


COMMUNICATIONS +

Media Relations Briefing Note

PR and Attorney-Client Privilege

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MONTIETH & COMPANY

BRIEFING NOTE + PR and Attorney-Client Privilege



Is the work of a public relations agency covered by attorney-client privilege?

Predictably, the courts are split on this question. The case law exists to take either side of the argument and it would be a fairly robust one.

Without being overly reductive, we believe there is another more insightful way to frame the question: is the PR consultant's counsel integral to the provision of legal advice and, as such, key to achieving the client's *overall* objectives?

Our view is yes. In the litigation, which includes protecting the corporate reputation, it is in fact essential to achieve that integration and it can be done in a way that shields PR advice (verbal, emailed) and work product (document development) from discovery.

Seeing PR counsel as integral to providing a client legal advice might be a high hurdle for some lawyers, especially if they have infrequently worked with a PR agency. But the reverse is also true. PR agencies who have little experience partnering with a law firm tend to discount the PR "advice" of lawyers. That has been a traditional divide between the two professions and one that increasingly today doesn't serve the client interest.

There is a growing need among clients involved in a wide array of legal matters—civil, criminal, and regulatory—for their legal and PR advice to be completely aligned and integrated. The reason is simple: the life cycle of a legal matter involves more public disclosure than ever before. Transparency, as a principle and a practice, is the order of the day. The stakes for the corporate reputation are enormous.

Litigation today also touches more constituents—employees, investors, business partners, regulators—and increasingly invites engagement via social media. Thanks as well to digital media, the shelf life of a matter, whether or not it gets a lot of media coverage, is now seemingly perpetual. We can therefore evolve the old saying about the Internet that information wants to be free. Today, information always wants to be everywhere, fast, and forever.

The world has changed and thus so must the strategic and tactical relationship between legal and PR firms. The question is how to achieve the integration of the two disciplines in a way that provides the strongest case for PR counsel to be protected by attorney-client privilege? There are three core requirements:

- 1. Have an integrated view about strategy.**
- 2. Highlight the PR agency's unique expertise.**
- 3. Be buttoned up.**

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Have an integrated view about strategy

What is legal strategy? Sometimes the answer is simply to win the case, which of course is a goal, not a strategy. Laying out the steps in motion practice is also not a strategy, but largely how one is executed.

Legal strategy is both a *perspective* and an *approach* that optimizes everything at the disposal of the litigation team to achieve the stated goals. This is always to prevail in the case but, realistically, it is more often than not to achieve the most reasonable settlement or compromise resolution.

Though a client may be hard-headed regarding what it seeks from a potential outcome, the legal strategy mandates that the litigation team do all it can to reach the best possible result based on the what is best for the client, even if the client may not always recognize its own best interests. That applies to PR outcomes as well.

Note we said litigation team. Strategy formulation must be seen as integrating the expertise of legal with PR, and all the other disciplines relied upon to achieve the goals. Like herding cats? Not really. Experienced PR counsel knows the role it plays on the litigation team and understands all the legal considerations at play. The more important issue for protecting privilege is how to integrate PR into strategy formulation and execution.

Highlight the PR agency's unique expertise

When PR is brought into the litigation team it should be because the client's organization doesn't have the expertise resident in its own organization to play the same role. This isn't a high hurdle to meet. Few if any client communications departments have experience with litigation PR beyond drafting reactive statements for stakeholders. With the hard-to-predict twists and turns of complex legal matters, litigation PR becomes something best tasked to the PR "experts."

At the same time, just about every PR agency with a crisis management or corporate communications practice group will say it can handle a litigation matter. The fact is, however, that very few have the breadth and depth of experience with a wide range of matters through the entire cycle of litigation.

The advice from an agency that does have that experience can much more easily be equated with legal counsel. In fact, the optimal argument that would be made to protect privilege is to be able to say that with that, the PR agency's counsel was necessary to enable the performance of legal tasks. And, with the right agency partner and a strong collaborative relationship, PR counsel really can be a necessary tool to achieve your desired outcome.

Be buttoned up

Finally, for the work of a PR agency to be equated with legal advice, the workflow processes that agency uses must mirror those used by law firms. That begins with the hiring process.

When the PR agency is retained, it is important that agreement is between the agency and the law firm, not the agency and the client. While the client should bear the costs, it should not be a primary party to the agreement. Also note that there should be language to indicate that the agency is assisting the law firm in providing legal services.

Beyond this, the PR agency must keep detailed privilege logs recording every relevant communication and must also mark every document it works on as "privileged and confidential/drafted at the request of counsel," a designation that should also be used on email exchanges.

These simple tasks may seem perfunctory, but they are crucial in establishing which communications should be regarded as privileged. In the absence of a definitive court ruling to indicate what constitutes legal advice from a third-party consultant, these processes are important lines of defense if your communications are ever brought into the litigation.

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Key

Court Decisions



Some courts have ruled that bringing in a third-party consultant of any kind to advise the client within their area of expertise, however beneficial to the client, is not necessarily afforded the protection of attorney-client privilege. The advice must be *necessary* to enable the lawyer to carry out her duties on the client's behalf.

A 2016 federal case in New York, *Guiffre v. Maxwell*, saw a judge take a narrow view on this issue, questioning the necessity of the public relations agent's role in implementing legal advice. However, this runs counter to earlier cases like *In Re Copper Market Antitrust Litigation*, a 2001 matter that recognizes privilege for communications between a lawyer and a PR agency. These decisions stem from the most seminal case making the argument for privilege, *United States v. Kovel*, which was heard in the Second Circuit. In *Kovel*, Judge Henry Friendly held that privilege protects communications between lawyer, client, and an accountant because the accountant's expertise was essential in helping the lawyer understand the complex tax issues in the case.

The accountant, in this case, was like an interpreter of a "foreign language" in the court's view. The judge quoted none other than Abraham Lincoln to illustrate his decision: "Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." *Copper Market* served to strengthen this argument and expand it to public relations.

Can PR be equated to accounting? Is it just as "foreign" of a language? Arguably, yes. Communications is a profession and the specialist PR expertise required to understand and support litigation is even more professionalized. With the evolution of digital media, PR is becoming foreign to lawyers. Lincoln, if he were alive today and tweeting his wisdom, would undoubtedly agree with us.

Additional Resources

- + *PR Week*—PR firms navigate the attorney-client privilege
- + *Illinois Law Review*—The Privilege of PR
- + Preserving Privilege and Maintaining Client Confidences When Dealing With Third-Party Consultants During a Crisis
- + Should Public Relations Experts Ever Be Privileged Persons?

OUR LITIGATION PR PRACTICE:

Montieth & Company is a global leader in the highly specialized field of litigation communications. We support the full cycle of litigation, from strategic planning through to the preparation and filing of pleadings, trial, and appeal. Our goal is to help our clients prevail both in and outside of the courtroom.

Our capabilities include risk assessment, strategic planning, investigation management and a complete set of communications services, from strategic positioning to media relations.

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