisting, in a specialized way, with furthering the company's litigation interests. Where a company is engaging with a PR team for the sake of public-facing media campaigns, wholly unrelated to litigation interests or only related to affecting public perception of pending or threatened litigation, such contacts are likely not covered by the attorney-client privilege. This advice should also be passed along to those within the company who might have contact with the outside PR team and should be shared with the outside PR team as well. Counsel should remind applicable decision-makers regularly that outside PR firms are often not viewed as employees, and the bar for keeping communications with such teams under the attorney-client privilege is both high and relatively undefined.

While there is no all-encompassing solution to keeping a company's PR privileged, these tips could help companies to protect their litigation interests when an external PR team is assisting counsel with its effective representation – protection many companies responsibly seek in light of the COVID-19 pandemic and its associated litigation.

[1] <https://www.thedailybeast.com/the-world-health-organization-hired-a-top-pr-firm-to-fight-covid-smears-in-the-us>

[2] <https://www.streetinsider.com/Globe+Newswire/FOMO+CORP.+Engages+Schenck+Strategies+as+PR+Agency+of+Record+to+Promote+Awareness+of+Disinfection+Solutions/17855693.html>

[3] <https://ktla.com/news/o-c-to-hire-public-relations-firm-to-reassure-skeptical-residents-about-safety-of-covid-19-vaccine/>

[4] <https://www.law360.com/articles/1331641>

[5] See *generally* Federal Testimonial Privileges § 2:16 (2d ed.) (noting that applying privilege to public relations professionals is considered “controversial.”).

[6] *Id.*; see also *Anderson v. SeaWorld Parks and Entertainment, Inc.*, 329 F.R.D. 628 (N.D. Cal. 2019).

[7] *Behunin v. Superior Court*, 9 Cal.App.5th 833, 849 (Cal. Ct. App. 2017) (collecting cases).

[8] See, for example, *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

[9] See, e.g., *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 432 (S.D.N.Y. 2013) (noting the necessity of PR assistance in cases involving high-profile grand jury investigations); *but cf. Universal Standard Inc. v. Target Corporation*, 331 F.R.D. 80 (S.D. N.Y. 2019) (finding that PR assistance did not satisfy the necessity test because client could've articulated the public relations needs without outside assistance); and *In re Signet Jewelers Ltd. Sec. Litig.*, 332 F.R.D. 131 (S.D.N.Y. 2019) (holding that a PR firm's actions which only related to mitigating public reaction to the lawsuit, and not to legal matters in the lawsuit, were not protected by the attorney-client privilege).

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[10] *In re Bieter Co.*, 16 F.3d 929, 933-38 (8th Cir. 1994); see also *Export-Import Bank v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005).