28 Geo. J. Legal Ethics 683

Georgetown Journal of Legal Ethics
Summer, 2015

Current Development 2014-2015

THE COMPETING ROLES OF AN ATTORNEY IN A HIGH-PROFILE CASE: TRYING A CASE INSIDE AND OUTSIDE OF THE COURTROOM

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INTRODUCTION

Whether in cases involving celebrities, heinous criminal acts, large corporations, or alleged civil rights violations, the public has a seemingly insatiable appetite, fueled by media coverage, for high-profile cases.[1] As a result, the role of modern American lawyers has expanded from an obligation to "pursue lawful strategies in the court of law" to ensuring that their "client's right to a fair trial is not undermined by negative media campaigns that ignite public outrage ... and possibly influence the jury pool."[2] Though lawyers are often taught how to "litigate, negotiate, and practice law according to precedent," they are rarely taught how to effectively address the media on their client's behalf.[3] Now, confronted with the risk of intense public scrutiny, parties involved in high-profile cases are increasingly relying on public relations experts to represent them in the public eye while continuing to rely upon legal counsel to advocate on their behalf inside the courtroom.[4]

The primary concern with using public relations professionals is the possible lack of the attorney-client privilege. Generally, the disclosure of confidential information to a third party constitutes a waiver of attorney-client privilege.[5] The use of public relations experts in conjunction with legal matters has created a wrinkle in the usual rules. Courts traditionally look to the nature and purpose of the shared material, including whether or not it was shared in anticipation of litigation or to facilitate litigation strategy, to determine whether the sharing of ***684** such information falls under the work-product doctrine.[6] The determination of whether or not privilege or the work-product doctrine applies to information shared between lawyers and the public relations firms they hire 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."[7] Due to the many variables at play, a debate continues over whether or not privilege applies to communications between attorneys and their public relations experts, giving rise to potential ethical concerns. Lawyers are both obligated ethically to protect their clients' confidences and to represent their clients' interests zealously.[8] Therefore, it is incumbent upon attorneys to take steps to ensure their communications with the press and public relations firms do not inadvertently reveal any client confidences or attorney work product and to ensure that clients are made aware of these potential risks in advance of any such communications.[9]

This Note will explore the attorney's role outside of the courtroom and some of the ethical obligations faced by attorneys and law firms when working with outside public relations firms. Part I provides an overview of the rise of the high-profile case. It demonstrates how early litigation and American Bar Association ("ABA") committees addressed the expanding role of the lawyer outside of the courtroom. Part II addresses the rise of the modern legal public relations field and examines reasons why litigants might find themselves seeking the advice of legal public relations consultants. Part III focuses on the impact of the attorney-client privilege on the role of litigation public relations professionals. It covers the relevant, and at times conflicting, case law that addresses the application of the attorney-client privilege to third parties involved in litigation. Finally, Part IV provides recommendations for best practices for attorneys working with public relations firms on litigation. It aims to provide guidance to an attorney when using a public relations firm and regulate his or her conduct when interacting with the media. Additionally, Part IV proposes ways in which the influence of the ABA might be used to help provide clarity on when and in what circumstances the attorney-client privilege would apply to the use of a legal public relations consultant or firm.

*685 I. A HISTORICAL LOOK AT THE MEDIA'S EFFECT ON THE JUDICIARY

The concerns regarding press coverage and a party's ability to have a fair trial date back to at least 1807 with former Vice President Aaron Burr's treason trial.[10] By the time of Burr's trial, newspapers had widely published the affidavits of two prosecution witnesses, making the potential negative influence of this publicity a concern for Burr's ability to obtain a fair trial.[11] In response, Chief Justice Marshall ruled that a fair trial could still be had despite a juror's exposure to the publicity so long as the juror could still reach a verdict based on the "testimony and the law."[12] This standard is still widely used today, although judges may still try to limit the publicity surrounding a **case** outside of the courtroom.[13]

The emergence of legal ethics codes at the turn of the 20th century presented another means to govern lawyer--press contact and control trial publicity.[14] Though the rules themselves varied, they shared a common theme: "Don't speak to the press, unless you can't help it."[15] Alabama, when adopting the first legal ethics code in 1887, warned lawyers against commenting publically about pending proceedings--a theme similarly adopted when the ABA published its *1908 Canons of Legal Ethics* ("*the Canons*").[16] *The Canons*, while acknowledging that under certain conditions a public statement might be essential, nonetheless stated that it would be "unprofessional to make it anonymously."[17] It also provided that, "An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme **cases** it is better to avoid any *ex parte* statement."[18]

A. THE RISE OF THE HIGH-PROFILE CASE

Two **cases** in the early half of the 20th century, the Sacco and Vanzetti robbery and murder trial and the Lindbergh kidnapping trial, highlighted the influential role of the press in covering **high**-**profile** trials.[19] In the Sacco and Vanzetti trials of 1921, the defendants, anarchist Italian immigrants, were convicted during the ***686** height of the post-World War I Red Scare amidst much fervor and public outcry against both foreigners and anarchists.[20]

The 1935 trial of Bruno Hauptmann for the Lindbergh kidnapping was covered by more American reporters than were sent to France to cover World War I.[21] One hundred seventy-five reporters converged in the 1,350 square foot courtroom, while approximately forty million people listened on the radio and 60,000 sightseers descended on the New Jersey town where the trial was held, purchasing souvenirs, including mini-replicas of the ladder thought to be used in the commission of the kidnapping, and backing up traffic for ten miles.[22] In each **case**, and in many other subsequent **cases** attracting mass media attention, questions remained regarding the guilt of each defendant, in part due to the potential fears that their convictions resulted from the "press-induced mass hysteria" that surrounded each **case**.[23]

B. RESPONSES FROM THE LEGAL COMMUNITYAND THE EMERGENCE OF THE "SUBSTANTIAL LIKELIHOOD" TEST

As the 20th century progressed, fears of media bias continued to grow and were acknowledged by the Supreme Court. In 1961, Justice Frankfurter stated, "not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts."[24] A few years later, in 1965, the Supreme Court decided *Estes v. Texas*, a **case** surrounding the due process implications of allowing television cameras into the courtroom.[25] In its decision, the Supreme Court stated, "[I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on [judges] both directly and through the shaping of public opinion" and later elaborated, "the television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his **case** in the eyes of the public."[26] Just one year later, in 1966, the Supreme Court further held, "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[27]

***687** The Reardon Committee was formed in 1966 in response to concerns about the increasingly intertwined role of the press and the judicial system.[28] Its creation advanced the Court's desire to take "steps to bring about a fair balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial" and addressed fears that potential jurors may be unfairly prejudiced as a result of mass media coverage.[29] The Reardon Committee was tasked with revising the ethical rules for lawyers wishing to speak publically about **cases** and reconsidering Canon 20 of the *Canons of Legal Ethics*.[30] Instead of placing primary fault with the press, as had been the **case** with the 1807 Burr trial, the Reardon Committee proactively focused on the role of lawyers and the scope of any public comments they make.[31]

The Reardon Committee's work resulted in a proposed set of rules affecting "everyone from lawyers to court officials."[32] The most relevant alteration was Model Rule 1.1, which was designed to protect trials by preventing the public release of prejudicial information and was later partially adopted by the ABA in its *Model Code of Professional Responsibility* (*"Model Code"*).[33] The majority of First Amendment speech is traditionally covered by the "clear and present danger" test in which the court determines "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[34] The Reardon rule, however, departs from the "clear and present danger test" accompanying most restraints on speech and instead requires only that there be a "reasonable likelihood" of interference with the administration of justice.[35] Model Rule 1.1 emphasizes, "A goal of our legal system is that each party shall have his **case**, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by the dissemination of news or comments which tend to influence judge or jury."[36] The comments accompanying Model Rule 1.1 further explain that a lawyer's "proper function at this point is to present his **case** in the courtroom, not to make extrajudicial statements interpreting or explaining evidence ... or attempting to build a favorable climate of public opinion."[37] As such, at the time, the ABA maintained that advocacy ought to take place in the courtroom, disavowing much of the idea that a lawyer ***688** could have a legitimate need to argue her **case** in public, beyond the reach of the courtroom.[38]

Amidst concerns that the Reardon rule might violate an attorney's First Amendment rights, the Goodwin Committee, chaired by Ninth Circuit Judge Alfred T. Goodwin, was formed in 1978 by the ABA.[39] It advised changing the "reasonable likelihood" standard to a "clear and present danger" standard.[40] This would mean that attorney speech ought only to be prohibited when there exists a "clear and present danger" of prejudicing a trial.[41] The ABA ultimately rejected this proposal.[42] Instead, the ABA opted for a looser test relying on "substantial likelihood" when it approved Model Rule 3.6 in 1978, disallowing the making of statements that a reasonable lawyer knows or should know would "have a substantial likelihood of materially prejudicing an adjudicative proceeding."[43] Though the rule adopted by the ABA did not define "substantial likelihood," the ABA created a list of statements that are presumed to violate the substantial likelihood test.[44] These statements include comments about inadmissible evidence and comments regarding the credibility of a witness.[45]

C. "THE SUBSTANTIAL LIKELIHOOD" TEST AS APPLIED TO ATTORNEYS

In 1991, the "substantial likelihood" test outlined in Model Rule 3.6 was upheld by the Supreme Court in *Gentile v. State Bar*, which for the first time examined to what extent the modern trial publicity rules properly consider an attorney's First Amendment interest in extrajudicial speech on behalf of his or her client.[46] In the **case**, Dominic Gentile, a prominent criminal defense attorney, was representing a storage facility owner accused of stealing drugs that police had been storing at the facility as evidence.[47] The **case** attracted much publicity and immediately after his client was indicted, Gentile held a press conference asserting his client's innocence and suggesting members of the police department may have instead stolen the drugs.[48] Six months later, Gentile's client was acquitted at trial, and the Nevada State Bar subsequently brought disciplinary proceedings against Gentile.[49] The issue was whether extrajudicial speech by an attorney must conform to the "clear and present danger" standard typically ***689** applied in First Amendment **cases** or whether a lower standard could be applied.[50] The Court ultimately determined that attorney speech need not be bound by the "clear and present danger" standard and upheld Model Rule 3.6's "substantial likelihood" test.[51] Chief Justice Rehnquist justified limiting the ability of an attorney to make extrajudicial statements in an effort to protect "the fairness of a pending proceeding" and "did not see the lawyerly significance of the extrajudicial advocacy," stressing the importance of maintaining the traditional ethics of the courtroom.[52] In his concurrence, Justice Kennedy acknowledged the important role an attorney plays in advocating for his or her client beyond the courtroom when he stated:

> An attorney's duties do not begin inside the courtroom door .... [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment ... including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.[53]

"The potential negative influence of publicity on public proceedings has long concerned lawyers."[54] The rise of the **high profile case** created challenges for the legal community regarding how to best weigh the protection of an attorney's First Amendment rights against the need to preserve impartiality at trial.[55] *Gentile* highlighted a deeper, yet related, division about how attorneys ought to act outside of a courtroom.[56] Furthermore, the above **cases** and rules attempt to restrict and define the role of the lawyer as an advocate outside of the courtroom. As will be discussed in the following sections, the situation becomes increasingly complicated when attorneys bring in legal public relations experts and other third parties, not bound by

these ethical constraints, to handle the publicity for them.

II. THE EXPANDING ROLE OF THE LAWYER AND THE EMERGENCE OF THE LEGAL PUBLIC RELATIONS FIELD

While the rise of the media's interest in **litigation** matters is not new, the ways in which attorneys respond to this media scrutiny is evolving. Attorneys, always looking to insulate their clients from the potentially negative impacts of ongoing, **high**-**profile** **litigation** have sought ways to use the media to their client's advantage.[57] However, with emergence of the 24/7 news cycle and the ease with ***690** which attorneys could make public comments about ongoing **litigation** came fears that attorneys might compromise the integrity of the judicial process. As a result, attorneys, many of whom are skilled **litigators** but not particularly well-versed in public relations or advocacy outside of the courtroom, often employ public relations professionals to assist in their interactions with the media and with members of the general public.

Advocating in the court of public opinion has become a norm within the legal profession. With the availability of new technology in the mass media saturated environment, it has become significantly less likely that trial proceedings will remain confined to the courtroom.[58] Members of the legal community have varied opinions on an attorney's decision to publically share information about a **case**.[59] The more favorable view of attorneys advocating in public considers the attorney's obligation to "compensate for the inevitable inaccuracy of the news media as it covers these sensational **cases**."[60] This view, much in line with Justice Kennedy's concurrence in *Gentile v. State Bar*, looks to the attorney to provide more holistic services in the defense of her client's reputation both inside and outside of the courtroom as it relates to the legal issue at hand.[61] The opposing, more traditional view, that the attorney's place is in the courtroom not in front of a camera, believes that attorneys have become "the miscreants who have largely monopolized the headlines" and that, "[**l**]**itigation** blackmail is being committed in the United States every day, aided and abetted by journalists, lawyers and public relations consultants."[62] There is little consensus over which viewpoint is the "correct" one, and this topic is widely debated amongst attorneys and legal scholars alike.[63]

While the practice of **litigation** public relations has been around since at least the early 19th century, the term itself has only been in existence since the mid-1990s.[64] In the 1995 book ***Litigation*** *Public Relations: Courting Public Opinion*, Susanne Roschwalb and Richard Stack gained recognition for coining ***691** the now commonly used phrase, "**litigation** public relations."[65] The term refers to public relations professionals and attorneys engaging in the **litigation**-related work.[66] This work often involves assisting attorneys for **high**-**profile** **cases** handle media inquiries, public opinion, and any crisis management that might be associated with the ongoing **litigation**.[67] In the book, Roschwalb and Stack advocate the need to make attorneys better able to handle their increasingly common interactions with the media.[68] In doing so, they offered advice from attorneys and other public relations experts on techniques employed to handle the news media in legal controversies.[69]

Additionally, on August 10, 1994, the comments to Model Rule 3.6 were amended to meet some of the concerns expressed in *Gentile v. State Bar*.[70] While the prior language of Model Rule 3.6 allowed lawyers to only talk about the general nature of a **case** they were handling, the modifications allowed lawyers to elaborate upon and talk more specifically about **litigation** they were handling.[71] The revised comments also included a "fair reply" provision, which allows a lawyer to publically "make a necessary response to protect a client from undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[72] These modifications both made it easier and more common for lawyers to respond to concerns in the press and were passed around the same time as the O.J. Simpson trial, further fueling the media frenzy.[73]

Despite the inconclusive findings on what impact going public with a **case** has on the outcome of **litigation**,[74] attorneys still frequently decide to go public with **cases**. Between around-the-clock news programming, the rise of the Internet and the digital age, and the ability of virtually anyone to publish nearly anything through social media and blogging sites, we are entrenched in a mass media saturated environment.[75] As Roschwalb and Stack stated,

***692** Because of the technology available and the history of the public appetite, it is less likely than ever that the proceedings in a court room can be secluded. What is necessary is that lawyers, publicists and the media work together before, during, and after a trial to reach an accommodation.[76]

While Roschwalb and Stack advocated getting ahead of the publicity and promoted proactive techniques that attorneys could use, as noted in the "fair reply" provision to Model Rule 3.6, sometimes it becomes necessary for an attorney to respond to

preexisting or ongoing press coverage on her client's behalf.[77]

When covering **litigation** and pending court matters, the media frequently creates a protagonist-antagonist relationship between opponents, focusing on painting one party as the "villain" and the other party as a "victim" of their behavior.[78] However, the reality is that such a portrayal may not be accurate and may not be in the client's best interest. Though not limited to matters involving criminal proceedings, this creates a particularly challenging dilemma for clients involved in criminal proceedings, as press coverage generally begins with reports adverse to the defendant.[79] While defendants often feel the need to set the record straight to ensure coverage will be "balanced, accurate, and less sensational,"[80] there is a fear that the more a defendant speaks publically surrounding their ongoing **litigation**, the more he or she potentially risks further incriminating himself or herself and having such a move backfire with potentially dire consequences.[81] Defendants in criminal proceedings will often look to their attorneys to respond on their behalf and to make their position public. As a result, "[i]n order to advocate zealously, the defense lawyer may feel compelled to set the record straight, or, in some small way, to balance the avalanche of negative news coverage."[82]

However, though excellent advocates in the courtroom, many attorneys are overly skeptical of the media and ill-equipped to handle the media and public ***693** relations demands associated with trying a **high**-**profile** **case**.[83] Public relations skills are often not a part of the traditional law school curriculum and are rarely considered in decisions regarding the hiring of counsel.[84] Because lawyers' attention is generally focused on things like discovery, motions, and trial, rather than managing the media, they have begun to look to outside companies to handle the public relations matters surrounding their client and pending **litigation**.[85] However, these **litigation** public relations experts serve a very different role from their regular, run-of-the-mill public relations colleagues. Unlike in regular public relations, the role of a **litigation** public relations practitioner is often not to disseminate or pitch stories, but instead to assist in educating reporters on the **litigation** process, the significance of previous **case** law, and the importance of the **case**.[86] Therefore, **litigation** public relations practitioners must understand both the legal world and the public relations world, turning it into a very niche field amongst attorneys and public relations professionals.[87]

III. THE OBLIGATION OF ATTORNEYS TO THEIR CLIENTS WHENWORKING WITH LEGAL PUBLIC RELATIONS: THE ATTORNEY-CLIENT PRIVILEGE

In determining whether the services of **litigation** public relations experts are needed, attorneys and their clients have many factors to consider including cost, expertise, availability, and previous work history. However, attorneys and their clients must also consider the potential effects of disclosing information normally covered under the attorney-client privilege to a third-party.[88] The attorney-client privilege serves to protect the disclosure of information between a client and his or her attorney when preparing for **litigation**.[89] As such, the disclosure of ordinarily protected information to a third-party traditionally constitutes a waiver of the attorney-client privilege.[90] By waiving this privilege, information that would otherwise be protected is now subject to discovery and subpoena.[91] ***694** However, an exception exists so that when information is disclosed to a third-party with a "necessary role in assisting the lawyer as a consulting expert or an agent," privilege is not waived and the information is still protected.[92]

Whether or not a **litigation** public relations expert falls within this third-party exception to attorney-client privilege is of paramount importance as to whether or not privilege applies.[93] In other words, when **litigation** public relations experts seek to influence public opinion, courts must determine whether their actions are being performed in order to advance the client's legal position or whether their actions serve a non-legal or business function.[94] If the **litigation** public relation expert's role is to advance the client's legal position, any information shared will likely remain protected; however, if the expert's role is to serve a non-legal or business function, any information shared is likely not privileged.[95] As demonstrated by the **cases** below, both attorneys and their clients face challenges when trying to ensure that the sharing of otherwise confidential, privileged information with a legal public relations expert does not accidentally or unintentionally waive the traditional attorney-client privilege that extends to key documents and communications.[96]

A. EXTENDING THE ATTORNEY-CLIENT PRIVILEGE TO SOME THIRD PARTIES: *UNITED STATES V. KOVEL*

The attorney-client privilege exists to ensure that clients are able to speak freely with their attorneys in preparation for

litigation without having to fear that anything they say or show to their attorney could be used against them.[97] However, the application of the attorney-client privilege, though still strictly interpreted, is no longer solely limited to attorneys and their clients--the seminal **case** authorizing the expansion of the traditional attorney-client privilege was *United States v. Kovel*.[98] In this **case**, a former IRS agent, Kovel, was hired to assist a law firm specializing in tax law with accounting matters as they arose in **litigation**.[99] Claiming privilege, he refused to answer a question asked during a grand jury inquiry about a client of the firm who was under investigation for alleged Federal income tax violations.[100] Because he was not an attorney, the Assistant United States Attorney prosecuting the **case** said that attorney-client ***695** privilege did not apply.[101] Kovel was sentenced to criminal contempt and appealed his conviction.[102] In its holding, the *Kovel* court applied the traditional attorney-client privilege to conversations between Kovel and the firm's client, even though Kovel was neither the client's attorney nor an attorney at all.[103]

As a result of *Kovel*, in order for the attorney-client privilege to cover communications and documents written by or shared with a third party, courts have held that the third party must be "necessary, or at least highly useful, to the attorney's representation of a client."[104] Generally, there are two categories of relevant third parties to which privilege may be extended.[105] The first consists of those who are essential to the attorney without whom representation of the client would be extremely difficult or even impossible and includes translators, investigators, scientific experts, and accountants.[106] The second group consists of those who serve as agents of the attorney whose work is sufficiently important to deserve protection and includes law clerks, paralegals, assistants, aides, and secretaries.[107] Courts will often extend the attorney-client privilege to these two categories of third parties because their assistance is designed solely to provide legal advice and assist in **litigation**.[108] However, courts have been reluctant to apply the attorney-client privilege to third parties providing business advice or services, as their services fall beyond the scope of the original aim of the attorney-client privilege--the protection of free and open communication between an attorney and their client when preparing for **litigation**.[109]

Though a seemingly straightforward test--if the information is shared with a third party to assist the attorney in their representation of a client it is likely to be protected--questions remain as to whether the attorney-client privilege applies to information shared with legal public relations experts.[110] Despite varied rulings by courts, in order to apply privilege when working with **litigation** public relations experts, it is of the utmost importance that there be a nexus or relation between the work performed by the consultant and the **litigation** or legal advice offered by an attorney.[111] While few **cases** deal directly with the issue of whether ***696** or not information shared with legal public relations experts will remain privileged, the ones that do have been widely cited amongst scholars and arise mainly from the Southern District of New York.[112]

B. DETERMINING WHEN THE *KOVEL* THIRD-PARTY EXCEPTION APPLIES TO THE LITIGATION PUBLIC RELATIONS FIELD

After *Kovel* demonstrated that some third parties could be covered by the attorney-client privilege, courts began to address the extent of how far this would apply to non-legal professionals and whether or not **litigation** public relations experts would be included.[113] The answer is often unclear.[114] Two noted **cases** upholding the application of attorney-client privilege to legal public relations consultants are *H.W. Carter & Sons, Inc. v. The William Carter Co.*[115] and *In re Copper Market Antitrust **Litigation***.[116] In 1995, the court in *H.W. Carter* upheld the application of attorney-client privilege to discussions between defendant, counsel, and a public relations consultant because "[t]he public relations consultants participated to assist the lawyers in rendering legal advice, which included how defendant should respond to plaintiff's lawsuit."[117] Additionally, in 2001, in *In re Copper Market Antitrust **Litigation***, one of the parties argued that privilege was waived when key documents were shared with public relations and government affairs consultants.[118] The District Court found the consultants to be an agent of the client constituting an independent contractor status, or a functional equivalent of a company employee, whose documents made "for the purpose of facilitating the rendition of legal services" are protected by the attorney-client privilege.[119]

Though the Southern District for New York has found the attorney-client privilege to apply to work involving legal public relations consultants in some instances, it has chosen not to apply the attorney-client privilege in others. In *Rattner v. Netburn*, the court held that a press release prepared by a client's ***697** attorney was not privileged as, "the privilege governs the performance of duties by the attorney as legal counselor, and if he chooses to undertake additional duties on behalf of his client that cannot be so characterized, those activities and communications in furtherance of them are not privileged."[120] Similarly, in *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, the court held that a memo on media disclosures was not to be protected by attorney-client privilege because it concerned business advice rather than legal advice.[121] Additionally, in

Haugh v. Schroder Investment Management North America Inc., a public relations consultant was hired in relation to an employment age discrimination **case**.[122] However, the privilege did not extend because merely standard public relations services were rendered.[123] As a result, the court found no nexus between the consultant's work and the attorney's role in preparing the plaintiff's complaint or the plaintiff's **case**.[124]

In one of the most oft-cited **cases**, *Calvin Klein Trademark Trust v. Wachner*, decided merely one year prior to the *Copper Market* **case** and involving the same public relations firm, Robinson Lerer & Montgomery, the Southern District for NewYork chose not to apply the attorney-client privilege to documents requested by opposing counsel from the public relations firm.[125] Here, the court stated the mere possibility that a public relations firm might help a law firm formulate legal advice is insufficient to extend attorney-client privilege.[126] By acting in a more traditional public relations role reviewing coverage, making comments, and finding friendly reporters, rather than assisting lawyers to develop their **case**, the public relations firm simply aided the lawyers in assessing the probable public reaction.[127] They did not "enabl[e] counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice" in the same way that a translator or accountant might.[128] The court further justified its decision not to apply privilege to the documents because very few documents contained "confidential communications that were originally made for the purpose of seeking legal advice," a preexisting relationship existed between the public relations firm and the plaintiffs, and the public relations firm acted solely in a public relations capacity providing ordinary advice.[129] Merely strategizing about "the effects of the **litigation** on the client's customers, the ***698** media, or on the public generally" was insufficient to substitute for the "zone of privacy for strategizing about the conduct of **litigation** itself" that the rule is designed to protect.[130]

IV. RECOMMENDATIONS: THE NEED FOR CLEAR RULES ON WHEN PRIVILEGE APPLIES

At the end of the day, attorneys face a dilemma--many wish to zealously advocate both inside and outside the courtroom on behalf of their clients, but doing so provides little guarantee that any public relations work done on behalf of a client will remain shielded by privilege.[131] As Ann M. Murphy highlighted, "A media campaign is not a **litigation** strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform the coordination of a campaign into legal advice."[132]

Due to the current and conflicting state of **case** law, "lawyers should assume that their communications with public-relations consultants are potentially not protected by attorney-client privilege" and should "[expect] that any written communications will be subject to disclosure to the opposing party."[133] Others have recommended that "[attorneys] are better off not having the [public relations] person in the room when talking strategy, especially when ... rendering a critical legal analysis."[134] In order to extend privilege to work performed by public relations consultants, attorneys must be able to show a nexus between the consultant's work and the attorney's role in preparing a **case**.[135] Without such a link, anything disclosed to a consultant almost certainly will fall beyond the scope of attorney-client privilege and be subject to discovery and subpoena.[136] As a result, some attorneys might choose to handle the public relations work themselves; however, even this is not immune to discovery.[137] For example, In *Burton v. R.J. Reynolds Tobacco Co.*, neither outside counsel nor consultants was ***699** involved.[138] Reynolds' own attorneys prepared the documents without any assistance.[139] Yet, the court held that the documents were not privileged, finding that when attorneys perform non-legal functions those communications will not be protected by privilege.[140]

Additionally, while courts have made some suggestions about how attorneys can strengthen their arguments to maintain attorney-client privilege when working with a legal public relations consultant, none of these suggestions are foolproof. In *In re Grand Jury Subpoenas*, the court held that the attorney-client privilege protects "(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** ... (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems."[141] Furthermore, in *In re New York Renu with Moistureloc Product Liability **Litigation***, the court suggested that in order to maintain attorney-client privilege over communications with a public relations firm, the attorney, not the client, should be the one to hire the public relations firm.[142] However, merely having the attorney hire a public relations firm does not necessarily ensure that attorney-client privilege will extend to communications.[143] There remain instances where courts have held that the public relations firm was performing business, not legal, services for the client through the attorney, and, as such, information shared was not privileged.[144]

Because the status of **case** law remains inconsistent and unclear, both across jurisdictions and even within, there is a need for

uniformity and clear guidance. The current state of **case** law is insufficient to define the circumstances in which a legal public relations professional is facilitating the attorney's ability to render legal advice; yet, the complexity of **high-profile cases** will often require attorneys to retain such professionals.[145]

In the absence of clear and consistent black letter law that is on point, many law firms have developed guidelines and recommendations for attorneys regarding how to maintain privilege when working with legal public relations firms.[146] Many of these articles outline similar strategies: clearly delineate the consultant's role in engagement letters, have the attorney hire and bill the public ***700** relations firm, ensure the public relations team used is not the same one used by a client in day-to-day business, and develop strict guidelines regarding the confidentiality of all documents and communications.[147] These strategies remain consistent with recommendations found in **case** law and are beneficial to practitioners; yet, even following these steps closely remains insufficient to guarantee that courts will uphold the application of attorney-client privilege to work shared with a public relations expert.[148] In a true crisis situation, there are often many moving parts and much going on. This creates an issue when attorneys believe documents to be privileged, only to later have a court find otherwise.[149]

As the legal public relations profession does not appear to be disappearing anytime soon, the ABA, with its established credibility in the legal field, ought to convene a committee consisting of judges, attorneys, and public relations professionals to address the role of Model Rule 3.6 and the attorney-client privilege in light of the use of legal public relations professionals and other consultants. Such a committee should aim to develop clear guidance for attorneys in hopes of achieving clarity in what remains a very murky area. With the "norms and rules" of legal advocacy in the court of public opinion constantly changing, it is important for the ABA to clearly understand the modern role of the lawyer as advocates for their client.[150] While earlier ABA commissions and committees were created to address the appropriateness of an attorney speaking publically about ongoing or future **litigation**, resulting in changes to the *Canons* and *Model Rules* to reflect their findings, these commissions included little about what happens when a consultant or proxy speaks on behalf of an attorney or a client.[151] Though ultimate decisions of attorney-client privilege in discussions with third parties will remain left to the courts, the role of an organization such as the ABA would likely be influential to both attorneys and judges in at least providing the first steps towards developing a consistent, uniform approach for applying attorney-client privilege to the use of **litigation** public relations professionals.

CONCLUSION

As the media evolves into the digital age, it has become easier than ever for attorneys and others to start conversations regarding ongoing **litigation** and ***701** become part of existing conversations surrounding **litigation**.[152] Where the line between legal communications and business communications exists for legal public relations professionals and those looking to hire them remains subject of much debate.[153] The issue of whether attorneys may utilize a public relations consultant or firm as part of the attorney's legal team while preserving privilege remains unclear.[154] However, as Justice Kennedy made clear in *Gentile*, the modern role of an attorney neither starts nor ends at the doors to a courtroom.[155] Therefore, it is essential for uniformity in the application of attorney-client privilege to exist in order to provide guidance to attorneys looking to enlist the services of legal public relations professionals. For the reasons stated above, current **case** law is insufficient to do so. As a result, the ABA should use its influence to develop a set of guidelines that both attorneys and judges can look to when determining whether or not attorney-client privilege should apply.

Footnotes

a1 J.D. Georgetown University Law Center (expected May 2016); B.A. Vassar College (2012). © 2015, Meghan Levine.

1 *See* Ann M. Murphy, *Spin Control and the **High-Profile** Client-Should the Attorney--Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 546 (2005) ("The public seemingly has an insatiable appetite for these **cases**.").

2 Deniza Gertsberg, *Should Public Relations Experts Ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443, 1444 (2004).

[3] *Id.*

[4] *See* Murphy, *supra* note 1, at 546.

[5] *See* Gertsberg, *supra* note 2, at 1445 ("Lawyers cannot be sure that confidential information and communications exchanged with a public relations firm will be protected by the attorney-client privilege.").

[6] *See* Amor A. Esteban & Makai Fisher, *Is There A Spin-Doctor in the House? Public Relations Consultants & Potential Waiver of Confidentiality (Ethical & Practical Considerations of Involving Public Relations Consultants)*, 9 SEDONA CONF. J. 157, 158 (2008).

[7] *Id.*

[8] *See id.*

[9] *See id.*

[10] Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816 (1995) (stating that amidst the press's coverage of Burr's treason trial, concerns arose about the former vice president's ability to get a fair trial).

[11] *See id.*

[12] *See id.* This standard set forth by Chief Justice Marshall, determining whether jurors could still reach a verdict based upon the testimony and the law despite mass media coverage, continues to guide trial courts today.

[13] *Id.*

[14] *See id.*

[15] *Id.* at 1816-17.

[16] Moses, *supra* note 10, at 1816-17.

[17] *Id.* at 1817 (internal quotation marks omitted).

[18] *See* CANONS OF PROF'L ETHICS Canon 20 (1908) [hereinafter 1908 CANONS].

[19] *See* Commonwealth v. Sacco, 255 Mass. 369 (1926) (on appeal); State v. Hauptmann, 115 N.J.L. 412 (1935); *see also* Moses, *supra* note 10, at 1817.

[20] *See* PAUL MARK SANDLER, RAISING THE BAR: PRACTICE TIPS AND TRIAL TECHNIQUES FOR YOUNG

MARYLAND LAWYERS 339 (The Maryland Institute for Continuing Professional Education of Lawyers, Inc. ed., 2d ed. 2010).

21 *See* Ronald D. Rotunda, *Dealing with the Media: Ethical, Constitutional, and Practical Parameters*, 84 ILL. B.J. 614, 620 (1996).

22 *See id.*

23 *See* Moses, *supra* note 10, at 1818.

24 Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring).

25 Estes v. Texas, 381 U.S. 532 (1965).

26 *Id.* at 548-49.

27 Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

28 *See* Moses, *supra* note 10, at 1820.

29 *Id.*

30 *See id.* at 1819.

31 *See id.* at 1820-21 (asserting that the placement of blame on members of the press, rather than members of the legal profession stretched back to the Burr trial).

32 *Id.* at 1821-22.

33 Moses, *supra* note 10, at 1821-22.

34 *See* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto,"* 22 STAN. L. REV. 1163, 1170 (1970) (quoting Schenck v. United States, 249 U.S. 47 (1919)).

35 Moses, *supra* note 10, at 1822.

36 *Id.* (citing Model Code of Professional Responsibility EC 7-33 (1988)).

37 *Id.* (citing American Bar Association, Standards elating to Fair Trial and Free Press 77, 92 (1966)).

38 *See id.*

39 *See id.* at 1823.

40 Moses, *supra* note 10, at 1823-24.

41 *Id.* at 1824.

42 *Id.*

43 *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 3.6 (1978) [hereinafter MODEL RULES]).

44 *Id.*

45 *Id.*

46 Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991); *see also* Moses, *supra* note 10, at 1826.

47 Gentile, 501 U.S. at 1039-42.

48 *See id.*

49 *See id.* at 1030.

50 *See id.* at 1031.

51 *See id.* at 1030-31. Note, though the "substantial likelihood" test was upheld, the disciplinary conviction against Gentile was ultimately overturned by the Supreme Court.

52 *Id.* at 1074; Moses, *supra* note 10, at 1828.

53 Gentile, 501 U.S. at 1043.

54 Moses, *supra* note 10, at 1816.

55 *See id.* at 1825.

56 *Id.* at 1827.

57 *See* Gertsberg, *supra* note 2, at 1463 (discussing how many attorneys have "begun to recognize that if they do not step into the spotlight and attempt to explain the situation, their client will experience difficulty obtaining a fair trial"); *see also* John C. Watson, ***Litigation*** *Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 90-91

(2002) (discussing how one unnamed prosecutor was surprised that Los Angeles District Attorney Gilbert L. Garcetti chose to move for an indictment in the O.J. Simpson **case**, rather than a preliminary hearing which would've allowed the "most damning evidence into the press and to the public").

[58] *See generally* **LITIGATION** PUBLIC RELATIONS: COURTING PUBLIC OPINION (Susanne A. Roschwalb & Richard A. Stack eds., 1995), 231.

[59] *See* Moses, *supra* note 10, at 1813-14.

[60] James E. Lukaszewski, *Managing* ***Litigation*** *Visibility: How to Avoid Lousy Trial Publicity*, PUB. REL. Q., Spring 1995, at 18.

[61] Watson, *supra* note 57, at 96.

[62] *See* Watson, *supra* note 57, at 89, 97 (citing Carole Gorney, ***Litigation*** *Journalism is a Scrouge*, N.Y. TIMES, Feb. 15, 1993, at A15) (citing William H. Fortune et al., Modern **Litigation** and Professional Responsibility Handbook 279 (1996)).

[63] *See* Watson, *supra* note 57, at 85-86.

[64] *See id.* at 83.

[65] *See id.*

[66] *See id.*

[67] *See* Lukaszewski, *supra* note 60, at 18.

[68] *See* Watson, *supra* note 57, at 83.

[69] *Id.*

[70] *Id.* at 97.

[71] *Id.*

[72] *Id.* (internal quotation omitted).

[73] *Id.*

[74] *Id.* at 86 (discussing how amongst studies seeking to analyze the effects of **litigation** public relations, no consensus has been reached).

75 *See* Gertsberg, *supra* note 2, at 1461 (recognizing that the reach of sensational media has grown "exponentially" from merely print and television due to the availability of numerous sources that can "deliver the information at incredible speeds"); *see also* Mark Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167, 1171 (discussing how the advent of outlets such as Court TV, competition amongst cable television stations, and other programming outlets has resulted in saturation coverage).

76 **LITIGATION** PUBLIC RELATIONS: COURTING PUBLIC OPINION, *supra* note 58.

77 Watson, *supra* note 57, at 95.

78 Phil S. Goldberg, *Managing Publicity: **Litigation** Communications in the Age of Trial By Media*, 47 No. 1 DRI for Def. 52 (2005).

79 *See id.*

80 *Id.*

81 *See id.*; *see also* Gertsberg, *supra* note 2, at 1463 ("While the rules of Professional Responsibility caution lawyers from contacting the media, many practitioners have begun to recognize that if they do not step into the spotlight and attempt to explain the situation, their client will experience difficulty obtaining a fair trial and may self-incriminate by responding to media attacks."); Colleen T. Davies et al., *PR That's Protected*, CORP. COUNS. (Reed Smith, Pittsburgh, P.A.), Oct. 2014, at 1 (discussing the ability of attorneys to advise their clients of the legal risks associated with speaking publicly and of the likely legal impact of "possible alternative expressions").

82 Joseph L. Daly, *What Can the Defense Attorney Say at a "Pre-Formal Charge" Press Conference? Gentile v. State Bar of Nevada Puts a Porous Gag on Trial Lawyers*, 15 AM. J. TRIAL ADVOC. 269, 269-70 (Winter 1991-92).

83 *See* Goldberg, *supra* note 78; *see also* Gertsberg, *supra* note 2, at 1444, 1475 (discussing how attorneys are "taught how to **litigate**, negotiate, and practice law according to precedent" and not how to "'spin"' and how ill-prepared attorneys who feel a compulsion to respond to harmful coverage may actually injure, instead of aid, the client's **case** by speaking publically).

84 *See* Goldberg, *supra* note 78; Gertsberg, *supra* note 2, at 1475.

85 *See* Goldberg, *supra* note 78.

86 *Id.*

87 *See id.* ("What makes **litigation** communication specialists 'experts' is that, in addition to being well-versed in media relations, they need to understand the legal world.").

88 *See* Esteban & Fisher, *supra* note 2, at 158; *see also* Gertsberg, *supra* note 2, at 1445 (discussing how lawyers cannot be certain that information exchanged with a public relations firm will remain privileged and how this uncertainty can have harmful effects as clients may not be as willing to engage in frank conversations with their attorney if they have knowledge that privilege may not apply).

89 *See* Gertsberg, *supra* note 2, at 1452.

90 *See id.* at 1445, 1450.

91 *See generally* Murphy, *supra* note 1, at 591 (discussing how without privilege communications may become subject to discovery).

92 Gertsberg, *supra* note 2, at 1446.

93 *See id; see also* Murphy, *supra* note 1, at 581 (discussing how courts have decided many of the **cases** involving public relations consultants based upon "whether or not the communication actually concerned legal advice").

94 *See* Gertsberg, *supra* note 2, at 1446.

95 *See id.* at 1472.

96 *See* Goldberg, *supra* note 78.

97 *See* Gertsberg, *supra* note 2, at 1447-48.

98 *Id.* at 1456.

99 *Id.*

100 United States v. Kovel, 296 F.2d 918, 919 (2d Cir. 1961).

101 *Id.*

102 *Id.*

103 *See id.*

104 Gertsberg, *supra* note 2, at 1457.

105 *See id.*

106 *See id.*

107 *See id.*

108 *See id.* at 1457-58.

109 *See id.* at 1458 (discussing how "parties who provide business advice are not considered privileged because the information is not considered 'legal advice.'").

110 *See* Murphy, *supra* note 1, at 581 (highlighting the challenges that arise when attempting to differentiate between legal advice and business advice).

111 *See* Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000); *see also* Haugh v. Schroder Inv. Mgmt. N. Am. Inc., No. 02 Civ. 7955 DLC, 2003 WL21998674 at *3 (S.D.N.Y. 2003); Rattner v. Netburn, No. 88 CIV. 2080(GLG), 1989 WL 223059 (S.D.N.Y. 1989).

112 *See, e.g.*, Murphy, *supra* note 1, at 570-78.

113 *See* Meaghan G. Boyd & Sarah T. Babcock, *The Attorney-Client Privilege and Communications Between Counsel and Public-Relations Consultants*, 22 THE ENVTL. **LITIGATOR** 1 (Fall 2010).

114 *Id.*

115 *See* H.W. Carter & Sons, Inc. v. The William Carter Co., No. 95 Civ. 1274 (DC), 1995 WL 201351 (S.D.N.Y. 1995).

116 *See In re* Copper Mkt. Antitrust **Litig**., 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

117 H.W. Carter & Sons, Inc. v. The William Carter Co., No. 95 Civ. 1274 (DC), 1995 WL 201351 (S.D.N.Y. 1995) (citing United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (paraphrasing that "attorney-client privilege protects communications made in presence of third parties who are there to assist lawyers in rendering legal advice") and United States v. Brown, 478 F.2d 1038, 1040 (7th Cir. 1973) ("[T]he attorney-client privilege may in some instances extend to communications to accountants providing assistance to an attorney, ..." if "'made in *confidence* for the purpose of obtaining *legal* advice *from the lawyer*.'") (emphasis in original)).

118 *In re* Copper Mkt. Antitrust **Litig**., 200 F.R.D. 213, 216-17 (S.D.N.Y. 2001).

119 *Id.*

120 Rattner v. Netburn, No. 88 CIV. 2080(GLG), 1989 WL 223059 at *5 (S.D.N.Y. 1989).

121 *See* Murphy, *supra* note 1, at 570-71.

122 Haugh v. Schroder Inv.t Mgmt. N. Am. Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674 (S.D.N.Y. 2003).

123 *Id.*

124 *See* Murphy, *supra* note 1, at 578; *see also id.*

125 *See* Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

126 *See id.*

127 *See id.* at 54-55.

128 *See id.* at 55.

129 *Id.*; *see also* Gertsberg, *supra* note 2, at 1469.

130 Esteban & Fisher, *supra* note 6, at 159.

131 *See id.* at 158; *see also* Gertsberg, *supra* note 2, at 1445 ("Lawyers cannot be sure that confidential information and communications exchanged with a public relations firm will be protected by the attorney-client privilege.").

132 Murphy, *supra* note 1, at 578 (citation omitted).

133 Boyd & Babcock, *supra* note 113.

134 Che Odom, *Keep Privilege in Mind While Drafting Crisis Management Plan, Panelists Say*, CORP. LAW & ACCOUNTABILITY REPORT, http:// www.bna.com/keep-privilege-mind-n17179890136/ (last visited Feb. 26, 2015).

135 *See* Gertsberg, *supra* note 2, at 1478 (describing how attorneys must show a judge that they "required the assistance and advice of a public relations expert for the purposes of the representation" when communications are challenged).

136 *See id.* at 1481 ("What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.").

137 *See* Murphy, *supra* note 1, at 576 (discussing how, in *Burton*, though "neither outside nor inside public relations consultants were involved in the **case**," the communications at issue remained beyond the scope of the attorney-client privilege).

138 *See* Burton v. R.J. Reynolds Tobacco Co., 200 F.R.D. 661, 669 (D. Kan. 2001).

139 *See id.*

140 *See id.*

141 *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003).

142 *In re* New York Renu with Moistureloc Prod. Liab. **Litig**., 2008 WL 2338552 (S.C. 2008).

143 *See* Gertsberg, *supra* note 2, at 1479.

144 *See id.*

145 Michael N. Levy & Todd A. Ellinwood, *The Applicability of the Attorney-Client Privilege to Non-Attorney Members of the Legal Team*, WHITE COLLAR/INVESTIGATIONS & ENFORCEMENT (McKee Nelson LLP, Washington, D.C.), Spring 2005.

146 *See, e.g.*, Davies et al., *supra* note 81; Boyd & Babcock, *supra* note 113; David Jacoby & Judith S. Roth, *Attorneys and Public Relations Consultants: Privileged or Perilous Communications?*, **Litig**. Committee Newsl. (Schiff Hardin LLP, New York, N.Y.), Sept. 2008; James B. Kobak, Jr. & Renee C. Redman, *Protecting Claims of Privilege for Communications with Public Relations Consultants*, Antitrust Advisory (Hughes Hubbard, New York, N.Y.), Aug. 2003.

147 Davies et al., *supra* note 81, at 2.

148 *See* Gertsberg, *supra* note 2, at 1479.

149 Michael O'Keeffe, *Roger Clemens Suffers Legal Setback vs. Brian McNamee*, N.Y. DAILY NEWS, Feb. 5, 2014.

150 Moses, *supra* note 10, at 1813.

151 *See id.* at 1820 (discussing various existing ABA approaches to develop rules focusing on lawyers).

152 *See* Brielynne Neumann, *The 21st Century Online Carnival Atmosphere: Ethical Issues Raised by Attorneys'Usage of Social Media*, 27 GEO. J. LEGAL ETHICS 747, 757, 762 (discussing how "the push to embrace technology has been extensive in the legal community" and expressing how, despite the many benefits to attorney use of social media, attorneys must remain mindful of their ethical obligations).

153 *See* Watson, *supra* note 57, at 86.

154 Odom, *supra* note 134.

155 Gentile v. State Bar, 501 U.S. 1030, 1043 (1991).

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University of Illinois Law Review
2015

Note

THE PRIVILEGE OF PR: EXTENDING THE ATTORNEY-CLIENT PRIVILEGE TO CRISIS COMMUNICATIONS CONSULTANTS

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The attorney-client privilege and work-product doctrine recognize the indispensability of free and frank communications between clients and attorneys for zealous legal counsel in an adversarial justice system. With the rise of citizen journalists seeking to expose wrongdoing and render justice in the "court of public opinion," zealous legal representation today necessarily requires consideration of public relations ("PR") strategies. While courts have recognized the importance of PR strategies in the rendering of legal advice, they have not consistently afforded attorney-client privilege or work-product protection to communications with external ***litigation*** *or crisis PR specialists. This uncertainty must be resolved with an easily administrable rule upon which attorneys, clients, and PR specialists can rely when responding quickly to crises. This Note first surveys and categorizes the varying approaches courts have taken to address the issue and recommends that courts consider the presence of PR specialists as an exception to waiver and expand application of the attorney-client privilege to include legal communications between lawyers,* ***litigations****, and PR consultants.*

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*1288 I. INTRODUCTION

With the rise of social media and citizen journalists, information spreads more quickly than ever. News and commentary need not be filtered through an editorial department before becoming available to the general public, triggering valid concerns for a fair trial amidst negative publicity for clients anticipating **litigation**.[1] In this challenging environment, legal counsel must balance ethical pressures of protecting client confidences from discovery while also zealously representing their best interests in the court of public opinion.[2] Recognizing these complexities, corporate general counsels have reported that their first call following the realized risk of **litigation** (after outside counsel) is often to a public relations ("PR") firm to manage investor concerns and other repercussions that may be induced by negative public sentiment.[3]

Although many courts have recognized the importance of the PR function to the lawyer's role, proper protection is not yet afforded to communications with external **litigation** or crisis PR specialists who may be necessary for expert counsel. No clear rules exist to outline the best methods of engagement, and courts are divided regarding whether to apply, and if so, how to apply, both the attorney-client privilege and work-product privilege to communications with enlisted PR support. This uncertainty and the resulting inability to predict which approach a court ***1289** will employ is especially problematic to **high-profile litigants** and lawyers seeking to provide the most effective counsel to their clients.

In response to this problem, this Note first traces the historical background for applying the attorney-client privilege to third parties and illustrates the increasing importance of strategic PR to companies and individuals facing **litigation**. Part III then outlines the various approaches courts have taken to applying the privilege, ranging from a blanket rejection, to granting based on specific elements, to extending only selective work-product privilege. This Part will go in-depth to analyze six of the most common considerations courts have stressed in applying the attorney-client privilege specifically to PR firms, including (1) the duration of the PR firm's relationship with the client; (2) the party enlisting the PR firm; (3) the type of services provided by the PR firm (using the agency theory analysis); (4) the functional equivalence test; (5) the common legal interest exception to waiver of the privilege; and (6) enlisting the PR firm as a nontestifying expert. Part IV then addresses the problem with such inconsistent approaches and fallacies with current suggestions, recommending that courts protect communications with PR specialists under the attorney-client privilege as an exception to waiver.

II. BACKGROUND

Before analyzing recent trends in application of the attorney-client privilege to PR communications in Part III, this Part traces the origins and development of the privilege as applied to third-party consultants and then illustrates the increasing importance of PR and PR consultants to effective legal counsel.

A. Attorney-Client Privilege for Third-Party Consultants Generally

1. The Privilege

The attorney-client privilege is the oldest common law privilege for confidential communications.[4] Its purpose "is to encourage full and frank communication between attorneys and their clients," recognizing that sound legal advice serves important public purposes and depends upon the lawyer being fully informed by the client.[5] By being fully informed of all relevant information, the lawyer can encourage compliance with the large body of public law, which "facilitate[s] the administration of justice." ***1290** [6] Thus, the privilege serves an important societal interest because effective legal counsel requires clients to disclose all relevant information.[7] Scholars have argued that all components of crisis management following the risk or onset of **litigation** -- from message development to correcting misinformation and later reputation management -- are based on the attorney's ability to gather information and thus, similar policy concerns are in play.[8]

The attorney-client privilege is created:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[9]

The privilege extends to communications, including writings, but not to underlying factual considerations surrounding the communication.[10]

Generally, communications with nonlawyers are included if the services are necessary to promote the lawyer's effectiveness.[11] However, many courts believe the privilege should be narrowly construed,[12] and courts vary in their application of the privilege to third parties who may be directly or indirectly involved in the **litigation**. The rationale for limiting its expansion is rooted in balancing the client's right to effective counsel against the public's right to evidence, noting specifically that this evidence may aid society in solving crimes and vindicating victims[13] and that the attorney-client privilege is "a barrier to learning the truth."[14] Thus, the Supreme Court has held that "it protects only those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege."[15]

The Court in *Upjohn* resolved conflicting federal court opinions, holding that "employees personify the corporate entity so that their communications with . . . counsel can be considered attorney-client ***1291** communications."[16] The Court adopted a **case**-by-**case** approach emphasizing the underlying policy of the attorney-client privilege to facilitate the flow of information between corporate employees and attorneys for sound legal advice,[17] highlighting that in order for the lawyer to obtain all relevant information, it may be necessary to speak with lower level employees about matters within the scope of their employment.[18] In its decision, the Court considered whether: "(1) the information helped the attorney provide legal advice; (2) the communications related to the employees' corporate duties; (3) the employees were sufficiently aware that they were being questioned; and (4) communications were considered and kept 'highly confidential.'"[19]

Given the complexity of the corporate landscape, businesses and their legal counsel are increasingly relying on third parties, such as "accountants, investment bankers, PR specialists, and other types of professional consultants" to gain the most informed legal advice.[20] As corporations have downsized and outsourcing has increased, businesses are increasingly hiring external consultants to be a part of their teams.[21] Outside the corporation, the privilege generally is considered waived when the client voluntarily discloses an otherwise confidential, privileged communication to a third party.[22]

2. Waiver Exceptions

Exceptions to waiver of the attorney-client privilege for third parties typically apply only when the third party is considered an agent of the attorney or client or when the third party is the functional equivalent of the client's employee.[23] These exceptions still require that the communications are predominantly legal or made primarily to generate legal advice versus purely business counsel.[24]

Under the agency theory developed in *United States v. Kovel*, courts extend the privilege to communications with third-party agents when the agent is *needed* to accomplish the attorney's work.[25] In *Kovel*, the court was prepared to extend the attorney-

client privilege to protect communications between the lawyer, client, and an accountant employed by the ***1292** law firm to help understand the accounting complexities of the client.[26] The court analogized the accountant to an interpreter translating a foreign language.[27]

When construed narrowly, courts interpret *Kovel* to apply only to third parties whose services are *necessary* for the attorney and client to effectively communicate, or when the third party is used to "interpret information the client already has to improve comprehension between [the] attorney and [the] client."[28] In *United States v. Ackert*, the court did not extend privilege to an investment banker who met with the client's internal tax counsel to gauge the tax implications of the legal and financial ramifications of the investment banker's suggestions.[29] Since the banker did not translate client communications or enable counsel to understand aspects of the client's own communications that could not otherwise be understood to provide proper legal advice, the court said that the privilege did not apply.[30] Courts using this narrow approach often reason that construing the privilege too broadly would allow companies to conceal otherwise discoverable information, obstructing fair resolutions and access to available evidence.[31]

When construed broadly, courts allow the privilege to extend to services that *facilitate* the attorney's ability to provide legal advice.[32] For example, in *Englin Federal Credit Union v. Cantor, Fitzgerald Security Corporation*, the court explained that privilege would extend to an accountant assisting the client so long as the accountant was "consulted in connection with the client's obtaining legal advice."[33] Proponents of this broad application stress that it actuates the intent of the attorney-client privilege to facilitate the free flow of communication necessary to providing effective counsel.[34]

When applying the functional equivalence test, courts question whether the third party is a "functional equivalent" of the corporate client's employees (essentially extending *Upjohn*'s inclusion of employees as retaining privilege existing between their employer and counsel).[35] ***1293** Under this approach, courts rationalize that there is no reason to differentiate an external third party from an employee when both occupy the same sensitive and continuing position.[36] Looking to the role the quasi-employee plays within the company and how he or she is treated is critical to demonstrate that they are a "quintessential insider of [the] business on every aspect."[37] In assessing whether a third party is functionally equivalent to a company's employee, courts often look for a "commonality of interest" with the employer, the context of the work and role of the third party, and who hires the party.[38] For example, in *In re Bieter Co.*, the Eighth Circuit used this approach and found that the company's hired development consultant was "in all relevant respects the functional equivalent of an employee."[39] The court reasoned that this classification was appropriate because the consultant was regularly retained, often the sole company representative at meetings, and possibly the only person to possess information regarding the transaction at issue in the **litigation**.[40]

B. Increasing Importance of Crisis Communications

Traditionally, law was viewed as a separate discipline from PR, and many believed that corporate legal services did not, and should not, include PR concerns.[41] In fact, many courts and bar associations believed **litigation** should be decided "exclusively in court," discouraging lawyers from making extrajudicial statements.[42] Emphasizing that the courtroom was "the place to settle the issue,"[43] these courts stressed that each party is entitled to an impartial tribunal free from comments or media coverage tending to influence and prejudice a judge or jury.[44] Although courts must balance the attorney's First Amendment right to free speech with the **litigant's** Sixth Amendment right to a fair trial, many questioned whether the **litigant** could obtain a fair trial despite juror exposure to publicity.[45]

***1294** Beginning in the late 1880s, state legal ethics codes answered this tension by limiting lawyer-press contact to control trial publicity.[46] In 1908, the American Bar Association ("ABA") subsequently adopted a rule against lawyers participating in publicity in the Canons of Legal Ethics.[47] The rule stated that "[n]ewspaper publications by a lawyer as to pending or anticipated **litigation** may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned."[48]

With time, the press became increasingly interested and aggressive in its legal commentary. Famed journalists published photos of alleged defendants and called for their execution before criminal trials began.[49] Responding to these pressures, Supreme Court Justice Frankfurter noted that each term, the Court was importuned to review nationwide **cases** "in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts."[50]

Accordingly, rules against lawyer-media communication were increasingly scrutinized as violating the lawyers' First Amendment rights. For example, in *Chicago Council of Lawyers v. Bauer*, the Seventh Circuit held that blanket prohibitions against such communications would restrict even trivial, innocuous statements to the press, and that such a broad prohibition would be inconsistent with the First Amendment.[51]

The Supreme Court addressed the issue for the first time in *Gentile v. State Bar of Nevada*.[52] In *Gentile*, a criminal lawyer who held a press conference following his client's indictment was charged by the State Bar of Nevada.[53] The lawyer was charged for violating the state's rule prohibiting a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding.[54] However, in rejecting the state bar's allegation against the lawyer, Justice Kennedy's concurrence noted that,

***1295** 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 . . . .[55]

In line with *Gentile*, the importance of consultants to an attorney was illustrated in *United States v. Nobles*, where Justice Powell recognized that the modern legal environment often requires attorneys to rely on the assistance of investigators and other agents to compile materials in preparation for trial; thus, he argued protection should be extended to those who assist the attorney in this preparation.[56]

The expanded role of an attorney is particularly emphasized during **high-profile** criminal **cases**. For example, recent **cases** such as Rodney King's multi-million dollar police brutality lawsuit against the City of Los Angeles, the murder of six-year old beauty queen JonBenet Ramsey, and the O.J. Simpson murder trial proved that the public image of the defendant would inevitably become a large factor in the outcome of each **case**.[57] Thus, lawyers increasingly used the media before trial as part of an "image-making strategy," with the hope of impacting future **litigation**.[58]

Despite the ethical controversy that remains, the reality and impact of PR on the outcome of **cases** has also become accepted within the role of the attorney. Courts themselves have recognized extrajudicial strategies by affirming the award of attorney's fees for PR activities during trials.[59] In *Davis v. City and County of San Francisco*, the Ninth Circuit affirmed the district court's award to counsel for time spent giving press conferences and performing other public relations work in a civil rights **case**.[60] In doing so, the court stated that "[w]here the giving of press conferences and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, ***1296** private attorneys do such work and bill their clients," and compared it to compensable attorney work in the political arena.[61]

Proponents of "spin control"[62] argue that these PR functions are necessary to best advocate for and represent the interests of their clients, as clients are often "concerned with the judgment of a number of people and institutions -- not just juries."[63] They argue that "[t]he lawyer's first duty is to be an advocate for his client, . . . [which] [i]mplicates the right of the attorney to speak on the client's behalf."[64] For example, in the criminal context, the client's public image "becomes crucial to a wide variety of interests, including the resolution of the legal issues and the client's ability to find work or live a life free of stigma afterward."[65] Similarly, corporations face broader repercussions if they cannot convince the public (specifically their investors) that the **litigation** will not lead to additional liability and may also be able to influence whether prosecutors will bring criminal or civil charges.[66] Public figures facing **litigation** will also likely be impacted long term by the publicity that will inevitably be attracted to their **cases**.[67] These **high-profile cases** mount extra media pressure on the government to bring charges or enforcement actions as a result of the target celebrity's status.[68] But even public interest clients often depend on influencing branches of government to achieve and enforce the ultimate outcome of their **litigation**.[69]

These concerns highlight why some attorneys must defend their clients' interests in the news media with the same zeal originally required of them in court[70] in order to competently represent their clients (as required by the ABA Model Rules of Professional Conduct).[71] This increased pressure is heightened by the simultaneous expansion of **litigation**-focused ***1297** media, capable of "spinning" legal news.[72] As technology advances, so too do the outlets and mediums from which news is disseminated.[73] Now, television, print, radio, and most recently internet bloggers, can shape and influence the same public that make up the jury pool.[74] Commentary stems from a wider pool of journalists, including citizen journalists, and becomes available to the general public more instantaneously than ever.[75]

Scholars have further noted that failing to consider the court of public opinion as a target when representing and advocating for clients may be a *disservice* by the attorney. Constitutional scholar Erwin Chemerinsky has noted that because trial publicity influences juries, an attorney should counter negative speech in the media to ensure a fair trial by speaking to the media in the client's favor.[76] If only one side decides to speak, he says, it could damage the client because coverage might appear slanted if the other side will not speak to the press.[77] Examples of this have been seen in "media-prosecutor alliances," which may result in sharing unbalanced information.[78] Even if both sides are silent, Chemerinsky says, leaks may occur from anonymous sources or by the other side which require "counter-speech" to neutralize impact in the same way as other negative publicity.[79]

Growing awareness of the realities of public sentiment has made lawyers aware of the necessity for extrajudicial statements in the court of public opinion as they represent clients. PR firms are providing specialized training in **litigation** communication for their own attorneys, and many have developed specific practices to deal with **litigation**-related issues.[80] Many law schools also include PR and media training in their curricula, and the ABA and Bar Leadership Institute now provide media trainings.[81] In 1994, the ABA amended its rule to allow an attorney to "make a necessary response to protect a client from undue prejudicial effect of recent publicity,"[82] which strayed from its previous skeptical ***1298** view of all extrajudicial statements.[83] This change reflects the profession's recognition as a whole of the increasing influence of public sentiment.

It is important to note that despite this proliferation, studies on the tangible influence of media coverage on legal outcomes yield varying results and have not pointed to a definitive benefit.[84] Scholars have also highlighted the inherent tension between PR efforts and legal counsel.[85] Both may try to control the dissemination of information during a **case** but have different perspectives on the substance and timing of the disclosures.[86] For example, **litigation** counsel generally seek to keep information confidential to avoid publishing admissions that could damage the client in the anticipated **litigation**, whereas PR consultants generally want to provide as much information as possible to quickly "frame" public perception and shape the direction of the story before other sources have the first-mover advantage to do so unfavorably.[87]

Nonetheless, representing a client's best interests increasingly involves enlisting the support of specialized crisis PR experts to navigate and influence public sentiment in the court of public opinion, which can, in turn, influence legal outcomes.[88] Courts and lawyers have recognized that "lawyers are 'amateurs' when dealing with **high profile cases** and may require the assistance of [PR] 'consultants"' to complement the lawyers' legal strategy.[89] PR consultants defend the company's public image through traditional media relations but increasingly also advise the **litigation** team in developing defense messages, trial themes, and even trial strategy.[90]

As we accept the increasing role PR concerns and consultants play on legal decisions, it is important to recognize the issues surrounding extension of the attorney-client privilege to these communications. "It is a mistake to assume that a crisis manager . . . who [personally] went to law school and has a law degree will be given the protection of the privilege."[91] Lawyers also should not assume that measures such as blanket ***1299** confidentiality clauses included in PR retention contracts (which state that correspondence between the parties is covered by the attorney-client privilege) will automatically mean that the privilege will be extended to communications with PR consultants in court.[92] Rather, "[i]t is the facts, circumstances, and purpose that determine whether a communication with an attorney will deserve protection."[93] The remainder of this Note will discuss the varying approaches to privilege extension by federal courts and explain why the attorney-client privilege should be expanded to encompass communications with third-party PR consultants to best actuate the underlying policy rationales at the heart of the privilege.

III. ANALYSIS

This Part illustrates that courts vary greatly in the application of privilege to communication with external PR firms. While some courts have refused to include any communication of this nature, others have employed different tests to determine whether the communications warrant protection, or have granted a more limited privilege under the work-product doctrine. Among those courts willing to extend the privilege to PR communications, no clear guidelines exist regarding if and when they will do so. Scholarship to date has not offered a method to synthesize the holdings of the **cases litigating** extension of the privilege. This Note attempts to do so by recognizing the following six factors as the most frequently cited criteria used by courts: (1) the duration of the relationship between the PR firm and the client; (2) the party enlisting the PR firm; (3) the nature of services provided by the PR firm (agency theory); (4) the functional equivalence of the PR firm to an employee of

the client (functional equivalence test); (5) the common legal interest exception to privilege waiver; and (6) whether the PR firm can be classified as a nontestifying expert. Each approach will be analyzed in more detail below.

A. Blanket Rejection of Attorney-Client Privilege

A few courts have asserted a general disapproval of any PR communications claimed under the attorney-client privilege.[94] They believe that evidentiary privileges must be narrowly construed as they "stand[[] in derogation of the search for truth so essential to the effective operation of any system of justice."[95] Skeptical of expansion, these courts note that:

> Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists, or investigators [or, here, a public relations firm] on their payrolls . . . should be able to invest all communications by clients to such persons with a privilege the law ***1300** has not seen fit to extend when the latter are operating under their own steam . . . . It may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status.[96]

These courts simply regard disclosure to a PR consultant as revealing the information to an outside consultant who is not an officer or employee of the corporation, and thus claim that this waives the attorney-client privilege.[97] For example, in *In re NY Renu with Moistureloc Products Liability* ***Litigation***, the court focused generally on the function of PR consultants engaged to assist in defense of **litigation** and denied the privilege to a report prepared by the consultants for counsel.[98] The court said, "communications among attorney, client and public relations agent are not within the privilege because a public relations agent is not necessary to the legal representation."[99]

One of the most frequently cited **cases** asserting that public relations services are not "essential" to providing legal counsel is *Calvin Klein Trademark Trust v. Wachner*.[100] In *Calvin Klein*, the plaintiff retained a communications consultant firm in anticipation of defending a lawsuit to understand **litigation** reactions of the plaintiff's clientele and to ensure that resulting coverage would be handled responsibly.[101] The court found these **litigation** functions to be nothing more than "routine suggestions from a [[PR] firm as to how to put the 'spin' most favorable to [the plaintiff] on successive developments in the ongoing **litigation**."[102] It went on to state that modern clients may come to court "as prepared to massage the media as to persuade the judge[,]" but that the former does not justify extension of the privilege.[103]

Other courts, such as *Haugh v. Schroder Investment Management North American, Inc.*, state generally that "[a] media campaign is not a **litigation** strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their ***1301** coordination of a media campaign into legal advice."[104] Going further, these **cases** often distinguish from *Kovel*, which held that privilege extended to a third-party accountant under agency theory, and state that "[w]hen a consultant is part of attorney-client communications, the privilege is retained only if the consultant's services are necessary to the legal representation" but that "[t] he services of a [PR] consultant are not necessary to the legal representation."[105] This refusal to classify PR advice as legal advice or being necessary for legal advice, and the *Kovel* court's analogy requiring the third-party consultant to serve in a role akin to a translator "has provided the foundation for all subsequent **case** law regarding the applicability of the attorney-client privilege to any nonattorney consultant, not just accountants."[106]

When addressing opposing courts who *have* extended the privilege to communications with PR consultants, rejecting courts reason that this must arise "from unusual and extreme facts and do not involve the basic provision of [PR] advice by a company retained by the client."[107] These rejecting courts, however, are often still amenable to applying the work-product privilege doctrine because the individual documents may qualify as being prepared in anticipation of **litigation**.[108] Part III.C will discuss the application of work-product privilege in more detail.

B. Privilege Extended

The following six factors are the most frequently cited criteria used by courts determining whether to apply the attorney-client privilege to communications with PR consultants. Though courts are inconsistent in their application, this Section illuminates characteristics and analytical approaches used to both grant and deny privilege.

1. Duration of PR Firm Relationship with Client

The duration of the relationship between the PR firm and the client has been highlighted by some courts as a factor to consider in analyzing ***1302** whether the privilege extends to communications with PR consultants. For example, in *Calvin Klein Trademark Trust v. Wachner*, the court denied privilege to communications between the PR firm and the client, noting that at the time the firm was enlisted for **litigation**-related PR services in May of 2000, it "was already working directly for plaintiff . . . pursuant to an agreement dated September 10, 1999."[109] In its decision, the court went on to highlight that "[the firm] does not appear to have been performing functions materially different from those that any ordinary [PR] firm would have performed if they had been hired directly by [the plaintiff] (as they also were), instead of by [its] counsel," emphasizing that the nature of its services between 1999 and 2000 remained similar.[110]

Other courts rejecting the privilege have also highlighted the timing of retention. In *LG Electronics v. Whirlpool Corp.*, the court denied privilege to Whirlpool's communications with its PR firms, specifically noting that the "outside agencies [have] long-term relationships based on Whirlpool's ordinary business dealings and thus do not implicate the same concerns as PR firms retained for the purpose of responding to **litigation**."[111] Similarly, in *Egiazaryan v. Zalmayev*, plaintiff's counsel retained a PR firm to assist with representing the plaintiff in anticipation of legal discussions that would start the following month.[112] In its decision not to extend the attorney-client privilege to these communications, the court noted, among other considerations, that the PR firm was retained before the **litigation** began and that the firm "was not called upon to perform a specific **litigation** task that the attorneys needed" for **litigation**, but rather, that "it was involved in a wide variety of [PR] activities . . . [to] burnish[] [plaintiff's] image."[113]

Accordingly, some courts have been more willing to grant privilege when the PR firm's engagement was specifically prompted by the pending **litigation**.[114] For example, in *In re Copper Market Antitrust **Litigation***, the court specifically noted that the PR firm was retained in direct response to the onset of **litigation** because the defendant had no experience dealing with the American **litigation** environment.[115] The defendant had given a deposition disclosing information that was predicted to prompt a Commodities Futures Trading Commission investigation and other **litigation**.[116] In anticipation of this **litigation**, the defendant retained a crisis ***1303** management firm to handle PR matters arising from the revealed information.[117] The court granted privilege to protect communications between the firm and the company's counsel, highlighting that the defendant had "retained [the firm] to deal with [PR] problems *following* the exposure of the . . . scandal."[118]

Under a similar rationale, the court in *In re Grand Jury Subpoenas Dated March 24, 2003* extended privilege to confidential communications between lawyers and PR consultants hired by the client's lawyers.[119] The court specifically differentiated the rejection of privilege in *Calvin Klein* by noting that "the public relations firm there had a relationship with the client that antedated the **litigation**."[120] However, in *In re Grand Jury Subpoenas*, the defendant had been the matter of intense press interest for months and defendant's attorneys hired the PR firm *after* being prompted by the concern that these inaccurate press reports would publicly pressure prosecutors and investigators to bring charges against the defendant.[121] Thus, retention of the PR firm was prompted specifically by **litigation** and the client's attorneys acted in response to fears resulting from that **litigation**.

While these **cases** indicate that an ongoing relationship will support a finding that the attorney-client privilege does not apply, it is important to note that an ongoing relationship with an outside firm may benefit the party asserting privilege if the court chooses to use the functional equivalence test discussed below to support the assertion that the PR firm is functioning as an employee of the company.[122] Additionally, like the following five characteristics, the duration of the relationship is not determinative; other courts have declined to grant privilege to these communications despite the PR firm being retained specifically in anticipation of **litigation**.[123]

2. Party Enlisting PR Firm

Courts are not uniform in weighing the importance of *who* retains the PR firm. Some courts have specifically noted that to retain privilege, the firm must be hired by legal counsel. For example, in *In re Grand Jury Subpoenas*, where the defendant's attorneys had retained the firm, the court granted privilege, and expressly stated that the client "would not have enjoyed any privilege for her own communications with [the PR firm] if she had hired [it] directly."[124]

1304** The *In re New York Renu with Moistureloc Product Liability* ***Litigation court took a similar approach, extending privilege when the PR firm was not retained by the client.[125] It "made the point at least twice [[in its opinion] that if a party wanted to maintain attorney-client privilege for communications with a [PR] firm, the attorney, as opposed to the client, should hire the [PR] firm."[126]

Additionally, many PR firms have independently stressed this factor to clients and advised clients to retain PR services through their respective legal counsel.[127] If a client already has a preexisting relationship with a PR firm for its day-to-day operations, as was the **case** in *Calvin Klein*, lawyers and PR firms have suggested hiring a different firm for **litigation**-specific support, having the attorney retain the PR firm under a separate engagement letter,[128] and having the [PR] firm send the bill directly to the attorney.[129]

Again, the importance of this factor alone is unclear. Other courts such as in *In re Copper Market Antitrust* ***Litigation*** have granted privilege even when the client retained the PR firm.[130] Most recently, some courts have failed to address who retained the consultant at all and have focused more on the functional elements of the PR firm's contributions, as in *A.H. Evenflo, Co.*.[131] Also of note, some courts have specifically noted that who hires the consultant is not determinative in the context of third-party consultants more generally.[132]

***1305** *3. Nature of Services Provided by PR Firm*

The most common consideration courts have emphasized, and the most difficult hurdle to overcome, is the nature of the services provided by the firm and proving "that the [PR] consultant's participation assisted in the provision of legal advice to the client rather than [simply] furthering an ordinary [PR] purpose."[133] Originating in *Kovel*, this approach is called the agency theory and has been applied to various third parties by focusing on "*how* the third party aids the attorney."[134] As mentioned earlier, some courts have construed this approach narrowly, noting that assistance by third parties must be necessary or nearly indispensable to promote legal effectiveness.[135] Others have interpreted it more broadly to say that the assistance of a PR expert will be privileged if it improves the communication and comprehension of the client's **case** by the lawyer.[136] Still others have insisted that there must be a nexus between the consultant's work and the attorney's role in preparing for court.[137]

Courts distinguish that the privilege does not apply solely because the "communication proves *important* to the attorney's ability to represent the client."[138] They inquire whether the PR firm is necessary to legal representation, citing a tenet of the attorney-client privilege test that all "communication be made in confidence for the *purpose* of obtaining legal advice from the lawyer."[139] More specifically, this is interpreted by practitioners as when "attorneys 'need outside help' [to be able to render] . . . 'legal advice' to the client."[140]

In *Kovel*, the court held that the "client's communications with an accountant employed by his attorney were privileged where made for the purpose of [helping] . . . the attorney [] understand the client's situation . . . to [[competently] provide legal advice."[141] Thus, the services performed by the nonlawyer must be "necessary to promote the lawyer's effectiveness; it is not enough that the services are beneficial to the client in ***1306** some way unrelated to the legal services of the lawyer."[142] Courts go on to describe the assistance provided by the *Kovel* accountant to be essential to the lawyer's basic understanding of the **case**, serving a foundational role analogous to a "translator."[143]

For example, in *In re Grand Jury Subpoenas*, privilege was extended where counsel hired a PR firm in an effort to reduce public pressure on prosecutors to bring charges and secure an indictment against the defendant.[144] The **case** involved a Securities and Exchange Commission insider trading investigation into Martha Stewart's ImClone stock.[145] During the investigation, Stewart's counsel hired a PR firm to balance inaccurate press reports that created a "risk that the prosecutors and regulators . . . would feel public pressure to bring some kind of charge against her."[146] Here, the court endorsed the view that advocacy in the court of public opinion was important to Stewart's ability to achieve a fair trial and that the lawyers' ability to represent its client would be seriously undermined if they could not engage in frank discussions with the PR firm.[147] The court also articulated other examples of PR activities that it believed to impact legal strategy (e.g., deciding when the venue should be changed based on the local state of public opinion, assessing juror dispositions, and teaching effective communication techniques for testimony) and laid out a test to determine if the assistance would be privileged.[148] The court held that the contribution to legal strategy will be satisfied if the PR firm's activities would promote observance of the laws or the administration of justice.[149] Some scholars have noted that this **case** essentially brought PR consultants under the *Kovel*

agency theory by categorizing the PR assistance as directly helping the attorney to formulate legal advice and strategies.[150] Subsequent **cases**, however, have limited the application of this test to PR consultants only in grand jury investigation circumstances.[151]

***1307** The key component in both *Kovel* and *In re Grand Jury Subpoenas* was that counsel (1) needed "outside help" in specialized areas where they lacked expertise and which directly impacted their legal strategy and processes, and (2) the consultants were retained by counsel for that purpose, rather than to provide ordinary accounting or PR services.[152]

Even courts denying privilege, such as in *Egiazaryan v. Zalmayev*, have cited *Kovel* and noted that the general exception to vitiating attorney-client privilege in the presence of a third party depends on whether the disclosure was "necessary for the client to obtain informed legal advice."[153] They clarify that necessity means "more than just useful and convenient, but rather requires that the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."[154] While the vast majority of courts agree that standard publicity services do not fall within the scope of privileged communication, courts will look to the specific activities of the enlisted consultant to determine if the activities fall under the strict categorization of being *necessary* for legal advice.[155]

4. Functional Equivalence Test for PR Services

The second most frequently used test in recent **cases** to determine whether privilege extends to PR firm communications is the functional equivalence test.[156] This test determines whether the third-party consultant is the functional equivalent of an employee of the client, or a de facto employee of the company, to whom privilege would apply.[157] The three-part test, articulated in *In re Bieter Co.*, requires that the consultant (1) has "primary responsibility for a key corporate job"; (2) has a "continuous and close working relationship [with] the company's principals on matters critical to the company's position in **litigation**"; and (3) "is likely to possess information possessed by no one else at the company."[158]

***1308** In *In re Bieter Co.*, the court held communications with an independent contractor enlisted to help a partnership develop farmland to be privileged because the contractor maintained a long-term relationship with the partnership, worked in the partnership's office, consulted in commercial and retail developments, secured tenants, acted as the partnership's sole representative in meetings, represented the partnership in front of the city council, and worked extensively on **litigation** resulting from the development project.[159] In this **case**, the Eighth Circuit found there was "no principled basis to distinguish [the contractor's] role from that of an employee, and his involvement in the subject of the **litigation** makes him precisely the sort of person with whom a lawyer would wish to confer confidentially" to prepare for **litigation**.[160]

Applying the *In re Bieter* test, the first prong has sometimes been satisfied when the PR firm interacts directly with media and has the authority to make decisions on its own.[161] In *In re Copper Market Antitrust Litgation*, one of the leading **cases** in this area,[162] privilege was extended to a crisis management PR firm.[163] In this **case**, a Japanese client, Sumitomo, had no prior experience in dealing with Western publicity issues and lacked language capabilities to deal with reaction to its **high-profile litigation**.[164] The court stressed that the firm worked out of Sumitomo's Tokyo headquarters and "acted as Sumitomo's agent and its spokesperson when dealing with the Western press on issues relating to the . . . scandal."[165] Specifically, it noted, each of these statements was made with the awareness it may be subsequently used against the company in **litigation**.[166] The court also highlighted that although documents were vetted with Sumitomo's counsel, the PR firm "had the authority to make decisions on behalf of Sumitomo concerning its [PR] strategy," ***1309** noting that it was the functional equivalent of an in-house [PR] department with regard to Western media relations.[167]

Likewise, in *A. H. v. Evenflo*, another supporting **case** in this area,[168] Evenflo had retained a PR firm to work with its counsel and provide advice regarding a recall of two of its products and subsequent remediation campaign.[169] Given that Evenflo did not have a PR department of its own, and the PR firm's activities included corresponding directly with government agencies and the public on Evenflo's behalf, the court found that the functional equivalence test extended to protect the communications between the PR firm and Evenflo's legal counsel.[170] Thus, the court's analysis "focused on whether the PR firm served an essential corporate function for which the company did not have an equivalent internal organization."[171]

Of note, when claiming the functional equivalence privilege, many courts still emphasize that communications made to PR agencies must also meet the general privilege test -- that the communication was made for the purpose of legal advice within the scope of the PR firm's duties and with proper confidentiality safeguards.[172] In addition to proving that the nonemployee is

functionally equivalent to an employee, it must be clear that information sought from the nonemployee would have been subject to attorney-client privilege if he were a true employee.[173] For example, in *Flagstar Bank, FSB v. Freestar Bank, N. A.*, despite satisfying the functional equivalence test, the court refused to extend privilege to communications between a defendant's president and an employee of an outside marketing agency because the defendant could not show that the communication was for the "rendition of legal advice" or the "protection of a legal interest."[174]

In circumstances where PR firms have not satisfied the functional equivalence test, the firm appears to lack integration into the client's company and the decision-making authority that was seen in *In re Bieter*, *In re Copper Market*, and *Evenflo*. For example, in *Calvin Klein Trademark Trust v. Wachner*, the court focused on the fact that the external PR agency performed no duties aside from those normally performed by an external PR agency and simply helped counsel assess public reaction to alternative strategies.[175] Similarly, in *Export-Import Bank v. Asia Pulp &* ***1310** *Paper Co.*, the court found that an outside financial advisor who negotiated on behalf of Asia Pulp was not a functional equivalent, or a "*de facto* employee," because the consultant's "schedule, the location of his head offices, and the success of his consulting business all contradict the picture [[that the consultant was] so fully integrated into the [client's] hierarchy as to be a *de facto* employee."[176] In considering whether the third party was a "*de facto* employee," the *Export-Import* court considered: (1) "whether there was a continuous and close working relationship" between the advisor and the company on a critical matter, and (2) whether the advisor alone possessed critical information.[177] Thus, when third parties are not significantly integrated or autonomously communicating directly with legal counsel, courts have refrained from extending the attorney-client privilege under the functional equivalence test.[178]

Other **cases** rejecting the functional equivalence of the PR firm have emphasized that the PR firm was supervised entirely by the company, rather than by legal counsel. In *In re Vioxx Products Liability* ***Litigation***, the court declined privilege to the client Merck's outside PR and advertising agencies, noting that Merck maintained absolute control of any public dissemination of materials on its behalf, as "[e]verything the consultants wanted to do under the contract had to be (1) proposed to the company, (2) screened and vetted within the company (including the Legal Department) and (3) approved in writing by Merck."[179] Thus, the court held that "[b]ecause of the pervasive supervision of the consultant's work by Merck, the consultants are not independently making decisions that need to be informed in the same way."[180] Relying on similar logic, the court in *LG Electronics v. Whirlpool* held that even though Whirlpool's agencies may prepare its marketing materials, since Whirlpool "exercise[d] the final say in all of its advertisements, closely monitor[ed] all agency work, and retain[ed] all rights in the agencies' work product," Whirlpool was not granting its agencies the type of freedom and control to operate "without Whirlpool's internal marketing approval."[181]

***1311** *5. Common Legal Interest Exception to Waiver*

Some courts have extended privilege to communications with PR firms under a common legal interest exception. The common interest is not "a privilege itself," but rather "an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person."[182] To this end, an initial attorney-client relationship must exist to claim this extension.[183]

The common interest doctrine originally developed in criminal **cases** as a "joint-defense privilege," where two or more codefendants were represented by a single attorney or had dual coinciding representations.[184] However, the rule has been extended in a wide range of circumstances and includes situations where different clients may have a joint defense or are pooling information for a common legal purpose,[185] or where any parties who have a "common interest" in current or potential **litigation**, either as actual or potential plaintiffs or defendants.[186] To maintain privilege, courts have specified that the common interest must relate to a **litigation** interest, and not merely a common business interest[187] or "a joint business strategy which happens to include as one of its elements a concern about **litigation**."[188] "The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial."[189] "The fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest,"[190] but the rule "does not encompass a ***1312** joint business strategy which happens to include as one of its elements a concern about **litigation**."[191]

Additionally, the common interest is not as important as "demonstrat[ing] actual cooperation toward a common legal goal";[192] however, it is not necessary "that there be actual **litigation** in progress for the common interest rule . . . to apply."[193] Some circuits permit potential parties and parties who are not otherwise joined in **litigation** to assert the common legal interest

privilege, even if it is not anticipated that the party will be sued in the future.[194] For example, in the Seventh Circuit, the definition for applying the exception is "where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise"[195] to encourage parties with a shared legal interest to meet legal requirements and plan conduct accordingly predicated upon open communication.[196]

Like the functional equivalence test, courts applying this exception have still emphasized the requirements of autonomy and joint liability for the actions of the third party. In *In re Jenny Craig, Inc.*, the court found a common legal interest between Jenny Craig International ("JCI") and its external advertising agency where the agency worked closely with JCI's in-house and outside counsel to review the legality of advertisements.[197] Additionally, once a Federal Trade Commission ("FTC") investigation began into JCI's advertising, the agency continued direct communication with legal counsel to obtain **litigation**-related advice on legal issues regarding the advertising program, and treated all communications as confidential.[198] Here, JCI and the agency were working toward the common legal interest of producing FTC-compliant advertising.[199]

By contrast, in *LG Electronics v. Whirlpool*, the court did not grant the common interest privilege extension to communications between Whirlpool and its external advertising agency, noting that because Whirlpool controlled the relationship with the firm, there was no joint strategy involved.[200] The court stressed that the agency did not direct its ***1313** own actions and that there was no way to evaluate the extent of the agency's risk of liability based on Whirlpool's advertisements from the information provided to the court.[201] The court stressed that neither fear of a lawsuit alone, nor an interest based on the fact that Whirlpool and the advertising agency routinely deal with each other and neither wants to be sued, justifies a common legal interest.[202]

6. Enlisting a PR Firm As a Nontestifying Expert

The notion of enlisting PR counsel as a nontestifying expert under Federal Rule of Civil Procedure 26(b)(4)(D) has not been heavily **litigated** but has been used in some jurisdictions in support of extending privilege. Rule 26(b)(4)(D) notes that nontestifying experts hired in anticipation of **litigation** are not subject to the same disclosure requirements as experts preparing reports, and communications may be accessed only when the requesting party shows "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[203] The reasoning behind this protection is that there is no need to prepare cross-examination for these witnesses, and both sides are capable and not limited in enlisting their own nontestifying experts.[204] However, there is no privilege if the nontestifying expert prepares a report that is then referenced or used in trial with testifying witnesses, or if the nontestifying expert also holds another role, the knowledge of the external role is not protected.[205]

Within the context of PR consultants, privilege against discovery has been denied if the PR consultant makes public disclosures. In *In re Long Branch Manufactured Gas Plant*, the defendant hired a PR firm that distributed two press releases following an explosion.[206] The court held that the privilege for non-testifying experts did not apply to the PR counsel because the public disclosures related to **litigation** constituted a completely separate activity and fell outside of the immunity protections of the discovery rule.[207] The court noted that the public activity did not constitute legal work, amounting to activities that are also "beyond [the] role [of] a consultative expert," no matter how the defendant tried to argue that they were "in anticipation of" **litigation** or trial.[208] The court then outlined examples of activities that are typically within the role of the consulting expert (e.g., "developing trial strategies . . ., performing investigations ***1314** . . ., and educating attorneys," but not "advocacy in the court of public opinion").[209]

Although the *In re Long Branch* ruling has not been cited by any other similar **cases**, it demonstrates that courts may continue to apply a spectrum of protection for non-testifying experts, looking at the specific role that the expert is playing when making the communication in question.[210] Courts following the reasoning in *In re Long Beach* may hold that, under Rule 26(b)(4)(D), crossing from counsel to execution of public statements may eliminate discovery protection by conflicting with the traditional roles of a consultative expert. However, this holding conflicts with courts applying the previously mentioned approaches and makes it difficult to make any broad generalizations. For example, similar advising activities were articulated by *In re Grand Jury Subpoenas* to be the exact type of PR activities impacting legal strategy that should be protected by attorney-client privilege.[211] Additionally, courts using the functional equivalence test would likely find that enlisting a PR firm without the decision-making or public-facing autonomy seen in *In re Long Beach* would likely fail the functional equivalence test and lose privilege if the court applied that approach.[212] Even so, courts denying Rule 26(b)(4)(D) protection may still award work-product privilege.[213]

C. Work-Product Privilege Permitted

Most courts have been willing to grant a limited work-product privilege for select communications relating to legal strategy. Like the third-party attorney-client privilege doctrine, the work-product doctrine was developed to account for the importance of third-party consultation[214] and protects tangible and intangible work product if it was prepared (1) by an attorney, or a representative or agent of the attorney, (2) for, or in anticipation of, **litigation**.[215] This privilege belongs to the attorney (compared to the attorney-client privilege which belongs to the client) because it is rooted in the right of a lawyer to enjoy privacy in the course of preparation of his suit.[216] Since its origin in *Hickman v. Taylor*,[217] many ***1315** courts consider work-product doctrine alongside attorney-client privilege and, in fact, may grant work-product doctrine to sidestep attorney-client privilege issues.[218]

It is important to note that work-product protection is not as comprehensive as extending the attorney-client privilege as it can be pierced by showing substantial need for the materials and undue hardship to obtain an equivalent (it is considered a qualified privilege instead of absolute).[219] Additionally, the "in anticipation of **litigation**" requirement narrows the scope of what is protected and may not include communications before a **case** is filed or documents prepared on the mere possibility of **litigation**.[220] It also faces many of the same problems as the attorney-client privilege analysis because the communications must have a primarily legal purpose.[221] Here, the party asserting privilege bears the burden of demonstrating that the documents or materials were prepared in anticipation of **litigation**.[222] Because most PR work starts "in advance of [an] indictment, let alone a possible trial," these narrowing requirement can be especially problematic to guarantee protection.[223] But, courts have recognized that attorneys must often rely on other nonlegal assistants and do not require that material be prepared by the attorney himself.[224]

Thus, although privilege will not extend to PR materials prepared in the ordinary course of business,[225] even those courts that express a disdain toward including PR activities under the attorney-client privilege may be willing to grant work-product privilege[226] if (1) the document is ***1316** prepared "in anticipation of **litigation**," (2) there has been no waiver of the privilege (e.g., delivered to a third party), and (3) there is no substantial need or inability to obtain the information elsewhere.[227] Declined work-product protection has typically been explained as not "in anticipation of **litigation**" and has included general business publicity strategies,[228] documents "prepared in the ordinary course of business,"[229] and general analyses of public reaction to a court's judgment.[230]

The court in *In re Copper Market Antitrust **Litigation***, for example, found both an extension of attorney-client privilege to the company's PR firm as well as work-product protection under Rule 26(b)(3), stating that the requirement of "in anticipation of **litigation**" must be based on the factual situation.[231] The court specified that documents created in the ordinary course of business do not qualify for protection, but that "[it] is firmly established . . . that a document that assists in a business decision is protected by work-product immunity if the document was created because of the prospect of **litigation**."[232] Thus, the court indicated that documents which would have been created in essentially similar form regardless of **litigation** would not be protected. The court also clarified that protected documents need not be created at the request of an attorney.[233]

In *Haugh v. Schroder Investment Management of North America*, although the court denied the attorney-client privilege, arguing that the PR firm did not perform anything other than standard PR services and communications were not made for the purpose of obtaining legal advice, it protected almost all of the documents under the work-product doctrine.[234] The court stressed the public policy underlying the work-product privilege to protect the lawyer with a degree of privacy as he prepares his client's **case** and emphasized that the work-product privilege is broader than and distinct from the attorney-client privilege.[235] Protected documents included preparation of background information, marked-up press releases, and handwritten notes.[236]

***1317** Other courts have rejected work-product protection generally to the work of PR consultants. For example, in *Calvin Klein Trademark Trust v. Wachner*, the court rejected both attorney-client and work-product privilege, stating that it is "obvious that as a general matter [PR] advice, even if it bears on anticipated **litigation**, falls outside the ambit of protection of the so-called 'work[-]product' doctrine" because the rule is meant 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 on the public generally."[237] Although not present in the facts before the court, the opinion did mention that if the attorney had

prepared the materials under valid work-product protection but then provided it to the PR consultant who also maintained confidence, that the work-product protection would not be *automatically* waived if "the [PR] 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."[238]

Other courts have taken a **case**-by-**case** approach, focusing on the purpose of PR assistance to avoid granting the work-product privilege too broadly. For example, in *NXIVM Corp. v. O'Hara*, the court inquired into the nature of each document and declined work-product privilege to a negative report shared with the company's PR consultant.[239] The court held that the company's leadership was asserting privilege only to shield communications and that they were not used by legal counsel itself to give legal services.[240] Additionally, citing *Calvin Klein*, the court stressed that the purpose of the privilege was not to strategize about the effect of the **litigation** on the public, and thus held that the communications at issue were not used for any purpose in anticipation of **litigation**.[241]

IV. RECOMMENDATION

Although the limited and often contradictory **case** law does not provide clear guidelines for application of the privilege, the confusion highlights the need for a uniform resolution. This Part first outlines the problems that result from the current state of uncertainty and then explains why several proposed solutions will not afford adequate protection to communications with PR consultants. The Note concludes by suggesting that an expansion of the privilege to include communications between lawyers, clients, and PR consultants without constituting waiver is ***1318** necessary to actuate the public policy underpinnings of the attorney-client privilege, protect the often-overlooked indirect effects of public sentiment on legal strategy, create an easily administrable rule, and safeguard the constitutional rights of the **litigant**.

A. Problems with Current Doctrinal Uncertainties

Currently, the primary problem with extending privilege to the work of PR consultants is that courts have used a variety of different approaches, which defeats the purpose of the attorney-client privilege and creates a framework that is too unpredictable for practitioners to follow.[242] Part III shed light on the various considerations of courts; however, these divergent approaches often result in conflicting rules from the same court based on which test is used.[243] Accordingly, although more than fifty percent of general counsel respondents have "hired external PR consultants to manage a legal controversy in the last three years," they report immense uncertainty about when communications would be covered by the attorney-client privilege.[244] Adding to the confusion, many courts do not even "outwardly recognize that there is more than one standard applicable to third-party consultation or more than one approach to [applying] the [*Kovel*] agency exception."[245] To this end, fifty-three percent of general counsels "appeared to believe that attorney-client privilege law was clear and would protect communications with external PR consultants."[246] This uncertainty goes against the clear articulation of the *Upjohn* court, stating that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected" and that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[247]

These distorted beliefs about the state of the privilege have also impeded the ability of corporate general counsels to *use* the advice of external consultants. Although many general counsels have reported that they "believe . . . it is important to share information with the external consultant to provide the best legal advice," they indicated that "they were uncomfortable sharing . . . confidential information."[248] This skepticism ***1319** may in turn prevent attorneys from using external consultants to their full extent, despite needing their assistance to competently advise and represent their clients.[249] It also handicaps consultants from providing the most informed advice to their corporate clients and legal counsel.[250]

Furthermore, uncertainty over the state of the doctrine also produces injustice from inconsistent judicial results and may allow regulators undue leverage. During negotiations, regulators may increasingly convince the company to voluntarily waive privilege to avoid more severe charges by stressing that the company "cannot accurately assess the likelihood of privilege protection" in court if it chooses not to waive.[251] For these reasons, we must devise a clear understanding of privilege application by creating an easy-to-apply, bright-line rule that eliminates subjective judicial interpretation of test factors and the haphazard approaches that characterize current jurisprudence.

B. Problems with Current Proposals

Before suggesting a proper framework to analyze the privilege as it applies to PR experts, it is important to address previously articulated suggestions and potential problems with some of these proposed solutions.

First, it is impractical to reject extension of the attorney-client privilege to all PR consultants and limit application to lawyers filling this function.[252] Advocates of this approach have argued that disclosing information to PR consultants "does nothing to encourage a client's frank disclosure of material information to his *attorney*," and thus would not further the public policy underlying the existence of the attorney-client privilege.[253] They argue that the same information would be revealed to the attorney regardless of the PR firm's involvement, implying that the PR firm is unnecessary to the lawyer's legal advice.[254] It is true that general counsels often have insider information and institutional knowledge to put them in the best position to render fully informed legal advice.[255] Additionally, ethical boundaries such as the Model Rules of Professional Conduct, which address trial publicity, and the Federal Rules of Civil ***1320** Procedure, which address ethical representation obligations to the court, provide clear guidelines regarding the lawyer's role and provide sanctions for conduct that strays from these rules, unlike the unsupervised position of PR consultants.[256]

However, the problem with this argument is that most lawyers are unable to provide equally effective counsel to clients alone versus with a PR consultant. **High**-**profile** lawyers have admitted that "[e]very lawyer is not a crisis manager" and that for lawyers to successfully handle all of the accompanying concerns with a crisis (e.g., stakeholder concerns, general public reputation, potential congressional interests, and regulatory matters), someone "with strong experience in public policy plus hands-on experience in actually managing crises at a very high level" is required.[257] Additionally, many law schools do not currently educate law students about the importance of managing legal PR for clients, further reducing the average lawyer's exposure and expertise in these types of matters.[258]

Second, it would be improper to look at expanding the attorney-client privilege to PR consultants only in a criminal setting, as similar risks still exist within the civil environment. While the court in *In re Grand Jury* recognized the broad discretion of prosecutors and the impact of public perception on these decisions, there are numerous factors that influence charging decisions, so it is not proper to use this **case** as the sole rationale for expansion in a criminal context.[259] Most importantly, however, civil proceedings may trigger and often lay the framework for criminal investigations, ultimately giving rise to the same problems.[260]

Third, using the work-product doctrine as the sole safeguard also fails to offer enough protection, given the important and potentially exposing nature of the client-PR firm communications during a crisis. It has been argued that using work-product privilege will even the disparities between rich companies that can afford expert consultants on their payrolls, and poor companies that cannot afford internal consultants, as the poorer companies' enlisting of external support will still be "in anticipation ***1321** of **litigation**."[261] Yet, given that the work-product doctrine only applies "in anticipation of **litigation**" or "with an eye towards **litigation**," it often does not protect much of the important PR work that is ultimately used to influence prosecutorial decisions or **litigation** outcomes.[262] For example, strategic early response (i.e., community relations campaigns or press releases) may encourage plaintiffs or prosecutors not to join or to bring a lawsuit. Even so, these early efforts would not be protected under the work-product doctrine as they were not *in anticipation of* a lawsuit, but rather were conducted with the indirect hope of raising general public sentiment to *avoid* a lawsuit altogether.[263] Additionally, as discussed in Part III.C., work-product protection is much easier to penetrate than attorney-client privilege (by showing substantial need for the materials and undue hardship to obtain an equivalent), and thus does not afford adequate protection to critical communications.

Similar concerns exist when depending on Federal Rule of Civil Procedure 26(b)(4) and attempting to engage the PR expert as a non-testifying expert. The rule protects "experts who are not expected to testify but who are retained or specially employed in anticipation of **litigation** or preparation for trial" from discovery "unless the party seeking discovery demonstrates 'exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.'"[264] Here too, assistance provided by PR experts may have the ultimate purpose of *avoiding* trial and thus will not satisfy the "in anticipation of **litigation**" requirement.[265] As noted above, the frequency of using PR firms for pretrial considerations to create favorable sentiment before entering trial or to avoid trial altogether are very unlike enlisted consultant trial experts who help specifically with trial advocacy and preparation where the nontestifying

expert protection is sufficient.[266]

1322** ***C. Need for Fully Expanded Privilege

The growing importance of PR functions underlines the need to expand the attorney-client privilege to include communications with PR consultants -- whose advice bears a close nexus to a legal counsel -- without constituting waiver. While **cases** such as *In re Grand Jury Subpoenas* underline direct ramifications of public sentiment on prosecutorial charging decisions, the court of public opinion may also influence judicial proceedings in other ways.[267] Responding to all of these concerns is best protected by a broad privilege to protect communication with PR experts as an exception to waiver.

First, expanding the attorney-client privilege to include the work of PR consultants will best actuate the privilege's public policy underpinnings.[268] As noted in *Upjohn*, the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[269] Recent examples show that public reputation and media coverage can influence **litigation** in ways that may not be protected by the work-product doctrine.[270] Immediate negative coverage following an incident may prompt additional **litigation** or influence what charges may be brought against the defendant by prosecutors or plaintiffs.[271] Given that the media tends to have a "clear plaintiff bias" in civil **cases** against corporate defendants, it is particularly important for companies and **high-profile** celebrities to have the ability to respond with the help of PR experts to shape (or even prevent) later judicial proceedings.[272] Thus, PR professionals are particularly important before the actual onset of **litigation**, as plaintiffs decide to file charges or join class action lawsuits and as companies decide on settlement versus going to trial.[273] Most importantly, in jury trials, negative publicity before **litigation** was anticipated may taint jury pools and make it almost impossible to give a civil or criminal defendant a fair trial.[274]

***1323** Thus, courts such as *Calvin Klein*, which denied privilege where media efforts were directed at the effects of the **litigation** on the company's audiences, have failed to fully consider the reciprocal relationship between general public sentiment regarding the company and the **litigant's** decision-making. The truth is that **litigants** often make decisions about asserting their judicial rights regardless of their moral responsibility for the alleged injuries.[275] In fact, to be financially stable, companies must often make decisions on behalf of their stakeholders, shareholders, etc., and thus, gauging popular response to media coverage about **litigation** may influence important legal choices.[276] These legal decisions based on public opinion are critical to rendering effective legal advice; however, they risk being excluded from protection under any other proposed solution because of their early timing or by occurring in a civil lawsuit.[277]

These situations present just a few examples of public sentiment impacting the ability to render effective legal counsel. Given the weight of decisions at hand before and during **litigation**, firms specializing in crisis communication are usually best equipped to manage these concerns because lawyers are rarely trained for media monitoring, sentiment analysis, press conferences, or other communications-related matters.[278]

Thus, the attorney-client privilege should be expanded to include communications with PR consultants, as long as the assistance is used for legal purposes. Moreover, the court should analyze legal purposes broadly to include PR analyses with an indirect strategy impact.[279] As courts recognize the growing need for lawyers to consider extra-judicial strategies to preserve their client's right to a fair trial, this broad application will ensure that the important role of PR consultants is adequately protected.[280]

Blanket expansion based on legal purpose has benefits for judges, lawyers, and **litigants**: it is easily administrable, allows the attorney "to focus on making the right legal decisions" rather than attempting to analyze the foreign subject of public sentiment, and helps achieve a fair trial in both criminal and civil settings.[281] Furthermore, because this suggested expansion allows for a uniform approach and judges are already familiar ***1324** with privilege application in traditional settings, judicial discretion in determining which factors to consider in granting privilege is minimized. This, in turn, increases the consistency of analysis and outcomes in these **cases**, allowing lawyers to plan accordingly.

Additionally, broadly extending privilege to third-party PR consultants mitigates the risk of favoring wealthy corporations in privilege application. Assuming *Upjohn* requirements are met, wealthier corporations may currently be afforded privilege for prelitigation communication between its in-house PR employees and its legal counsel because the PR support is maintained on its payroll. On the other hand, poorer corporations who must hire external PR consultants may be forced to rely only on

qualified work-product protection, depending on the court's approach.[282] As discussed in Part III.C, the nature of PR support typically begins before the work-product doctrine protection is triggered and early efforts to preempt **litigation** often do not qualify as being "in anticipation of **litigation**." Therefore, by applying the attorney-client privilege broadly to include external PR consultants, neither company will be unfairly advantaged in protecting its PR materials.

Moreover, I believe that the benefits to our judicial system and to **litigants**' constitutional rights outweigh critics' primary argument that privilege expansion obstructs the finding of truth. It has been argued that "[p]rivileges are based upon the idea that certain societal values are more important than the search for truth" and that while the communication between attorneys and clients rise to this level, that communications of a client seeking PR advice "[do] not rise to the same level [as attorney-client communications] in terms of societal importance."[283] Under Wigmore's utilitarian balancing test, used to justify preserving the confidentiality of client communications, the benefit of preserving the relationship's confidentiality must outweigh the obstruction of the court's search for "truth."[284] Critics argue that in the **case** of PR consultants, no such benefit exists.

Unfortunately, this argument does not consider the constitutional importance that these communications may have, as a narrowly-construed privilege may violate a criminal **litigant's** Sixth Amendment right to a fair trial and effective counsel, as well as his Fifth Amendment right against self-incrimination, if he is forced to respond to media attacks without proper legal counsel.[285] Given that criminal proceedings ***1325** may necessitate extrajudicial media activity by attorneys, the right to a fair trial often includes neutralizing public sentiment to avoid public pressure on prosecutors to bring charges or ensure that prosecutors are not contaminating the jury pool before trial.[286] Accordingly, the right to effective counsel may include consideration of these extrajudicial factors. Finally, if legal counsel fails to consider or advise a **litigant** about proper media strategy, the **litigant** may fall victim to self-incrimination traps in self-defense of media inquiries.

Some critics also believe that PR consultants do not provide legal advice; rather, they are retained for the very purpose of transmitting information to the public.[287] However, this focus does not take into account the external factors that can influence legal strategy and legal advice. As previously explained, the current court of public opinion is characterized by a flood of **litigation** journalism[288] and lawyer recognition that "if they do not step into the spotlight and attempt to explain the situation, their client [may] experience difficulty obtaining a fair trial," or may self-incriminate in response to media attacks.[289] Accordingly, the ABA Rules of Professional Conduct were amended, reflecting on the reality that the American adversarial system has expanded outside the courtroom.[290] All of these considerations demonstrate the importance of public sentiment to **litigation** and illustrate that complete legal advice must now incorporate these considerations to effectively and zealously represent clients.[291] Whether acting as an advisor to the lawyer, speaking to the client, or serving as the attorney's agent and mouthpiece, these PR functions may be critical to successfully managing the **litigant's** reputation in and outside of **litigation**.[292]

Another common argument against expanding the privilege is that **litigants** will be permitted to abuse the privilege's purpose and mask misconduct.[293] For example, some assert that expansion will allow clients to "shop" for favorable opinions, while claiming all shopping communications to be privileged.[294] Others argue that it is easier to hide abuse and ***1326** harder to uncover it when the standard is broad because **litigants** may "funnel [more] corporate communications through their attorneys [or public relations consultants] in order to prevent subsequent disclosure" or use attorney involvement to circumvent discovery of sanctionable action.[295]

However, both of these concerns are misplaced because extending the attorney-client privilege does not produce an absolute shield -- all communications must still meet the elements to qualify for privilege. The privilege only applies "(1) where legal advice of any kind is sought [[and] . . . (3) the communications relat[e] to that purpose."[296] All communication protected by the privilege still requires a sufficient nexus between the communication and the obtaining of legal advice. Thus, "funneling" communications through lawyers or PR consultants with norelation to legal advice becomes extremely difficult. Even if expanded to include PR consultants, the attorney-client privilege remains a "**case**-by-**case**" inquiry and thus, potential abuses may still be addressed.[297] Additionally, since all communication must be made to obtain legal advice, lawyer participation remains an essential element of any protected communication. This creates a further guard against unethical conduct because all lawyers remain sanctionable and subject to reprimand under applicable rules of professional conduct.[298] These safeguards are inherent in all communications qualifying for the attorney-client privilege and pacify concerns of abuse from expansion.

IV. CONCLUSION

While the attorney-client privilege is the oldest and most fundamental of the common law privileges, its application has not evolved at the same speed as media technology. Public sentiment increasingly plays both a direct and indirect role in legal outcomes, and thus, legal counsel must turn to PR experts to navigate this difficult arena. Recognizing that lawyer's roles have evolved to best protect their clients' legal rights in this environment, the attorney-client privilege should expand to include communications with a legal purpose between lawyers, clients, and PR experts, without amounting to waiver. Other selective privileges will not afford the same protection to PR assistance, which is often called upon even before the "anticipation of **litigation**" but is equally essential to the lawyer's holistic provision of competent counsel to the client. Expanding ***1327** the privilege will ensure that **litigants**' constitutional rights and extrajudicial concerns can be effectively managed while creating a more easily administrable and consistent approach for courts to effectively administer justice.

Footnotes

[a1] J.D. Candidate 2015, University of Illinois College of Law. B.A. Communication Studies, 2010, Northwestern University. I would like to thank the editors, members, and staff of the University of Illinois Law Review for their assistance; Andy Tuck and Jonathan Parente for their inspiration on this topic; my former colleagues at Edelman for showing me the importance of this evolving topic; and my family and friends for their constant support.

[1] *See* Kate Bulkley, *The Rise of Citizen Journalism*, GUARDIAN, June 10, 2012, http://www.theguardian.com/media/2012/jun/11/rise-of-citizen-journalism.

[2] Amor A. Esteban & Makai Fisher, *Is There a Spin Doctor in the House? Public Relations Consultants & Potential Waiver of Confidentiality (Ethical & Practical Considerations of Involving Public Relations Consultants)*, 9 SEDONA CONF. J. 157, 158 (2008).

[3] Meaghan G. Boyd & Sarah T. Babcock, *The Attorney-Client Privilege and Communications Between Counsel and Public-Relations Consultants*, 22 ENVTL. **LITIGATOR** 6, 6 (2010), *available at* http:// www.alston.com/Files/Publication/312665ce-6cff-4bb3-9e4d-5196f3b48cda/Presentation/PublicationAttachment/2e046529-9afe-47c2-a7b2-5392c50145df/boyd_babcock_FYL_Article.pdf.

[4] United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). The privilege is based on a confidentiality principle that has "long been accepted -- not just in the law, but in religion and medicine as well." *See* Lanny J. Davis, *Why Lawyers Are Best at Crisis Management: Advantages of the Attorney-Client Privilege*, PURPLE NATION SOLUTIONS, http:// www.purplenationsolutions.com/why-lawyers-are-best-at-crisis-management/ (last visited Feb. 13, 2015).

[5] Jaffee v. Redmond, 518 U.S. 1, 11 (1996); *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[6] Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968) (quoting Radiant Burners Inc. v. Am. Gas Ass'n, 320 F.2d 314, 322 (7th Cir. 1963)).

[7] People v. Gionis, 892 P.2d 1199, 1204-05 (Cal. 1995).

[8] *See* Davis, *supra* note 4.

[9] Jodi A. Janecek, *Media Management: PR and Preserving the Privilege*, 51 No. 2 DRI FOR DEF. 45 (2009) (citing *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 324 (S.D.N.Y. 2003)).

[10] Deniza Gertsberg, Comment, *Should Public Relations Experts Ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443, 1448 (2004).

[11] Janecek, *supra* note 9 (citing *In re* N.Y. Renu with Moistureloc Prod. Liab. **Litig**., No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552 (D.S.C. May 8, 2008)).

[12] NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 125-26 (N.D.N.Y. 2007).

[13] United States v. Bryan, 339 U.S. 323, 331 (1950) (noting the maxim that "the public ... has a right to every man's evidence").

[14] Gertsberg, *supra* note 10, at 1455 (citing Cyril V. Smith, *Attorney-Client Privilege Ain't What it Used to Be*, BALT. BUS. J., Dec. 2003, at 2, *available at* http:// www.bizjournals.com/baltimore/stories/2003/12/22/focus2.html?page=all).

[15] Fisher v. United States, 425 U.S. 391, 403 (1976) (citing *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973)).

[16] Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 742 (2009).

[17] Upjohn v. United States, 449 U.S. 383, 392-93, 396-97 (1981).

[18] *Id*. at 391.

[19] *Id*. at 394-95.

[20] Beardslee, *supra* note 16, at 730.

[21] *Id*. at 736.

[22] Hickman v. Taylor, 329 U.S. 495, 508 (1947) (explaining that there is no expectation of privacy when disclosed); *see also* Brian Martin, *Ensuring Attorney-Client Privilege in Crises*, INSIDE COUNSEL, Aug. 23, 2012, http://www.insidecounsel.com/2012/08/23/ensuring-attorney-client-privilege-in-crises.

[23] Beardslee, *supra* note 16, at 744.

[24] McCaugherty v. Siffermann, 132 F.R.D. 234, 240 (N.D. Cal. 1990).

[25] Beardslee, *supra* note 16, at 744-45 (emphasis added).

[26] *See generally* United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

[27] *See id.* at 921.

[28] *See* Beardslee, *Third-Rate*, *supra* note 16, at 746.

[29] United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999).

[30] *Id.*

[31] Beardslee, *supra* note 16, at 733.

[32] For a list of courts construing broadly, see *id.* at 747 n.92.

[33] 91 F.R.D. 414, 418-19 (N.D. Ga. 1981) (failing to extend privilege to an accountant where "board minutes produced by plaintiff's former accountants had been turned over to them for the purpose of conducting plaintiff's annual audit and not for reasons relating to the obtaining of legal advice") (applying *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973)).

[34] Richard B. Kapnick et al., *Financial Advisors and the Attorney-Client Privilege*, BLOOMBERG L. REP.-CORP. AND M&A L., Oct. 18, 2011, http:// www.sidley.com/files/Publication/e791ba12-592d-4232-87a7-8d1a6c6ff4f0/Presentation/PublicationAttachment/90c39985-3571-43da-9059-9008dd354ae3/cllr%20-%2010%2024%C2011%20-%20financial%20advisors %20and%20the% 20attorney-client%20privilege%20sidley.pdf (noting that adding further narrowing restrictions to the *Upjohn* test "will not encourage the free flow of corporate information that the *Upjohn* Court sought to promote").

[35] *In re* Currency Conversion Fee Antitrust **Litig**., MDL No. 1409-M-21-95, 2003 WL 22389169, at *3-4 (S.D.N.Y. Oct. 21, 2003).

[36] *Id.* at *2.

[37] NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 139 (N.D.N.Y. 2007).

[38] Beardslee, *supra* note 16, at 749-52.

[39] 16 F.3d 929, 938 (8th Cir. 1994).

[40] *Id.*

[41] Michele Destefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1261 (2009).

[42] Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1637, 1640 (1996).

[43] State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964) ("The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible."). "The Van Duyne rules served as an early model for restrictions on extrajudicial speech by lawyers and police officials." Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1821 n.50 (1995).

[44] *Id.* at 1822 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 7-33 (1988)). Many courts have stressed this predicted impact of prejudicing the jury pools; *see, e.g.*, *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003).

[45] Moses, *supra* note 43, at 1815.

[46] James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2402 (2003).

[47] Moses, *supra* note 43, at 1817.

[48] *Id.* (quoting *Canons of Professional Ethics Canon* 20 (1908), *in* AMERICAN BAR ASS'N, SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 237 (1990)).

[49] *Id.* at 1817-18 ("[The] Sacco and Vanzetti murder trial and the Lindbergh kidnapping trial... reopened the debate over press coverage of criminal trials. Photos of Sacco and Vanzetti appeared in Boston newspapers immediately upon their arrest for murder, and worldwide press coverage continued until their execution six years later. The Lindbergh **case** generated tremendous press coverage as well. In his column, famed journalist Walter Winchell called for the conviction and electrocution of Lindbergh defendant Bruno Hauptman well before the trial began.").

[50] Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) (overturning a murder conviction noting that pretrial publicity made it impossible for the defendant to receive a fair trial).

[51] 522 F.2d 242, 247 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chi. Council of Lawyers, 427 U.S. 912 (1976).

[52] 501 U.S. 1030 (1991).

[53] *Id.* at 1030.

[54] *Id.*

[55] *Id.* at 1043 (Kennedy, J., concurring).

[56] 422 U.S. 225, 238-39 (1975) ("[T]he work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's **case**. But the doctrine is an intensely practical one, grounded in the realities of **litigation** in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.").

[57] John C. Watson, ***Litigation*** *Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 79-81 (2002) (examining impact of publicity regarding Rodney King and JonBenet Ramsey incidents); Moses, *supra* note 43, at 1834 (noting media impact on O.J. Simpson trial).

[58] Watson, *supra* note 57, at 79.

[59] *See, e.g.*, Gilbrook v. City of Westminster, 177 F.3d 839, 877 (9th Cir. 1999) (affirming an attorneys' fee award for media and

public relations work in a civil rights action); Child v. Spillane, 866 F.2d 691, 698 (4th Cir. 1989) (stating that attorneys should be compensated for public relations in **cases** involving issues of vital public concern).

60 976 F.2d 1536, 1545 (9th Cir. 1992).

61 Davis v. City of S.F., 976 F.2d 1536, 1545 (9th Cir. 1992); *see also In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 327 n.28 and accompanying text (S.D.N.Y. 2003) (noting "fee awards under civil rights and other statutes, for public relations efforts in recognition of the importance of such work in the clients' interests").

62 Moses, *supra* note 43, at 1815 n.15 ("'Spin control' is a phrase first used in the political arena to describe how politicians and their spokespeople coordinate and manipulate public commentary in order to control public opinion.").

63 *Id.* at 1832.

64 Mawiyah Hooker & Elizabeth Lange, *Limiting Extrajudicial Speech in **High**-**Profile** **Cases**: The Duty of the Prosecutor and Defense Attorney in Their Pre-Trial Communications with the Media*, 16 GEO. J. LEGAL ETHICS 655, 656 (2003).

65 Watson, *supra* note 57, at 80.

66 Moses, *supra* note 43, at 1833. For a full examination of public relations concerns regarding legal matters by corporate general counsels, see generally Beardslee, *supra* note 41.

67 Moses, *supra* note 43, at 1832-33.

68 Mathew S. Rosengart, *Celebrity Clients and the Attorney-Client Privilege*, L.A. DAILY J., May 14, 2012, http://www.gtlaw.com/News-Events/Publications/Published-Articles/160109/Celebrity-clients-and-the-attorney-client-privilege (click "View Media" for PDF file of article).

69 Moses, *supra* note 43, at 1833.

70 Watson, *supra* note 57, at 81.

71 The American Bar Association Model Rules of Professional Conduct Preamble requires lawyers to represent clients zealously as an advocate. MODEL RULES OF PROF'L CONDUCT pmbl. (1983) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

72 Esteban & Fisher, *supra* note 2, at 157.

73 *See* Gertsberg, *supra* note 10, at 1461.

74 Esteban & Fisher, *supra* note 2, at 157.

75 *See* Bulkley, supra note 1.

[76] *See* Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 868 (1998) ("[A] lawyer cannot take the chance that media publicity has no impact [on juries] and should counter adverse publicity concerning his or her client.").

[77] Watson, *supra* note 57, at 82.

[78] *See* Gertsberg, *supra* note 10, at 1462.

[79] Chemerinsky, *supra* note 76, at 868 (stating that "[s]uch leaks are virtually impossible to stop" and highlighting unlikely sources in the World Trade Center bombing **case** and O.J. Simpson **case** where "there were leaks that clearly came from the police").

[80] Watson, *supra* note 57, at 88 ("In the thick of the burgeoning **litigation** public relations industry are such large public relations firms as Edelman PR Worldwide, which reportedly established a special division for this aspect of the trade and called it Edelman **Litigation** Communications."); *see also, e.g.*, ***Litigation*** *Communications*, KETCHUM, https:// www.ketchum.com/**litigation**-communications (last visited Mar. 7, 2015); *Crisis management*, OGILVY PUBLIC RELATIONS, http://www.ogilvypr.com/practices/crisis-management (last visited Mar. 7, 2015).

[81] *Id.* at 78.

[82] *See* Gertsberg, *supra* note 10, at 1463.

[83] Moses, *supra* note 43, at 1817 (quoting *Canons of Professional Ethics Canon* 20 (1908), *in* AMERICAN BAR ASS'N, *supra* note 48, at 237 (1990)).

[84] Watson, *supra* note 57, at 86 (citing Bruce Hoiberg & Lloyd Stires, *The Effects of Several Types of Pre-Trial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCHOL. 267 (1973)); *see also* Geoffrey P. Kramer, *Pretrial Publicity, Judicial Remedies and Jury Bias*, 14 L. & HUM. BEHAV. 440 (1990); Regina Ganelle Sherard, *Fair Press or Trial Prejudice?: Perceptions of Criminal Defendants*, 64 JOURNALISM Q. 337 (1987); Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977)).

[85] *See generally* Mark Herrmann & Kim Kumiega, *On Trial in the Courts of Law and Public Opinion: The Tension Between Legal and Public Relations Advice*, 28 **LITIG**. 29 (2002).

[86] *See id.* at 30-31.

[87] David Jacoby & Judith S. Roth, *Attorneys and Public Relations Consultants: Privileged or Perilous Communications?*, **LITIG**. COMM. NEWSL. (IBA Legal Practice Div., London, Eng.), Sept. 2008, at 19.

[88] *See In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003) (describing the pressure on prosecutors to bring more charges in an indictment).

[89] *See* Gertsberg, *supra* note 10, at 1467.

[90] Esteban & Fisher, *supra* note 2, at 158.

91 Davis, *supra* note 4.

92 NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 140 (N.D.N.Y. 2007).

93 *Id.*

94 *See, e.g.*, Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

95 *Id.*

96 *Id.* (citation omitted).

97 *See, e.g.*, Nance v. Thompson Med. Co., 173 F.R.D. 178, 182-83 (E.D. Tex. 1997) (noting that privilege was waived regarding communication copied to public relations representative of company's retained public relations firm and that since work-product privilege was not asserted, it too was waived).

98 No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *8 (D.S.C. May 8, 2008).

99 *In re* NY Renu with Moistureloc Products Liability **Litigation**, No. 766,000/2007, MDL. 1785, C/A 2:06-MN-77777-DC, 2009 WL 2842745, at *2 (D.S.C. July 6, 2009) ("But of course [this] does not mean that communications with consultants can never come within the privilege. It depends on what the consultant is hired to do. The test is whether their function is necessary for the lawyer's representation to be effective.").

100 198 F.R.D. 53. A WestLaw KeyCite search on February 13, 2015 revealed that this **case** has been cited 259 times to demonstrate not granting the privilege.

101 *Id.* at 54.

102 *Id.*

103 *Id.* at 55.

104 No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (citing *Calvin Klein*, 198 F.R.D. at 55); *see also* NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141 (N.D.N.Y. 2007) (citing *Haugh* for holding that "a media campaign is not a legal strategy").

105 *See, e.g.*, *In re* NY Renu with Moistureloc Products Liability **Litigation**, 2009 WL 2842745, at *2 (citing United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961); *Haugh*, 2003 WL 21998674, at *8); *see also Kovel*, 296 F.2d at 922 ("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.").

106 Michael N. Levy & Michael L. Spafford, *Preserving the Attorney-Client Privilege with the Nonattorney Members of Your Legal Team*, 15 CONSTRUCT 8, 10 (2006), *available at* http:// www.bingham.com/Publications/Files/2006/10/Preserving-the-Attorney-Client-Privilege.

107 *In re* N.Y. Renu with Moistureloc Prod. Liab. **Litig**., No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *8 (D.S.C. May 8, 2008) (calling *In re Copper Market Antitrust* ***Litigation*** an extreme exception where client lacked experience in English-speaking and Western-media prior to **litigation** on the functional equivalency test).

108 *See, e.g.*, *Haugh*, 2003 WL 21998674, at *4 (citing United States v. Nobles, 422 U.S. 225, 238 n.11 (1975)) (noting that the work-product privilege is "distinct from and broader than the attorney-client privilege"); *see also infra* Part III.C.

109 09.198 F.R.D. at 54; *see also In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 328-29 (S.D.N.Y. 2003) (differentiating from *Calvin Klein* noting "public relations firm -- which had a preexisting relationship with the plaintiffs" and differentiation made by *Copper Antitrust* which held that the "firm [in *Calvin Klein*] had a relationship with the client that antedated the **litigation**").

110 *Calvin Klein*, 198 F.R.D. at 55.

111 661 F. Supp. 2d 958, 964 (N.D. Ill. 2009).

112 290 F.R.D. 421, 425 (S.D.N.Y. 2013).

113 *Id.* at 432.

114 *See, e.g.*, *In re* Grand Jury Subpoenas, 265 F. Supp. 2d at 331; *In re* Copper Mkt. Antitrust **Litig**., 200 F.R.D. 213, 215 (S.D.N.Y. 2001).

115 200 F.R.D. at 215.

116 *Id.*

117 *Id.*

118 *Id.* at 219 (emphasis added).

119 265 F. Supp. 2d at 331-32.

120 *Id.* at 329.

121 *See generally id.*

122 *See infra* Part III.B.4.

123 *See, e.g.*, Haugh v. Schroder Inv. Mgmt. N. Am. Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003).

124 *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003).

125 Janecek, *supra* note 9 (quoting *In re* New York Renu with Moistureloc Products Liability **Litigation**, No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552 (D.S.C. May 8, 2008)).

126 *Id.*

127 *See, e.g.*, Bradley Boyer, *When Your Client Faces a Crisis, Put a Crisis Manager on Your Team*, PROVISORS, http://www.rmkb.com/tasks/sites/rmkb/assets/image/When%20Your%C20Client%C20Faces%C20a%C20Crisis%C5B1%).pdf (last visited Feb. 13, 2015) (noting that "[e]stablishing a new relationship between lawyer and crisis manager, with all bills from the crisis manager going to the lawyer, strengthens the assertion of the privilege in protecting communications" and that "[a] written engagement letter between the lawyer and the crisis manager also is critical to protect confidentiality").

128 *See* Michael Lasky, *PR Firms Navigate the Attorney-Client Privilege*, PRWEEK, Nov. 15, 2013, http://www.dglaw.com/images_user/newsalerts/Lasky_ PRWeek.Atty%20client%C20privilege%20article.Nov.15.2013.pdf.

129 *Id.*; *see also* Michael C. Lasky, *Where Public Relations and the Law Meet in a Media Intensive Environment*, METRO. CORP. COUNS. (Mar. 1, 2006), http://www.metrocorpcounsel.com/articles/6446/where-public-relations-and-law-meet-media-intensive-environment ("*First*, be certain to have the public relations firm retained by the lawyers. *Second*, if the PR firm is handling other work of a nonsensitive nature for this client, have the PR firm bill for it separately and to a business person, while the sensitive work is billed to the attorneys under a separate engagement letter. That gives notice to the world that the matter is regarded, at least by the parties to the arrangement, as privileged. *Third*, have the PR firm provide its advice and counsel directly to the lawyers - and not to the client - for incorporation into the overall legal strategy. *Fourth*, label all documents, memoranda, e-mails, reports, and so on, in a way that reflects the claimed privileged status. *Fifth*, limit review of the client documents to only those provided to the lawyers for purposes of obtaining legal advice. *Finally*, once the dispute over the privilege starts, portray the PR firm's activities in such a way as to show that they are part of the investigation or **litigation**.").

130 *See, e.g.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

131 James M. Beck et al., *Attorney-Client Privilege and PR Firms*, DRUG & DEVICE L. (June 11, 2012), http://druganddevicelaw.blogspot.com/2012/06/attorney-client-privilege-and-pr-firms.html.

132 *See* Beardslee, *Third-Rate*, *supra* note 16, at 751 (2009). Yet, many in interviewees in Beardslee's study indicated that they believed this to be a key factor and purposefully arranged for law firms to sign hiring contracts. *See id.* at 751 n.118.

133 Jacoby & Roth, *supra* note 87, at 20.

134 Beardslee, *supra* note 16, at 784 (emphasis added).

135 United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961); Egiazaryan v. Zalmayev, 290 F.R.D. 421, 432 (S.D.N.Y. 2013).

136 NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141 (N.D.N.Y. 2007). *But see Egiazaryan*, 290 F.R.D. at 432 (noting that where public relations are not necessary to facilitate communication between client and attorney, there is no privilege).

137 Haugh v. Schroder Inv. Mgmt. N. Am. Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (stating that in considering whether the communications were made for the purpose of obtaining legal advice, that the defendant had "not identified any nexus between the consultant's work and the attorney's role in preparing [the defendant's] complaint or ... **case** for

court").

138 United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999) (emphasis added).

139 *Kovel*, 296 F.2d at 922 (emphasis added).

140 Rosengart, *supra* note 68 (noting examples of helping the attorney understand the complex accounting issues at stake as in *Kovel*, helping the client to deal with Western media which client had no experience in as in *In re Copper Market Antitrust* ***Litigation***, 436 F.3d 782 (7th Cir. 2006), or helping impact prosecutorial decision by impacting pressure created by news coverage in *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003)).

141 *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d at 325 (citing *Kovel*, 296 F.2d at 922).

142 *In re* New York Renu with Moistureloc Prod. Liab. **Litig**., No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *7 (D.S.C. May 8, 2008) (citing *Kovel*, 296 F.2d at 922).

143 *Id.* (citing NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141 (N.D.N.Y. 2007)); Levy & Spafford, *supra* note 106 (citing *Kovel*, 296 F.2d at 922) (noting that the *Kovel* court analogized the use of an accountant to the use of a foreign language translator because "[a]ccounting concepts are a foreign language ... to almost all lawyers in some **cases**") (internal quotation marks omitted).

144 265 F. Supp. 2d at 322.

145 *See* Gertsberg, *supra* note 10, at 1465.

146 *Id.* (quoting *In re Grand Jury Subpoena*, 265 F. Supp. 2d 321 at 323).

147 *Id.* at 1465-67.

148 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 331 (stating test for privilege: "(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 purpose of giving or receiving advice (5) directed at handling the client's legal problems").

149 *Id.* at 329-30.

150 *See, e.g.*, Gertsberg, *supra* note 10, at 1467.

151 *See* Egiazaryan v. Zalmayev, 290 F.R.D. 421, 432 (S.D.N.Y. 2013) (citing Ravenell v. Avis Budget Grp., Inc., No. 08-CV-2113 (SLT), 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012) ("The reach of [*In re Grand Jury Subpoenas Dated March 24, 2003* is] limited by its context: the [c]ourt couched its finding in the narrow scenario of public relations consultants assisting lawyers during a **high** **profile** grand jury investigation.")).

152 Rosengart, *supra* note 68.

153 *Egiazaryan*, 290 F.R.D. at 431 (citing Don v. Singer, No. 105584/06, 2008 WL 2229743, at *5 (N.Y. Sup. Ct. May 19, 2008)).

154 *Id.* (citing Nat'l Educ. Training Grp., Inc. v. Skillsoft Corp., No. M8-85 (WHP), 1999 WL 378337, at *4 (S.D.N.Y. June 10, 1999)).

155 NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141 (N.D.N.Y. 2007) (quoting Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54-55 (N.D.N.Y. 1999)) ("Much like the services being rendered here, the public relations firm in *Calvin Klein* was found to have simply provided ordinary public relations advice and 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 otherwise be appreciated in the rendering of legal advice."'); *see also* Haugh v. Schroder Inv. Mgmt. N. Am. Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003).

156 *See generally* A.H. *ex. rel.* Hadjih v. Evenflo Co. Inc., No. 10-cv-02435-RBJ-KMT, 2012 WL 1957302 (D. Colo. May 31, 2012); LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958 (N.D. Ill. 2009); Ex.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103 (S.D.N.Y. 2005); *In re* Copper Mkt. Antitrust **Litig**., 200 F.R.D. 213 (S.D.N.Y. 2001).

157 *Exp.-Imp. Bank*, 232 F.R.D. at 113 (citing *In re* Bieter Co., 16 F.3d 929, 936-37 (8th Cir. 1994)). For a full list of courts applying the functional equivalent test of corporate employees, see LAW JOURNAL PRESS, CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 2.05, 38 n.15 (1999).

158 *Ex.-Imp. Bank*, 232 F.R.D. at 113 (citing *In re Bieter Co*., 16 F.3d at 933-34, 38).

159 16 F.3d at 930-36.

160 *Id.* at 938; *see also* FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) ("[The defendant] 'worked with these consultants in the same manner as they d[id] with full-time employees; indeed, the consultants acted as part of a team with full-time employees regarding their particular assignments' and, as a result, the consultants 'became integral members of the team assigned to deal with issues [that] ... were completely intertwined with [[GSK's] **litigation** and legal strategies.' In these circumstances, 'there is 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."').

161 *See Evenflo*, 2012 WL 1957302, at *4 (noting that PR firm prepared communications plan, drafted communications, and incorporated direct input from Evenflo officers); *In re Copper Mkt.*, 200 F.R.D. at 216 ("RLM was the functional equivalent of an in-house public relations department ... having authority to make decisions and statements on [the client's] behalf, and seeking and receiving legal advice from [the client's] counsel with respect to the performance of its duties."). *But see LG Elecs.*, 661 F. Supp. 2d at 964-65 (comparing Whirlpool's agents to those in *In re Vioxx Prods. Liab. **Litig***., 501 F. Supp. 2d 789 (E.D. La. 2007), and holding that "'[b]ecause of the pervasive supervision of the consultant's work ... the consultants are not independently making decisions that need to be informed in the same way,' and thus there was no justifiable need to extend the privilege").

162 Brian Martin, *Ensuring Attorney-Client Privilege in Crises*, INSIDE COUNS. (Aug. 23, 2012), http://www.insidecounsel.com/2012/08/23/ensuring-attorney-client-privilege-in-crises.

163 200 F.R.D. at 215.

164 *Id.*

165 *Id.*

166 *Id.* at 216.

167 *Id.*

168 Martin, *supra* note 162.

169 A.H. *ex. rel.* Hadjih v. Evenflo Co. Inc., No. 10-cv-02435-RBJ-KMT, 2012 WL 1957302, *4 (D. Colo. May 31, 2012).

170 *Id.* at *4-6.

171 Martin, *supra* note 162.

172 Stafford Trading Inc. v. Lovely, No. 05-C-4868, 2007 WL 611252, at *7 (N.D. Ill. Feb. 22, 2007) (adopting a "balanced approach" recognizing protection for third parties to the extent that communications were made "for the purpose of obtaining or providing legal advice"); *Evenflo*, 2012 WL 1957302, at *4 (citing Horton v. United States, 204 F.R.D. 670, 672 (D. Colo. 2002)).

173 *Evenflo*, 2012 WL 1957302, at *4 (citing *Horton*, 204 F.R.D. at 672).

174 No. 09 C 1941, 2009 WL 2706965, at *5 (N.D. Ill. Aug. 25, 2009).

175 198 F.R.D. 53, 54-55 (S.D.N.Y. 2000).

176 232 F.R.D. 103, 113-14 (S.D.N.Y. 2005); *see also* Stafford Trading, Inc. v. Lovely, 2007 WL 611252, at *17 (N.D. Ill Feb. 22, 2007) (noting that in *Export-Import Bank* the "client's advisor did not work in the client's offices, and that the advisor, even at the project's peak, devoted only 85% of his time to the client's business").

177 232 F.R.D. at 113.

178 *See, e.g.*, *In re* Currency Conversion Fee, No. MDL 1409, M 21-95, 2003 WL 22389169, at *2 (Oct. 21, 2003) (citing *Calvin Klein*, 198 F.R.D. at 55 (S.D.N.Y. 2000)) (holding that the support services company's role was "akin to that of an accountant or other ordinary third party specialist" and was thus not the functional equivalent of the client's employees and that privilege did not extend to consultant who was "merely a transaction processing and computer services corporation that provided standard trade service to [the client] and a vast number of other credit card companies").

179 PAUL R. RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:19 (2d. ed. 2009).

180 *Id.*

181 661 F. Supp. 2d 958, 965 (N.D. Ill. 2009).

182 United States v. BDO Seidman, LLP, 492 F.3d 806, 815-16 (7th Cir. 2007) ("In effect, the common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances. For that reason, the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine

is limited strictly to those communications made to further an ongoing enterprise.").

183 *See, e.g.*, *In re* F.T.C., No. M18-304 (RJW), 2001 WL 396522, at *3 (S.D.N.Y. Apr. 19, 2001) ("This argument fails because the common interest rule is not an independent source of the attorney-client privilege ... and the Court has not found[] a single **case** applying the common interest rule in such circumstances [where an initial attorney-client relationship does not exist].").

184 *In re* Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990); United States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1985); United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); *see also* Mt. McKinley Ins. Co. v. Corning Inc. 2009 Misc. LEXIS 6625, at *7 (Dec. 4, 2009) (noting that the "clearest indication of common interest is dual representation ... [but] [i]t also extends to a situation where there is joint defense or strategy, but separate representation") (citing Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co., 40 A.D.3d 486, 491 (N.Y. App. Div. 2007)).

185 United States v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997) (noting that the joint defense privilege is more aptly referred to as the common interest doctrine).

186 Russell v. Gen. Elec. Co., 149 F.R.D. 578, 580 (N.D. Ill. 1993).

187 *See, e.g.*, Medcom Holding Co. v. Baxter Travenol Labs., 689 F. Supp. 841, 845 (N.D. Ill. 1988).

188 *See* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995).

189 *Id. (*quoting another source).

190 *In re* F.T.C., No. M18-304 (RJW), 2001 WL 396522, at *3 (S.D.N.Y. Apr. 19, 2001) (quoting Strougo v. BEA Assocs ., 199 F.R.D. 515, 520 (S.D.N.Y. 2001)).

191 *See Bank Brussels Lambert*, 160 F.R.D. at 447; *see also In re F.T.C.*, 2001 WL 396522, at *5 (finding that a common legal interest was not found where company's counsel provided legal advice to advertising agency regarding draft advertisements where both were concerned about consequences of failing to comply with the applicable law and regulations because it did not "transform their mutual commercial interest in [an] advertising campaign to a coordinated legal strategy").

192 N. River Ins. Co. v. Columbia Cas. Co., No. 90 Civ. 2518, 1995 WL 5792, at *4 (S.D.N.Y. Jan. 5, 1995).

193 United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989).

194 LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 965 (N.D. Ill. 2009) (citing United States v. BDO Seidman, LLP, 492 F.3d 806, 815 (7th Cir. 2007)).

195 *BDO Seidman*, 492 F.3d at 816.

196 *Id.* (citing *In re* Regents of the Univ. of Cal., 101 F.3d 1386, 1390-91 (Fed. Cir. 1996)).

197 Docket No. 9260, 1994 WL 16774903 (F.T.C.), at *2 (May 16, 1994).

198 *Id.* at *1.

199 *Id.* at *3.

200 661 F. Supp. 2d 958, 965-66 (N.D. Ill. 2009).

201 *Id.* at 967.

202 *Id.* at 966-67.

203 CHARLES ALAN WRIGHT ET AL., 8A FEDERAL PRACTICE AND PROCEDURE § 2032: EXPERT (3d ed. 2013) (citing Fed. R. Civ. P. 26(b)(4)(D)).

204 *Id.*; *see also In re* Long Branch Manufactured Gas Plant, 907 A.2d 438, 441-44 (N.J. Super. Ct. Law Div. 2005).

205 James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIAMI L. REV. 1101, 1185 (1988).

206 *In re Long Branch*, 907 A.2d at 447.

207 *Id.* at 448.

208 *Id.*

209 *Id.*

210 *See generally id.*

211 *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003).

212 *See* LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 964 (N.D. Ill. 2009) (noting that "[b]ecause of the pervasive supervision of the consultant's work, ... consultants are not independently making decisions that need to be informed in the same way," eliminating need to extend privilege).

213 .*See In re* Painted Aluminum Prods. Antitrust **Litig**., No. CIV. A. 95-CV-6557, 1996 WL 397472, at *2 (E.D. Pa. July 9, 1996).

214 United States v. Nobles, 422 U.S. 225, 238-39 (1975).

215 FED. R. EVID. 502(g)(2); *In re* Omeprazole Patent **Litig**., No. M-21-81(BSJ), MDL 1291, 2005 WL 818821, at *8 (S.D.N.Y. Feb. 18, 2005) (citing *In re* Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982)).

216 Jeffrey F. Ghent, Annotation, *Development Since* Hickman v. Taylor *, of Attorney's 'Work Product' Doctrine*, 35 A.L.R. 3d 412, § 2[a] (1971). *But see* Mack v. Superior Court of Sacramento Cnty., 259 Cal. App. 2d 7, 10 (Cal. Ct. App. 1968) (stating that the work-product privilege "was created for the protection of the client as well as the attorney").

217 329 U.S. 495, 510 (1947) (noting that although communications fell outside the scope of attorney-client privilege, they were nevertheless protected as discovery would contravene public policy and orderly prosecution because "[i]n performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel").

218 *See, e.g.*, *In re* Vioxx Prods. Liab. **Litig**., No. MDL 1657, 2007 WL 854251, at *6 (E.D. La. Mar. 6, 2007) (addressing only work-product doctrine and not attorney-client privilege because court found communications were protected as work-product).

219 FED. R. CIV. P. 26(b)(3)(A)(ii) (noting that protection can be overcome if party seeking discovery shows that it (1) has "substantial need" for the materials and (2) cannot obtain the substantial equivalent "without undue hardship").

220 Beardslee, *supra* note 16, at 756-59 (citing Diversified Indus., v. Meredith, 572 F.2d 596, 604 (8th Cir. 1977) (noting "that the 'remote prospect of future **litigation**' is not 'in anticipation of **litigation**' and is not work-product")); *see also* Kingsway Fin. Servs., Inc. v. PricewaterhouseCoopers LLP, No. 03 Civ. 5560 (RMB) (HBP), 2007 WL 473726, at *5 (S.D.N.Y. Feb. 14, 2007); Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974) (holding that the "remote possibility of **litigation**" does not meet the work-product requirement). Kingsway Fin. Servs., Inc. v. PricewaterhouseCoopers LLP, No. 03 Civ. 5560 (RMB) (HBP), 2007 WL 473726, at *5 (S.D.N.Y. Feb. 14, 2007).

221 *See* Beardslee, *Third-Rate*, *supra* note 16, at 756-59.

222 United States v. Constr. Prods. Research, 73 F.3d 464, 473 (2d Cir. 1996).

223 Moses, *supra* note 43, at 1839.

224 United States v. Nobles, 422 U.S. 225, 238-39 (1975).

225 *See* United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998).

226 *See* Haugh v. Schroder Inv. Mgmt. N. Am. Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *1 (S.D.N.Y. Aug. 25, 2003); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000); *see also* Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 400 (2005) ("Even courts that have declined to extend the attorney-client privilege to communications with public relations consultants have denied discovery based on the work-product doctrine.").

227 Egiazaryan v. Zalmayev, 290 F.R.D. 421, 435-36 (S.D.N.Y. 2013).

228 Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 78-79 (S.D.N.Y. 2010).

229 *Adlman*, 134 F.3d at 1202.

230 Chevron Corp. v. Salazar, No. 11 Civ. 3718(LAK)(JCF), 2011 WL 3880896, at *1 (S.D.N.Y. Sept 1, 2011).

231 200 F.R.D. 213, 219-21 (S.D.N.Y. 2001).

232 *Id.* at 220-21 (citing *Adlman*, 134 F.3d at 1202). The court cites *United States v. Adlman* for adopting a broad test that looks to see if the document was created "because of" **litigation**, arguing that documents do not lose protection "merely because it is created in order to assist with a business decision." *See Adlman*, 134 F.3d at 1202.

233 *In re Copper Market*, 200 F.R.D. at 221 (citing Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd., No. 95 Civ. 4856, 1996 WL 490710, at *2 (S.D.N.Y. Aug. 27, 1996)).

234 *See generally* No. 02 Civ. 7955 DLC, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003).

235 *Id.* at *4 (citing United States v. Nobles, 422 U.S. 225, 238 n.11 (1975)); *see also* Upjohn Co. v. United States, 449 U.S. 383, 397-98 (1981).

236 *See id.* at *2.

237 198 F.R.D. at 55.

238 *Id.* (citing *In re* Pfizer Inc. Sec. **Litig**., No 90 Civ. 1260 (SS), 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993); Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 589 (N.D.N.Y.1989)).

239 241 F.R.D. 109, 140-43 (N.D.N.Y. 2007).

240 *Id.*

241 *Id.* at 142 (quoting Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)).

242 *See* Beardslee, *supra* note 16, at 778 (stating that "courts can use any of the approaches to determine whether communications with third-party consultants will be privileged" and that "[t]his creates additional problems" as the "doctrine is unpredictable and results in varying interpretation and application").

243 *Compare Calvin Klein*, 198 F.R.D. 53, *with In re* Copper Mkt. Antitrust **Litig**., 200 F.R.D. 213 (S.D.N.Y. 2001); *see also* Boyd & Babcock, *supra* note 3 (comparing *Calvin Klein* and *In re Copper Market* **cases** under subtitle "Two Conflicting Views from One Court").

244 Beardslee, *supra* note 16, at 779-80.

245 *Id.* at 780 n.279 (citing various examples where courts claim that other tests have been "'done away' with" or explaining that only one approach is used to analyze the problem).

246 *Id.* at 781.

247 Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

248 Beardslee, *supra* note 16, at 780.

249 *Id.*

250 *Id.*

251 *Id.* at 782-83.

252 *See* Davis, *supra* note 4.

253 Jonathan M. Linas, Note, *Make Me Well-Liked:* In re Grand Jury *and the Extension of the Attorney-Client Privilege to Public Relations Consultants in* ***High*** ***Profile*** *Criminal* ***Cases***, 19 WASH. U. J.L. & POL.'Y 397, 423 (2005) (emphasis added) ("The extension of the privilege to a public relations firm does nothing to encourage a client's frank disclosure of material information to his attorney. While it may encourage forthright disclosure from the client to the public relations firm, there is no reason that all material facts would not be brought out in the absence of the firm .... [T]he attorney is in no better position to advise his client than he would be without such an extension.").

254 *Id.*

255 *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119, 1165-66 (2010).

256 *Id.* at 1176-82 (highlighting Model Rule 3.6 regarding publicity, Federal Rule of Civil Procedure 11 regarding representations to the court, and Federal Rule of Civil Procedure 12F regarding motions to strike as vehicles to guide general counsel behavior regarding publicity matters).

257 Xenia Kobylarz, *The Emerging Crisis Management Practice*, LAWDRAGON (Oct. 23, 2013), *available at* http://www.lawdragon.com/wp-content/uploads/2013/10/Emerging-Crisis-Management-Practice.pdf.

258 *See* Beardslee, *supra* note 255, at 1182-83 (suggesting that law schools should "educate law students about the importance of managing legal PR for clients" and should "teach students how to play ... the roles of counselor, gatekeeper, and strategic partner for corporate clients").

259 Linas, *supra* note 253, at 423-25.

260 *How Courts Work: Steps in a Trial*, A.B.A., http:// www.americanbar.org/groups/public_education/resources/law_related_education&uscore;network/how_courts_work/cases.html (last visited Feb. 13, 2015) ("An auto collision gives rise to a civil **case** if one driver sues the other, or if a passenger in one of the cars sues either driver. An auto collision might also lead to a criminal **case**, if it involves allegations of a crime such as drunken driving or leaving the scene of an accident.").

261 *See* Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 312-13 (2011).

262 Steven B. Hantler et al., *Extending the Privilege to* ***Litigation*** *Communications Specialists in the Age of Trial by Media*, 13 COMMLAW CONSPECTUS 7, 24, 30-31 (2004) (citing *Hickman v. Taylor* which states that the work-product doctrine "protects

materials prepared by or at the behest of counsel in anticipation of **litigation** or for trial so that a lawyer can have a 'zone of privacy' in preparing and developing theories and strategy 'with an eye towards **litigation**,"' but noting that often, the larger framing of a series of lawsuits may bolster the strength of the plaintiff and that the corporation must often respond to common **litigation** issues regardless of "whether or not they are tied to a specific lawsuit at the time the issues arise").

263 *See id.* at 30-31.

264 JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE § 1:59 (3d ed. 2013) (quoting Fed. R. Civ. P. 26(b)(4)(B)).

265 *See id.*

266 Linas, *supra* note 253, at 420-21 ("The difference between trial consultants and a public relations firm is that trial consultants are used to assist the lawyer with trial advocacy. The public relations firm, on the other hand, is used for pre-trial advocacy or to avoid trial at all. The rule for non-testifying experts is too dissimilar to be applied in [situations engaging public relations consultants].").

267 *See infra* notes 285-86 and accompanying text.

268 *See In re* Copper Mkt. Antitrust **Litig**., 200 F.R.D. 213, 217-19 (S.D.N.Y. 2001).

269 Upjohn Co. v. United States, 449 U.S. 383, 390 (1981).

270 *See id.*

271 *See* John Grgurich, *8 Brutal Public Relations Disasters from 2013*, FISCAL TIMES, Dec. 24, 2013, http://www.thefiscaltimes.com/Articles/2013/12/24/Duck-Dynasty-and-Other-Brutal-Public-Relations-Disasters-2013 (predicting that negative coverage of Carnival Cruise Line's ocean liner fire makes it "almost certain the lawsuit machine is in high gear"). *See generally In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

272 Hantler et al., *supra* note 262, at 10 (quoting Dirk C. Gibson & Mariposa E. Padilla, ***Litigation*** *Public Relations Problems and Limits*, 25 PUB. REL. REV. 215, 216 (Jun. 22, 1999)); Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APPLIED SOC. PSYCHOL. 345, 363 (1991).

273 Hantler et al., *supra* note 262, at 31; Christine Caulfield, *To Settle or Not to Settle: Lawyers Share Their Tips*, LAW 360, July 10, 2009, http://www.hunton.com/files/News/236c18dd-fcb6-4486-a348-e96597a7062a/Presentation/NewsAttachment/4ef14289-8ad8-4aa1-b2e6-9af18a76a3a8/To_Settle_Or_Not_To_Settle_Law360.pdf.

274 *See Martha's Jury: Judge Takes on Delicate Task in* ***High-Profile Case***, ASSOCIATED PRESS, Jan. 22, 2004, *available at* http://wcfcourier.com/business/local/martha-s-jury-judge-takes-on-delicate-task-in-high/article_69b42a89-9ac2-5ea1-8578-e78d3c9c7318.html; *see also* Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 635-36 (1991) (citing frequency of substantial claims that jury trial has been distorted because of inflammatory newspaper accounts).

275 *See* Hantler et al., *supra* note 262, at 31.

276 *See id.*

277 *See supra* Part III.B.6; *see also supra* Part III.C (outlining requirement that communications be "in anticipation" of **litigation** to be protected under nontestifying expert rule and work-product doctrine).

278 Elisabeth Semel & Charles M. Sevilla, *Talk to the Media About Your Client? Think Again*, 21 CHAMPION 10, 64 (1997).

279 For analysis of attorney-client privilege extension in terms of contribution to legal strategy see Egiazaryan v. Zalmayev, 290 F.R.D. 421, 431 (S.D.N.Y. 2013) and *In re* Grand Jury Subpoena Dated Mar. 24, 2004, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003).

280 *See, e.g.*, *Egiazaryan*, 290 F.R.D. at 431; *In re Grand Jury*, 265 F. Supp. 2d at 330-31.

281 Hantler et al., *supra* note 262, at 32.

282 *See* Imwinkelried & Amoroso, *supra* note 261, at 301.

283 Ann M. Murphy, *Spin Control and the **High**-**Profile** Client -- Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 590 (2005).

284 Michael Jay Hartman, Comment, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in **High**-**Profile** Criminal **Cases***, 10 U. PA. J. CONST. L. 867, 894 (2008).

285 *Id.* at 878 ("[T]he Sixth Amendment's guarantee of a fair trial and the assistance of counsel in criminal proceedings may necessitate extrajudicial media activity by attorneys. This is because the ever-expanding scope of intense media coverage of **high**-**profile** crimes continually threatens to jeopardize the ability of an accused to achieve his or her right to a fair trial." Prosecutor comments may have the purpose and ability to "contaminate the potential jury pool" and "[e]xcessive media coverage can result in ... public pressure on prosecutors to bring ... charges"); Gertsberg, *supra* note 10, at 1463.

286 .Hartman, *supra* note 284, at 878.

287 *See In re* Long Branch Manufactured Gas Plant, 907 A.2d 438, 448 (N.J. Super. Ct. 2005) (noting that the PR consultant's public statements on behalf of the company "necessarily amount to activities that are beyond her role as a consultative expert, no matter how defendants attempt to label these activities as being 'in anticipation of **litigation** or preparation for trial.' Statements made in a public forum do not warrant an expectation of privacy or confidentiality").

288 Carole Gorney, *Model Rules and **Litigation** Journalism: Enough or Enough is Enough?*, N.Y. ST. B.J. 6, 6 (1995) ("**Litigation** journalism, as first identified and defined in *The New York Times*, is the planned use of the news and information media to create a favorable environment and gain public-opinion support for the positions of plaintiffs and attorneys involved in civil lawsuits.").

289 Gertsberg, *supra* note 10, at 1463.

290 *Id.*

291 *Id.*

292 *Id.* at 1475-78.

293 Beardslee, *supra* note 16, at 794.

294 *See, e.g.*, Imwinkelried & Amoroso, *supra* note 261, at 311.

295 *See, e.g.*, Beardslee, *supra* note 16, at 794.

296 *See supra* Part II.A.

297 Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (citing S. Rep. No. 93-1277, at 13 (1974)) ("[T]he recognition of a privilege based on a confidential relationship...should be determined on a **case**-by-**case** basis.").

298 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_ misconduct.html (noting that it is professional misconduct to, among other provisions, "violate ... the Rules of Professional Conduct" or "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation," or "engage in conduct that is prejudicial to the administration of justice").

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American Justice or American Idol? Two Trials and Two Verdicts in the Case Anthony Case
(Richard Gabriel (Decision Analysis, Inc.), The Jury Expert, July, 26, 2011)

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