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EXPANDED LEGAL PRIVILEGE NEEDED FOR LITIGATION PUBLIC RELATIONS

by
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Unless you are a devotee of the legal and public relations trade press, you probably missed a small but important story about one of the essential rules of the litigation and prosecution game. On June 2nd, a U.S. District Court judge in Manhattan reaffirmed that under some circumstances some public relations advisors to some attorneys enjoy some protections of attorney-client privilege. Reported unanimously as victory for communications counselors, the decision looks very different to a careful reader

Judge Lewis Kaplan's ruling was a redacted version of one handed down seventeen days before but not released to the public record. Discretion was required, Judge Kaplan explained, because the case at issue remained before a grand jury. So the judge excluded the names of the defendant and, as he noted throughout, "her" advisors and "her" company from his published decision. Still, he stated that the case had attracted "intense press interest and extensive coverage for months." Let's see: high profile businesswoman, a frenzy of media attention, first half of the 2003, New York, grand jury. You don't need to be Martha Stewart to identify the main ingredient in this salad.

It seems that prosecutors wanted to compel testimony and written records from the public relations advisors to Ms. Stewart's attorneys, who invoked the privilege. In arguing that these advisors should be protected, the attorneys explained that the target of their public relation offensive had been the prosecution itself. To reduce political and professional pressure on prosecutors to bring an indictment, they said, they wanted to put Ms. Stewart's side of the story before the public. In other words, the public relations work involved was specific to the legal back and forth of the case and dealt with nothing else. In an opinion that reflected both diligent research and considerable common sense, Judge Kaplan held that "(1) confidential communications (2) between lawyers and public relations consultants (3) hired by lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving and receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege."

From the small, tight media world covering legal communications battles, the response was breathless. "Extension of the attorney-client privilege is a resounding judgment for every PR counselor" headlined *PR Week*, while the *New York Law Journal* confidently announced, "Privilege Applies to Attorney's Conversation With PR Firm." But as Judge Kaplan was at pains to spell out, his decision included little that was new, which is exactly what makes it so worrisome.

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As Kaplan noted, more than a decade ago Justice Anthony Kennedy, writing for a plurality of the Supreme Court, addressed the question of an attorney's public relations duties. "A defense attorney," Justice Kennedy stated, "may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."

The problem here is that, responding to the aggressive tactics of plaintiff attorneys and, increasingly, prosecutors, the actual practice of defendant-oriented communications long ago moved beyond the intimate role of a few counselors conferring that is imagined in Federal regulation, case law and Judge Kaplan's decision. It has become the art of waging broad and sophisticated campaigns using numerous spokespeople and addressing multiple audiences, not just the court and its officers.

In saying this I am not relying on media reports or casual observation but on my own experience and that of my colleagues at the White House Writers Group over the past decade. Whether dealing with numerous antitrust cases, or lawsuits in the convoluted cable and Internet worlds, or class-actions and other torts against U.S. and non-U.S.-based multinationals, or scalp-driven (or at least partially scalp-driven) prosecutions similar to the one of Ms. Stewart and in fields ranging from financial services to environmental protection, we have found ourselves in a far fiercer and more expansive world than even so sophisticated a jurist as Judge Kaplan appears to imagine.

In the world we inhabit, communications tactics include: wide ranging op-ed campaigns giving voice to independent allies of the contending sides; radio, television and press interview campaigns putting forward these same people; the subtle harnessing of radio, television and newspaper advertising (such as the mom-and-daughter-employees advertisements that Wal-Mart — not a client of ours — is now running, presumably as part of its defense against an employment-related class action); working with sympathetic scholars to develop sophisticated economic analyses and to present this work at appropriate conferences, in well regarded journals and in newspapers; and helping numerous experts and institutions to make a broad case for our clients in many forums.

Who are the audiences for all this effort? They vary. They may include the intellectual circles in which judges and particularly appeals judges travel, but often the audience is much wider. Prosecution and plaintiff-attorney tactics usually include de-legitimatising a defendant or potential defendant in the eyes of the media, the financial markets, the political community and with any number of other groups. Defense communications works to frustrate them and in turn de-legitimatises their case. In this back and forth, the ultimate target may be, as Ms. Stewart's attorneys suggested to Judge Kaplan, the opposition itself. For at the end of the day, each side's willingness to parlay and the deal each is willing to cut is often a product of how confident each feels about its position as revealed in the opposing communications campaigns. What is involved here, then, is not the workings of the fabled "court of public opinion" so much as a shadow play in which the ultimate judges are the players themselves as they take measure of how their shadows fall or might fall on the broader world that they inhabit.

And here is the heart of my reservation. Judge Kaplan's emphasis — and that of the law regarding privilege generally — assumes public relations counselors assembled specifically for the case at hand (he all but disqualifies any PR firm that already serves the defendant). The judge assumes that a PR campaign consists of attorneys and their PR consultants talking among themselves, then issuing media statements or guiding the client's media statements. Period. In other words, Judge Kaplan doesn't seem even aware of most of what constitutes a sophisticated and comprehensive defense communications campaign in our time.

So where does this leave us? About where we were before. But there is a growing need for the privilege to be expanded. Effective communications campaigns are conducted through large teams, many of the members of which have little or no contact with the case's attorneys. This is true of campaigns on behalf of plaintiffs and prosecutors as well as defendants. The rules governing litigation and prosecution should address the environment in which we all operate, not that of decades past. It is time for the courts to come to grips with modern legal communications — and for the coverage of attorney-client privilege to be expanded to fit the world as it is.