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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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

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.

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 jus-

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).

tice."[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

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)).

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

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).

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]

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%2011%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).

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]

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.

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,

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.*

> 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,

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).

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 litiga-

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.").

tion-focused 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

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.

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

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.

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 non-testifying 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

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.*

> 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

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.

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

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.

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

109. 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.*

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]

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).

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]

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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%20Client%20Faces%20a%20Crisis%5B1%5D.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%20privilege%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.

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

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).

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]

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.")).

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]

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).

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,"

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.

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 &*

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).

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]

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).

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

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)).

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

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).

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 inves-

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.*

tigations . . . , 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

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

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

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 de-

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]

clined 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.

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

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)).

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 skepti-

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.

cism 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

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).

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 anticipa-

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_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.").

tion 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 nontestifying 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]

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].").

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]

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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-

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

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.

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

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

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

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.

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 no relation 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

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").

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.