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IS THERE A SPIN-DOCTOR IN THE HOUSE? PUBLIC RELATIONS CONSULTANTS & POTENTIAL WAIVER OF CONFIDENTIALITY (ETHICAL & PRACTICAL CONSIDERATIONS OF INVOLVING PUBLIC RELATIONS CONSULTANTS)

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I. INTRODUCTION

The press loves to vilify corporate defendants, and pharmaceutical companies rank at the top of the bashing. Undoubtedly consumer confidence has been weakened by events like the increased safety warnings attached to some drugs and the market withdrawal of others. It is how these events (and their subsequent lawsuits) are depicted in the media, however, that inflict the most damage. Whether because drug companies are viewed as profiting from other's misfortunes or because Big Pharma has become the whipping-boy of a healthcare system perceived to have gone topsy-turvy, the reality is that the public's perception of pharmaceutical manufacturers—fueled by negative stories in the press—is at an all-time low.[2]

The damage can be significant. Sensationalistic news stories lead to corporate difficulties beyond just a negative public opinion, like the loss of investor confidence, a drop in stock value, a risk to jury neutrality, or an increased number of lawsuit filings and runaway juries. Just recently, Schering Plough's stock plunged 26% in one day after it was widely reported that the Senate Finance Committee was investigating an allegation that the drug maker withheld negative results on one of its most popular medicines in order to boost sales. While the pharmaceutical maker disputes the allegation, little attention is paid to the denial by the media. Simply put, the press focuses predominantly on the accusation because it is sexy, feeds the public's already skeptical view of drug companies and sells advertisements. Pharma's explanation, regardless of merit, is not newsworthy by those standards.

The "spin" given by television, print, radio, and—in this day and age—internet bloggers, shapes the public's opinion of the pharmaceutical company in trouble; the very same public that makes up the jury pool. What the media does or does not say may be the difference between a few

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2 Less than 13% of U.S. consumers believe information provided by pharmaceutical companies is more trustworthy than healthcare information provided by other organizations, according to research conducted in 2005. The research also found that public opinion has the potential to negatively impact individual pharmaceutical firms far more dramatically than increased federal regulations. *Public Perception of U.S. Pharmaceutical Industry at All-Time Low*, PHARMACEUTICAL BUSINESS REVIEW, October 18, 2005, http://www.pharmaceutical-business-review.com/article_feature.asp?guid=DE5ED0BA-28DB-4011-9FFA-781D96BBD6EB.

isolated lawsuits or hundreds of coordinated actions and the difference between a detached jury and a jury with preconceptions. As part of its defense strategy, and to prepare for the anticipated media assault, the corporate defendant often turns to veteran public relations consultants to cut a path through the media bog and defend the company's public image. Public relations consultants also may take on the role of advisors to the litigation team; helping to develop defense messages, trial themes, and even trial strategy. In this expanded role, public relations consultants often participate in meetings with the legal team and review documents in which legal strategy is discussed. Does this type of participation by the consultant strip an otherwise protected document or communication of its confidentiality under the attorney-client privilege or the work-product doctrine?

Whether a document or communication that is protected by attorney-client privilege or work-product doctrine loses that protection when shared with a public relations consultant is a question that has met with mixed reviews. When attorney-client privilege is at issue, the central question to the court's inquiry is whether the primary purpose of the communication was to aid in the rendering of legal advice. When the work-product doctrine is at issue, the court looks to the nature and purpose of the shared material—particularly, whether it was shared in anticipation of litigation to facilitate litigation strategy.

Determining the application of the privilege or the work-product doctrine is premised on questions of fact and dependent on the judge assigned, the public relations consultant's role, the motivation for hiring the consultant, and the information shared. In short, there is no one-size-fits-all answer, leading to the conclusion that, because of the uncertainty, lawyers need to think through the potential consequences before involving a public relations consultant. This uncertainty, in turn, gives rise to ethical concerns: attorneys are both ethically obligated to protect the confidence of their clients and to zealously represent their clients' interests. To do both, attorneys must take necessary steps to ensure that their communications with the press do not reveal client confidences or attorney work product. In addition, because the use of a public relations consultant may potentially waive a client's legally protected confidences, it is incumbent upon the attorney to ensure the client is adequately informed of the risks and knowingly authorizes the recommendation.

This article examines in detail the conflicting case law as to whether and under what circumstances the involvement of public relations consultants threatens confidentiality, provides guidance for the practitioner relative to the ethical obligations owed to the client under those circumstances, and suggests 'best practices' for protecting confidentiality if the decision has been made to retain the services of a public relations consultant.

II. CONFLICTING CASE LAW—WHAT IT TELLS US

A. The *Calvin Klein* Decision

Two cases with conflicting results—privilege found in one, but not the other—decided within months of each other, in the same jurisdiction and, ironically, involving the same public relations firm are instructive. The first decision, *Calvin Klein Trademark Trust v. Wachner*,[3] involved the clothing designer's attempt to protect what it saw as attorney-client and work-product communications as contained in various documents. These documents concerned the litigation and were prepared and shared between Calvin Klein, its lawyers, and Robinson Lerer & Montgomery, a public relations firm hired by the lawyers.

The United States District Court for the Southern District of New York first addressed Calvin Klein's argument for application of the attorney-client privilege. The designer maintained that its lawyers needed the advice from the public relations firm so that the lawyers could properly advise Calvin Klein on matters involving the litigation and on issues that might arise in the media. The court was not convinced.

3 198 F.R.D. 53 (S.D.N.Y. 2000).

The mere possibility that the public relations firm might help the law firm to formulate legal advice was not sufficient to invoke the privilege, the court held.[4] Robinson Lerer, it found, had acted in the more traditional role of a public relations firm (reviewing press coverage, making comments to various media and finding friendly reporters) and not in the role of helping the lawyers with their case:

> The possibility that such activity may also have been helpful to [the law firm] in formulating legal strategy is neither here nor there if RLM's work and advice simply serves to assist 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.[5]

The court did not stop at simply refusing to accept Robinson Lerer's role as a necessary part of the attorney-client relationship. To the extent that the client or its attorneys shared confidential information with the public relations firm, the attorney-client privilege had been waived.[6] Thus, not only were documents authored by or addressed to the public relations firm not covered by the privilege, but any privileged document shown to it had lost its protected status. Calvin Klein surely had not contemplated this result when it gave Robinson Lerer access to its litigation secrets or strategy.

Turning to the work-product doctrine, the court first determined that public relations advice generally does not qualify for work-product protection, even if it bears on anticipated litigation.[7] The purpose of the work-product rule "is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or the public generally."[8] Where there is a valid assertion of the work-product doctrine, however, the privilege is not waived simply because the attorney shares the information with a public relations consultant he has retained and who maintains the confidence. "This is especially so if . . . the public relations firm needs to know the attorney's strategy in order to advise as to public relations, and the public relations impact bears, in turn, on the attorney's own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form."[9] Under this rationale, the court permitted a number of documents to qualify for work-product protection.

B. The *Copper Market* Decision

Four months later, another district court judge from the Southern District of New York addressed the same issues involving the same public relations consultant in the case *In re Copper Market Antitrust Litigation*.[10] There, Sumitomo Bank hired Robinson Lerer after one of its managers had made admissions concerning illegal trading. The public relations firm was retained to handle the public relations issues emanating from the anticipated governmental investigation and ensuing civil litigation. Plaintiffs in the civil cases sought the communications between Sumitomo Bank, its counsel and Robinson Lerer. The bank objected to the discovery on grounds of attorney-client privilege and the work-product doctrine.

This time, in contrast to the *Calvin Klein* decision, the district court judge upheld the confidentiality of the communications on both grounds. With regard to the attorney-client privilege, the court believed the purpose for which Robinson Lerer had been retained was important in determining whether the privilege applied. The court was influenced by the fact that Robinson Lerer had been retained because 1) Sumitomo had no prior experience dealing with publicity arising from

4 *Id.* at 54 (citing *United States v. Ackert,* 169 F.3d 136, 139 (2d Cir. 1999) ("[T]he privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client").
5 *Id.* at 55.
6 *Id.* at 54.
7 *Id.* at 55.
8 *Id.* (citing *United States v. Nobles*, 422 U.S. 225, 238 (1975); *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995)).
9 *Id.*
10 200 F.R.D. 213 (S.D.N.Y 2001).

high-profile litigation; 2) it lacked experience in dealing with the Western media; and 3) the English-language skills of its communications department were not sufficiently sophisticated for media relations.[11] These factors, which in the court's view were missing in *Calvin Klein*, changed the equation in favor of upholding the privilege. The court determined that Robinson Lerer had become the "functional equivalent" of Sumitomo.[12] Accordingly, the court held confidential communications between the public relations firm and the client, the client's in-house lawyers, or the client's outside counsel *made for the purpose of facilitating the rendition of legal services to the client* were protected from disclosure by the attorney-client privilege.[13]

Determining that the *Calvin Klein* case had only "superficial similarities to the instant matter," the judge distinguished the case on the grounds that, in *Calvin Klein*, Robinson Leher had been retained by the lawyers and not the client and there was no suggestion that Robinson Leher performed business functions for the client or entered into communications with counsel for that purpose.[14]

The work-product claim also fared well for Sumitomo Bank. The court first found that the documents had been prepared in collaboration with Sumitomo's counsel in the context of the litigation. Compelling for the court was that Robinson Lerer had been retained specifically because of the governmental investigation and the civil litigation. The court also believed it was important that the public relations firm specialized in litigation-related crisis management and was specifically tasked with making sure that Sumitomo's public statements would not result in further exposure in the litigation. The court had little difficulty under those circumstances finding that the documents prepared by Robinson Lerer or delivered to it were in anticipation of litigation and were thus protected by the work-product doctrine.[15] Likewise, documents prepared by Sumitomo itself or by its counsel in anticipation of litigation were also protected by the doctrine.[16]

C. Progeny of *Calvin Klein* and *Copper Market*

Subsequent to *Calvin Klein* and *Copper Market* came a series of similar cases with equally differing results. Shortly after the *Copper Market* decision was published, its rationale was adopted by the court in *FTC v. GlaxoSmithKline*.[17] The district court there found that the attorney-client privilege applied to documents distributed to outside consultants where the consultants were "'needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel.'"[18] At issue was whether GSK had waived the privilege by circulating privileged attorney-client communications to public relations and government affairs consultants. The court accepted that outside consultants could become integral members of a defense team such that the attorney-client privilege should extend to communications involving them. Specifically, the court found that GSK's corporate counsel worked with the consultants "in the same manner as they did with full-time employees," and, citing *Copper Market*, found there was "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."[19]

A year later, and again in the Southern District of New York, (the same district as both *Calvin Klein* and *Copper Market*), Martha Stewart found herself in a bit of legal trouble. She hired lawyers who in turn hired public relations consultants. The lawyers and public relations consultants worked together to aid in avoiding an indictment. During the grand jury investigation, Ms. Stewart's public relations consultant was subpoenaed to testify and produce documents.[20] The public relations

11 *Id.* at 215.
12 *Id.* at 216.
13 *Id.* at 219.
14 *Id.* at 220 n.4.
15 *Id.* at 221.
16 *Id.*
17 294 F.3d 141, 147 (D.C. Cir. 2002).
18 *Id.* at 147 (quoting *F.T.C. v. GlaxoSmithKline*, 203 F.R.D. 14, 19 (D.D.C. 2001)).
19 *Id.* at 148.
20 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 322-23 (S.D.N.Y 2003).

consultant, as one might expect, objected to the subpoena on grounds that a majority of the anticipated testimony and the documents requested were protected by the attorney-client privilege and the work-product doctrine.[21]

The court in *In re Grand Jury Subpoenas* sustained the objections based on the attorney-client privilege and work-product doctrine. In doing so, however, the court distinguished the facts at bar from those found in both *Calvin Klein* and *Copper Market.* The *In re Grand Jury Subpoenas* court pointed out that the attorney-client privilege did not attach in *Calvin Klein*, in part, because the public relations firm had a preexisting relationship with the client that was not uniquely focused on the litigation; whereas the privilege did apply in *Copper Market* because the public relations firm had taken on a role akin to itself becoming the client.[22] Neither of those two fact patterns were analogous, held the court, because, for Martha Stewart, the public relations assignment did not address the public at-large, rather it "'focused on affecting the media-conveyed message that reached the prosecutors and regulators responsible for charging decisions in the investigations.'"[23] This specialized role was integral to the retention of the public relations consultant and, accordingly, that relationship deserved by extension the advantages of the attorney-client privilege and the work-product doctrine.

In the court's view, "the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants."[24] It was further found that a lawyer's public advocacy on behalf of the client—efforts to influence public opinion in order to advance the client's legal position—*is* a professional legal service deserving of attorney-client and work-product protection.[25] In coming to this conclusion, the court relied on Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nevada*:

> 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*.[26]

The court further observed that claims of privilege could be sustained not only with respect to communications among Stewart, her lawyers, and the public relations firm, but also as to those between Stewart and the public relations firm without the lawyers present, so long as the communication is at the direction of the lawyers and for the purpose of obtaining legal advice from the lawyer.[27] Interestingly, the court further found that the application of privilege when consultants are involved is limited to situations where the lawyer needs outside assistance, thus Stewart "would not have enjoyed any [attorney-client] privilege for her own communications with [the public relations] Firm if she had hired [it] directly."[28]

Last year, a bankruptcy court confronted the controversy in *In re SCBA Liquidation, Inc.*[29] In this case, the court found that the attorney-client privilege or the work-product doctrine applied to a majority of the documents in question. The finding was based on the role played by the public relations firm in providing critical advice central to the legal strategy of the case.

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21 *Id.*
22 *Id.* at 329.
23 *Id.* at 323-24 (quoting Witness Aff. Paragraph 12).
24 *Id.* at 330.
25 *See id.* at 325-29.
26 *Id.* at 327 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (emphasis added)).
27 *Id.* at 331.
28 *Id.*
29 Hr'g Tr., *In re SCBA Liquidation, Inc.*, No. 04-12515 (Bankr. W.D. Mich. Nov. 28, 2007).

Persuasive to the court was that the contract retaining the public relations consultant specifically stated that the law firm "is not retaining [the public relations consultant] to provide ordinary public relations advice." This led the court to find that the public relations consultant was "a very specialized litigation consultant."[30]

While it might appear that the trend is toward viewing public relations consultants as falling within the zone of those who can share confidential information without causing a waiver, the question is still not settled. Recently, for example, a district court in the Northern District of New York, adopted the rationale of *Calvin Klein* in declining to extend privilege to the communications and documents shared with a public relations consultant. In *NXIVM Corp. v. O'Hara*,[31] it was determined that the hiring of the consultant was not for the purpose of legal advice, but "a façade…to give cover to communications" between the party and its various consultants.[32] Thus, the *NXIVM* Court found that like in *Calvin Klein*, the public relations firm was "simply provid[ing] ordinary public relations advice," and such communications are not covered by attorney-client privilege.[33]

Moreover, the court declined to apply work-product protection to documents provided to the public relations consultant, holding that "[i]n a case like ours, a work-product document must lose its essential character when it is given even to a friendly party who advances it for purposes other than the anticipation of litigation."[34] Important to the court's opinion was the finding that the purpose of the public relations consultant was not to assist the lawyers, but to "pander the sensitive yet damaging information to sympathetic reporters."[35] "It is hypocritical," continued the court, "to claim that a document is confidential one moment and then share such documents with a host of others to be used for something other than litigation."[36]

Other cases that have faced the issue and continued the disagreement are *In re Vioxx Products Liability Litigation*[37] and *Haugh v. Schroder Investment Management of North America Inc.*[38] *In re Vioxx* is particularly interesting because within the same case the court issued two seemingly conflicting orders concerning the application of privilege where public relations consultants were concerned. The difference in the court's two orders, however, is a result of different factual situations, not from inconsistent application of the law. In the first situation, defendant Merck's board of directors established a committee to investigate the development and marketing of Vioxx, in light of criticisms and anticipated litigation.[39] The investigative team, which included a public relations consultant, prepared and published a report of their findings. In subsequent products liability litigation, plaintiffs sought discovery of all the documents "relating to the creation, preparation, and publication" of the report.[40] Merck argued that the materials were entitled to work-product protection because the "communications consultants were acting under the direction of … attorneys," and the court agreed, noting that documents prepared in anticipation of litigation are protected.[41] Further, the court also held that even though the final report was published, and therefore lost its protection, such publication did not waive protection for the underlying drafts and materials.[42]

Eight months following the order applying privilege, however, the *Vioxx* court issued a second order also concerning communications with public relations consultants, but with the opposite result.[43] The difference between the outcome of the first order and the second order lay in the nature of the public relations consultants' role—the *Vioxx* court determined that the communications at issue the second time were ordinary public relations advice, not communications necessary for rendering legal advice.[44] Specifically, the communications at issue were those between Merck and its

30 *Id.* at 19.
31 241 F.R.D. 109 (N.D.N.Y. 2007).
32 *Id.* at 140.
33 *Id.* at 141.
34 *Id.* at 142.
35 *Id.*
36 *Id.*
37 MDL No. 1657, 2007 U.S. Dist. LEXIS 23164 (E.D. La. Mar. 5, 2007).
38 02 CIV. 7955 (DLC), 2003 U.S. Dist. LEXIS 14586 (S.D.N.Y. Aug. 25, 2003) (Cote, J.).
39 *In re Vioxx*, 2007 U.S. Dist. LEXIS 23164, at *3.
40 *Id.*
41 *Id.* at *11 n.3.
42 *Id.* at *12.
43 *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 8, 2007).
44 Second Special Master's Report and Recommendations, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, at 7 (E.D. La. July 31, 2007).

public relations consultants prior to the withdrawal of Vioxx from the market.[45] The discovery master, therefore, reasoned in his initial report that because the communications at issue predated the withdrawal of Vioxx, and Merck claimed that at that time it was not aware of the dangers in using Vioxx, Merck could not have been communicating with the consultants in the anticipation of litigation.[46] Merck also argued to expand the privilege in a different way—it sought privilege for shared communications with outside consultants on the basis that the advice would be helpful to the consultants, not to assist "Merck or its attorney in *obtaining or rendering advice.*"[47] The court, however, declined to expand the parameters of the attorney-client privilege, opining that such an extension was "different in purpose and inconsistent" with the existing authority, which requires communications with the consultant to be necessary for rendering legal advice in order for privilege to apply.[48]

Alternately, in *Haugh v. Schroder Investment Management* the attorney for the plaintiff hired a consultant to advise on media strategy. In this case, the court found that the consultant was providing ordinary public relations advice, the communications were not for the purpose of obtaining legal advice, and therefore the communications were not protected by attorney-client privilege.[49] However, like *In re Vioxx*'s first order, the work-product protection did apply to documents prepared by the consultant because they were prepared "in anticipation of litigation."[50]

III. ANALYSIS

Calvin Klein, *Copper Market,* and their progeny highlight the dangers involved in permitting a public relations firm to participate in or receive the contents of communications by or between the client and its lawyers. The prudent lawyer will advise his client of the very real possibility of a waiver. The dilemma for counsel and client alike is that different courts, applying the law of the forum, may come to different conclusions under identical factual circumstances.

Although the issue is muddied, some conclusions can be reached. Courts consistently recognize, for example, that the attorney-client privilege protects confidential communications between an attorney and the attorney's client made for the purpose of furnishing or obtaining professional legal advice and assistance. The courts also accept that the attorney-client privilege protects communications made in the presence of third parties, including independent contractors, who assist the lawyers in rendering legal advice.[51]

It also appears that a court's decision whether to sustain the objection to disclosure may be guided by an underlying disdain for any party that attempts to cloak broad communications under the guise of attorney-client or work-product confidentiality. In *Calvin Klein*, the court conducted an *in camera* review of the documents and found that "few, if any" of the documents contained or concerned attorney-client communications but that many, instead, related to "how to put the 'spin' most favorable to [Calvin Klein] on successive developments in the ongoing litigation."[52] Similarly, in *NXIVM*, the court found that the public relations consultant's involvement "was nothing more than a tool to achieve secrecy, not to give legal advice."[53] Both courts seemed offended by blanket claims of privilege made in transparent attempts to protect nonprivileged documents. Sumitomo, in contrast, in the *Copper Market* case, withheld few documents from production and had provided a detailed privilege log that obviated the need for a review of the documents by the trial court.[54] The court had little difficulty, under the surgical approach to withholding documents, in making the determination to sustain objections to their production.

45 *Id.* at 5.
46 *Id.*
47 Fourth Special Master's Report and Recommendations (Revised), *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, at 2 (E.D Nov. 8, 2007).
48 *Id.*
49 *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *8.
50 *Id.* at *14.
51 *See United States v. Kovel,* 296 F.2d 918, 921 (2d Cir. 1961) (attorney-client privilege extends to accountant acting as translator in assistance to attorney); *see also Copper Market*, 200 F.R.D. at 219-220; *Calvin Klein*, 198 F.R.D. at 54-55.
52 198 F.R.D. at 54.
53 241 F.R.D. at 140.
54 *Copper Market*, 200 F.R.D. at 216-217, 223.

The overriding question for purposes of application of the attorney-client privilege seems to be whether the consultant is aiding in the rendering of legal advice—either because the consultant is so interrelated with the client as to become essentially an extension of the client, as in *Copper Market*; or because the consultant is providing specialized advice critical to the legal defense, which would require an understanding of the legal strategy and other privileged information, as in *In re Grand Jury Subpoenas*. If the answer is in the affirmative to either question, it is more likely that the attorney-client privilege will be sustained, assuming the other elements of the privilege have been satisfied *(i.e.* that legal advice was sought from a lawyer and the related communications were made in confidence).[55]

This is, of course, putting the lawyer and client on the horns of a dilemma. In an effort to maximize the likelihood that the attorney-client privilege will apply, the public relations firm should provide very specialized advice critical to the legal representation, and/or become an integral part of the communications with the lawyer on behalf of the client, thereby becoming the functional equivalent of the client. Both approaches are risky. If the court ultimately determines the consultant is providing typical public relations advice, or that the consultant is not the functional equivalent of the client, not only are communications directly with the consultant discoverable but, arguably, the consultant's knowledge of or participation in any communication between the client and the lawyer may constitute a waiver of the privilege. The flip side is that providing too little confidential information to the consultant risks a finding that the consultant is providing only traditional "spin" or worse, that the use of the consultant is merely a transparent crack at shielding otherwise discoverable communications.

A work-product doctrine objection, on the other hand, stands a greater likelihood of being sustained than one based on the attorney-client privilege. "This is especially so if . . . the public relations firm needs to know the attorney's strategy in order to advise as to public relations, and the public relations impact bears, in turn, on the attorney's own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form."[56] It is questionable, however, the extent to which one will convince a court that the nature of the relationship between law firm and public relations firm is mutually and strictly intended solely for the litigation, particularly if the communications are prophylactically filtered to avoid exposing critical confidential information. Again, the horns of the dilemma. And it should not be forgotten that the attorney work-product doctrine, unlike the attorney-client privilege, is not absolute.

Regardless of approach, professional ethics compel the cautious practitioner to frankly communicate to the client the advantages and disadvantages of using a public relations consultant as part of the litigation team. The Model Rules of Professional Conduct state that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives *informed consent."* [57] Because sharing confidential materials or communications with a public relations consultant could potentially result in waiver of confidentiality, counsel should provide the client with sufficient information to make an informed decision as to the use of a public relations consultant.[58] Of course, attorneys also have the obligation to be zealous advocates for their clients and such a role may call for interaction with the press.[59] Accordingly, with or without a public relations consultant's advice, the prudent practitioner should be prepared to respond to press inquiries so that communications with the press do not inadvertently disclose client confidences.

IV. 'BEST PRACTICES'

Pharmaceutical companies in litigation, particularly in the 'bet the company' variety, are prone to use public relations consultants to counteract the anticipated media's anti-corporation 'spin' and to help protect the company's public image. Public relations consultants often take on the

55 *See In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 325.
56 *Calvin Klein*, 198 F.R.D. at 55.
57 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007) (emphasis added).
58 *See id.* R. 1.1.
59 *See id.* R. 1.3.

additional role as advisors to the litigation team; helping to develop defense messages, trial themes, and trial strategy. Some or all of these functions may be viewed as integral to the defense of the litigation, but that does not necessarily guarantee that a court will sustain objections based on confidential communications involving pubic relations consultants. Worse, some courts might even determine that, because of that involvement, confidentiality has been waived.

What to do? The emerging case law suggests three possible strategies, each with its own advantages and risks. Because confidentiality objections may not be sustained, and because confidentiality may in fact be waived with the use of a public relations consultant, legal ethics and 'best practices' dictate frank and full disclosure to the client. The three strategies to consider are to:

1) Treat the consultant much like one would treat other experts in litigation. This means limiting confidential communications especially those that are highly sensitive or reveal litigation strategy. While this approach makes it most likely that a court will deny objections based on the attorney-client privilege or the work-product doctrine, it is the most conservative approach in the sense that little might be revealed of any consequence if the consultant is forced to testify or communications are ordered to be produced.

2) Treat the consultant as integral to communications with the client so that the consultant becomes the functional equivalent of the client or specifically hire the consultant for very specialized services that are critical to the client's defense. While this is the strongest position for purposes of extending the attorney-client privilege to the communications with the consultant, it is the riskiest because it exposes sensitive communications to production if the putative privilege of the material is denied.

3) Treat the consultant as an advisor to the client that needs to know the attorney's strategy in order to advise as to public relations, and the public relations impact bears, in turn, on the attorney's own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form. The consultant should focus its efforts on the company's public statements concerning the lawsuit with the aim of limiting the company's exposure in litigation. Limit confidential communications to only those necessary for the attorney and consultant to serve their respective functions. While this is the strongest position for extending the work-product doctrine—which tends to be broader in scope than does the attorney-client privilege—the strategy suffers from an exact definition. It is, on the other hand, less risky because of the limited scope of the confidential communications exchanged.

Additional 'best practices' guidance follows:

- Be judicious in claiming privilege or the work-product doctrine. Courts dislike overreaching and giving the court the impression that the consultant's main role is to shield communications from disclosure, is the surest means of having the objections overruled.

- Always assume that any information you provide a public relations consultant may be discovered by the adversary.

- Avoid expressing to the public relations consultant particular concerns or weaknesses about the case.

- Ensure the client knowingly consents to the involvement of a public relations consultant after having been informed of the risks that doing so may waive certain confidences.

- The agreement retaining the public relations consultant should specify the purpose of the retainer. A retainer that is not for public relations advice in the traditional sense but rather is for purposes of helping the attorney

understand the client's public relations issues relative to the litigation at hand and to aid in the determination of how public statements made on behalf of the client might influence the litigation strategy, for example, is more likely to be found to invoke the attorney work-product doctrine.

- The public relations consultant should be advised that unless specifically requested, a report is not necessary.
- The consultant should be advised not to discuss matters learned through communications with counsel or the client relative to the litigation with third parties without specific direction or authorization by the attorney.
- Material should not have a dual usage (both for litigation and ordinary public relations or business purpose) in the consultant's hands.
- Communications relative to supporting the defense of the case should be kept separate from those concerning ordinary public relations advice.
- If the consultant is doing other, non litigation work for the client, the consultant should maintain a separate legal file surrogated and marked confidential.
- Confidential documents should only be distributed on a need-to-know basis.
- Avoid making jokes in email—although irrelevant material may be redacted from a document production, jokes and banter found within documents not deemed litigation strategy could be released if they have any bearing on the case.

V. CONCLUSION

There are no simple answers to the question of whether objections to disclosing communications involving public relations experts will prevail. An order sustaining an objection based on the attorney-client privilege is more difficult to obtain than one based on the work-product doctrine. An accidental waiver of either is a very real possibility. Counsel is best advised to consider all the possible variations of the retention, and the pros and cons of each, before bringing a public relations consultant onto the litigation team. Ethics and 'best practices' dictate that informed consent should be obtained from the client before the retention of a public relations consultant.