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Litigation

Keeping Up Public Relations Has Its Risks

Questions Raised Over Liability for Statements and Application of Attorney-Client Privilege

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FIRST, do no harm. That founding oath of the medical profession applies equally to lawyers working with public relations professionals in jointly handling matters that place their clients, who are often used to doing business in the more anonymous realm of corporate America, in the spotlight of media or governmental scrutiny. The working relationship between lawyers and public relations professionals engaged on behalf of common clients creates risks of liability and disclosure. If this relationship is handled improperly, the professionals can cause more harm than they provide help to the client's interests and public image.

This article examines some recent court decisions that highlight two ways in which companies' spinning can get out of control and create new and potentially damaging legal risks.

First, the content of a public relations effort can itself become the subject of a lawsuit for false advertising, unfair competition or disparagement. Depending on what the U.S. Supreme Court does with the Supreme Court of California's deeply divided decision in *Kasky v. Nike*,[1] this may become a huge problem for companies active in the marketplace of ideas. If the decision in *Kasky* is affirmed, essentially all a would-be plaintiff must do to survive a motion to dismiss is plead that statements made in the course of a public relations campaign are false or misleading.

Second, communications between public relations professionals and lawyers can destroy the protections of attorney-client privilege and the attorney work-product doctrine. Courts are divided over whether and to what extent privileged information and litigation strategy can be shared with public relations professionals. No clear rules exist on this subject, and waiver may turn on such questions as who hired the public relations firm, what role(s) the firm served and the sophistication of the corporate client. Lawyers and clients working with public relations professionals should structure their communications carefully.

A Double-Edged Sword

Conventional wisdom was that a corporation accused of misdeeds in news reports could "fight fire with fire," issuing a strong denial of the accusations, perhaps even affirmatively asserting that it was a "good citizen." Such statements, issued through outside public relations consultants, incite public debate and might keep the corporation in the headlines, but they certainly would not lead to a lawsuit or expose the corporation to liability. In light of the *Kasky* decision, however, it is no longer true that "all press is good press." If *Kasky* survives U.S. Supreme Court review, even seemingly innocent public statements about matters of public concern can themselves create high-stakes corporate litigation.

Throughout the mid-to-late '90s, Nike faced allegations that its workers were paid less than applicable local minimum wage laws, were encouraged to work more overtime than applicable local law allowed, were subjected to physical, verbal and sexual abuse and exposed to dangerous working conditions without adequate safety equipment.[2]

Nike spun back, defending itself in press releases, and in letters to newspapers and universities stating that Nike workers are protected from dangerous conditions and the alleged abuses and are paid in accordance with applicable local wage laws.[3] Nike purchased a full-page advertisement printed in leading newspapers to publicize a report prepared by GoodWorks International, a political risk and corporate consulting firm, contending that there was no evidence of illegal or unsafe working conditions in Nike factories in Asia.[4]

But Nike's public relations campaign itself became the subject of a new challenge to the company's integrity. Marc Kasky sued Nike on behalf of the general public under California's unfair competition law, alleging false advertising and seeking restitution of any money acquired as a result of unfair or unlawful business practices. He sought an injunction requiring Nike to undertake a corrective advertising campaign and

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to cease misrepresenting the working conditions at its factories.

Nike moved to dismiss, asserting a First Amendment defense. The trial court sustained the demurrer, and the Court of Appeals affirmed.[5]

The California Supreme Court reversed, however, holding that Nike's advertisements and press releases were commercial speech, deserving of less First Amendment protection than non-commercial speech and no protection at all if they were false and misleading. The court, citing U.S. Supreme Court cases involving commercial speech, created what it called a "limited-purpose" test.[6] This three-part inquiry for determining whether speech was commercial focuses on (1) the speaker, (2) the intended audience, and (3) the content of the message.

Applying the test to Nike's challenged statements, the court determined that Nike was a commercial speaker intending to reach a commercial audience by describing its own commercial policies with a purpose of maintaining its sales and profits. The court held that Nike's goal was to bolster sales in the face of negative press. Thus, for First Amendment purposes, the speech was the same as any other commercial advertisement and the plaintiff therefore had a right to present evidence that statements within the advertisement were false.

One dissenting judge, Justice Janice Rogers Brown, responded that the majority's newly created limited-purpose test "promises much, but solves nothing."[7] Justice Brown lamented the idea that a company, because it wants the public to buy its products, would be effectively precluded from engaging in public debate. This dissent opined that this kind of overly restrictive test that unconstitutionally favors some speakers over others was "so destructive of the right of public discussion" as to be "incompatible with the freedoms secured by the First Amendment."[8]

Nike successfully obtained a Writ of Certiorari from the U.S. Supreme Court, and the appeal is currently pending. Absent a reversal of *Kasky*, however, any corporate public statements (including those made through public relations professionals) put their proponents at risk and will have to be even more carefully vetted before publication. Simply put, under *Kasky*, anything a corporation says, even in its own defense in response to public statements can and will be used against it in a court of law if it can be pled in a complaint as an allegedly fraudulent or misleading statement. If the corporation sought to retain consumer confidence and ensure that the public remains interested in its product, under *Kasky* its statement would be susceptible to challenge as actionable commercial speech.

Sharing Strategy and Privilege

Public relations professionals, like lawyers, are frequently entrusted by their clients with sensitive information and are admitted into a company's innermost deliberative processes. When this occurs during litigation, there is an understandable tendency to assume that attorney-client privilege and attorney work-product protections still apply. But that can be a dangerous assumption.

The privilege rules that apply to other outside consultants such as accountants do not necessarily apply to public relations consultants.

Although courts, in the past, have allowed lawyers and clients to share privileged information with certain outside consultants without fear of waiver,[9] some recent decisions sharply question whether public relations professionals can join a litigation team without destroying the privilege. As a result, lawyers must be cautious in involving public relations professionals in otherwise privileged communications.

The privilege rules that apply to other outside consultants such as accountants do not necessarily apply to public relations consultants. In *United States v. Kovel*, the U.S. Court of Appeals for the Second Circuit extended the attorney-client privilege to communications between a client, a lawyer, and an accountant.[10] The court reasoned that an accountant, when employed by a law firm for the purposes of educating the lawyer and client about subjects outside their expertise or knowledge, is no different than a foreign language translator.[11] The court held that the outcome should not differ when the consultant was hired by the client.[12] The fact that the accountant was elucidating concepts foreign to an attorney made the accountant "necessary, or at least highly useful, for effective consultation between the client and the lawyer which the privilege is designed to permit."[13]

Kovel has not been uniformly extended to cases involving public relations firms. In *Calvin Klein Trademark Trust v. Wachner*, the court held that attorney-client privilege did not extend to communications between a law firm, its client and a public relations firm.[14] Calvin Klein International hired a law firm which retained the public relations firm Robinson Lerer & Montgomery (RLM). The court examined RLM's activities and held that it mostly engaged in lobbying and disseminating generalized public relations advice.[15] The court reasoned that where a public relations firm assists counsel "in assessing the probable public reaction to various strategic alternatives," it is not serving as a "translator" as the accountant did in *Kovel*.[16] The court also found important (and contrary to *Kovel*) that the attorney hired RLM, suggesting that had the client hired RLM, the analysis would somehow be different.

Calvin Klein creates significant problems for law firms if they choose to hire public relations firms. Taking the reasoning to the extreme, law firms would no longer be able to hire any consultants, because the privilege would only extend when the consultant was in the client's employ. This would especially burden attorneys working on a contingency basis, as they often hire all of the consultants themselves because some clients are in no financial position to do so. Public relations firms are more than mere conveniences, performing ministerial tasks. One need only look at the statements Nike made in the *Kasky* case to appreciate why client communications and public perception are extremely important and not nearly as "ordinary" as *Calvin Klein* suggests.

Under *Calvin Klein*, other complications

may arise if a public relations professional is hired for multiple tasks. In *Calvin Klein*, RLM served as a media lobbyist, a communications consultant and part of a litigation preparation team. The court held that the privilege could not attach because the consultant mostly acted as a media lobbyist.[17] It was irrelevant that RLM's work was also helpful to the lawyer in developing a litigation strategy.[18] Under this reasoning, an accounting firm, hired as a translator of information, would enjoy the privilege if it was only hired for that purpose and did nothing else to assist the attorney. Certainly, this will create needless discovery litigation.

Other courts have not been nearly as restrictive as *Calvin Klein*. More recently, *In re Copper Market Antitrust Litigation*, a case also involving RLM, held that privilege should attach to communications between lawyers, the client and a public relations firm.[19] There, a Japanese corporation hired RLM to act as a liaison between the corporation and the media and also to advise the client on how best to protect itself from making public statements that could be legally or otherwise damaging.

The plaintiff in *Copper Market* unsuccessfully asserted that communications shared with RLM could not be privileged because the work done was not exclusively litigation-related, nor was it done at the request of the attorneys. The court noted that the client's executives had limited knowledge of English and therefore needed outside help to otherwise understand "the legal ramifications and potential adverse use of [public] communication the company might have otherwise made."[20] RLM essentially became an employee of the client and therefore shared the attorney-client privilege as if it was the client.[21] Whatever the merit to the court's analysis that foreign clients such as those in *Copper Market* need hand-holding, a more savvy client could fall outside the scope of the *Copper Market* holding. These facets of *Copper Market* suggest that it may be easily distinguished or narrowly confined to its facts.[22]

Taken together, these cases fail to establish a clear rule for how communications between client, counsel and public relations firms should be treated with regard to privilege. Lawyers, clients and their public relations counselors stand in uncertain territory. The need for a clear set of guideposts is apparent.

A recent case from the Colorado Supreme Court could be instructive in developing such a test. In *Alliance Construction Solutions v. Department of Corrections*, the Colorado Department of Corrections (DOC) sought to keep confidential communications between DOC and an independent contractor during the course of a construction project.[23] The agency terminated the project and the original construction firm sued. Throughout the course of the litigation, the agency's counsel had discussed extensively specific litigation issues with the independent contractor.

The court upheld the privilege, adopting the test espoused in the U.S. Supreme Court's decision in *United States v. Upjohn Company*.[24] The *Upjohn* test examines: (1) whether the information was needed to supply a basis for legal advice; (2) whether the communications concerned the matters which were within the scope of the employees' corporate duties; (3) whether the employees understood that the information they were discussing was for the purpose of obtaining legal advice; and (4) whether the communications were considered "highly confidential" when made.[25]

This test could simplify and resolve the complex issues described above. If the public relations firm is retained for the purpose of assisting attorneys in rendering legal advice and all parties involved treat the communications as confidential, privilege should attach. The appropriate analysis should focus on the function of the public relations firm (i.e., how, when and for what purpose communications were made) rather than the particular party that hired the firm.

Conclusion

Perhaps the most important lesson to be learned from *Kasky* and from the privilege cases summarized above is that the lawyer's role of protecting the client — and preserving the confidentiality of client information — does not end when public relations professionals are hired. In some respects, the lawyer's job has only just begun.

Lawyers must always remain attentive to protecting the client's interest, and should affirmatively take an appropriate role in vetting the content of public relations campaigns and structuring the flow of communications to ensure that the use of public relations help does not result in waivers of privilege that result in disclosing information rather than protecting the client's interests and image. No professional wants to harm a client's case or cause while trying to help. In the end, when dealing with public affairs and litigations that are in the public eye, when the time comes to seek public relations help, it is best to think like a doctor, and first do no harm.

(1) 45 P.3d 243 (Cal. 2002), cert. granted, 123 S. Ct. 817 (2003).
(2) Id. at 248.
(3) Id.
(4) Id.
(5) Id. at 248-49.
(6) See *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557 (1980); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
(7) *Kasky* at *81 (Brown, J., dissenting).
(8) *Kasky* at *107 (quoting *Thomas v. Collins*, 323 U.S. 516, 536-37 (1945)).
(9) See *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (accounting firm); *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (real estate developer); *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 F. 563 (S.D.N.Y. 1898) (patent expert); but see *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999) (investment banker).
(10) 296 F.2d 918 (2d Cir. 1961).
(11) Id. at 921.
(12) Id.
(13) Id. at 922.
(14) 198 F.R.D. 53 (S.D.N.Y. 2000).
(15) Id. at 54.
(16) Id.
(17) Id. at 54.
(18) Id. at 54-55.
(19) 200 F.R.D. 213 (S.D.N.Y. 2001); see also *H.W. Carter & Sons, Inc. v. William Carter Co.*, 1995 U.S. Dist. Lexis 6578 (S.D.N.Y. May 15, 1995); *Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002).
(20) Id. at 219.
(21) Id.
(22) The *Copper Market* court distinguished *Calvin Klein* on the basis that the client in *Copper Market* hired RLM and not the attorney. This distinction may not hold water, as prior cases such as *Kovel* have suggested. Id.
(23) 2002 WL 31051586 (Colo. Sept. 9, 2002).
(24) 449 U.S. 383 (1981).
(25) Id. at 394-395.

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