

Applying Attorney-Client Privilege to PR & Comms

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Public relations firms are increasingly occupying an important seat at the table when their clients confront a crisis of one type or another. The 24-hour news cycle and the constant availability of “trending” information on social media have only exacerbated the need for effective strategic communications. Crisis work regularly involves legal issues and legal advice — these matters range from regulatory or compliance matters, to sensitive employment issues, to claims or litigations, corporate restructuring, and mergers and acquisitions.

PR firms need to be mindful of ways their work product may be protected by the attorney-client privilege whenever working with a client’s internal legal team or its external legal counsel.

The attorney-client privilege protects communications between clients and their attorneys which relate to the provision of legal advice. Ordinarily, the presence of a third party other than the attorney and client (such as a PR firm) on a communication will “break” or “waive” the privilege. This means that the communication may be subject to production to an opposing party in a litigation, or in response to a subpoena. There are, however, three exceptions that may apply to protect the privilege when a PR firm is assisting an attorney with the provision of legal advice on behalf of a client. These are:

1. The exception for aiding in legal strategy, which applies when a PR firm is needed to help provide legal advice or achieve a circumscribed legal or litigation goal;
2. The “functional equivalent” exception, which applies when the employees of the PR firm are considered by a court to be the “functional equivalent” of employees of the client; or
3. The “translator” exception, which applies when the PR firm is necessary to facilitate or interpret communications between an attorney and the client.

A recent court decision illustrates how these rules are applied to potentially extend the attorney-client privilege to PR professionals. In *In re Roman Catholic Church of the Archdiocese of New Orleans*, the Catholic Archdiocese of New Orleans retained legal counsel to represent the Archdiocese in advance of a bankruptcy filing. Before the Archdiocese filed for bankruptcy, the bankruptcy counsel retained a PR firm. The engagement letter was entered into between the law firm and the PR firm – presumably in an attempt to shield the work product of the PR firm and communications with the PR firm from disclosure in the bankruptcy proceeding. The engagement letter stated that the PR firm’s purpose was to be the “sole provider of public relations and crisis communication counsel for the Archdiocese regarding its potential restructuring.” In the litigation following the bankruptcy filing, a dispute emerged over whether certain communications involving the PR firm were privileged, or whether those communications had to be produced in the litigation. The Archdiocese took the position that these communications were covered by both the functional equivalent and translator exceptions, and thus argued that the communications were protected by the attorney-client privilege. The court disagreed and ordered the communications with the PR firm to be produced in the litigation.

The court reached this conclusion because it found that the PR firm was working solely to craft responses to media inquiries, and not to aid legal counsel with the legal advice it provided to the Archdiocese. In particular, the court noted that there were no bankruptcy lawyers included on any of the most relevant communications, and that the “ultimate purpose” of the PR advice was solely to “benefit the Archdiocese’s reputational and business/mission goals.” The court further held that the PR firm employees exercised no independent decision-making authority and were not the Archdiocese’s “sole representative” to the media.

Steps That a Proactive PR Firm Can Take to Protect the Attorney-Client Privilege

The *Archdiocese of New Orleans* decision illustrates that courts will strictly scrutinize claims of attorney-client privilege involving PR firms. This means that everyone involved in a crisis situation or a legal matter – the PR firm, the lawyers, and the client – need to take proactive steps to protect the attorney-client privilege. It is usually an uphill battle to keep communications involving a PR firm privileged because courts tend to narrowly construe the exceptions to attorney-client privilege waiver. Therefore, it is important to take each one of the steps outlined below. Even failing to follow one of these steps can be enough for a court to find that the privilege has been waived.

Here are the six key steps to follow:

- 1. PR Firms Should Contract Directly with the Attorney:** PR firms should be engaged directly by the client’s attorney, not the client. The PR firm should send its invoices to the attorney, even if the fees are ultimately passed on to their joint client. The invoices should specifically describe how the PR firm’s work helps the attorney to provide legal advice.
- 2. Describe the Engagement as Legal in Nature:** The engagement agreement should describe the PR firm’s work as aiding in legal strategy and services. The more a PR firm’s work can be tied to legal strategy, the stronger the argument for retaining the privilege.
- 3. Always Copy Attorneys:** PR firms should copy their client’s legal counsel on all communications involving potential legal matters. The fact that the bankruptcy attorneys were not included on the relevant communications in the *Archdiocese of New Orleans* decision was an important fact relied upon by the court in denying protection of the privilege.
- 4. Clearly Mark Communications:** Legal communications should be clearly marked as protected by the attorney-client privilege. This can be accomplished by simply writing “Attorney-Client Privileged Communication” at the top of the relevant communication.

5. **Always Keep Communications Confidential:** The PR firm should keep communications involving legal matters confidential. In particular, the PR firm should never share these communications with any third parties.
6. **Always Keep Legal Work Separate:** The PR firm should keep legal-related PR work separate from any other PR work it performs for the client. If the legal-related work is intermingled with non-legal work, a court is more likely to find that none of the work is legal.

When a PR firm is contacted to assist with a potential legal matter, the firm should promptly raise the issue of attorney-client privilege and discuss the best steps to protect the privilege. Raising this issue proactively will also demonstrate a PR firm's experience, expertise and value.