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How PR firms can avoid killing the attorney-client privilege

My [prior column](#) discussed how attorney-client privilege is an incredibly important protection that promotes full and open communications between lawyers and their clients. It's more critical than ever that comms professionals be aware of this privilege and know how to maintain it when helping clients with crisis or other corporate communications involving lawyers.

Last month, a New York federal court provided important guidance regarding the attorney-client privilege in the context of PR firms and other third-party consultants to lawyers.

In *Universal Standard, Inc. v. Target Corporation, et al.*, Universal sued Target claiming the name and brand concept of a Target clothing line infringed on the trademark and concept of Universal's "Universal Standard" clothing line.

Universal retained legal counsel and BrandLink, a comms firm specializing in corporate communications for fashion and consumer clients. In the litigation, a dispute arose about whether Universal was required to disclose emails among employees at Universal, its attorneys and BrandLink.

The emails may have involved legal strategy because they were "discussions regarding a public relations strategy surrounding the filing of the lawsuit [against Target] and in particular whether a press release should [be] issue[d]."

Ultimately, the court said including BrandLink on the emails destroyed the attorney-privilege between Universal and its attorneys and ordered Universal to produce the emails to Target.

The case demonstrates the general rule that including any third party (like a PR firm) on email or other communications between a lawyer and client eliminates whatever attorney-client privilege the communication may have originally had.

While addressing that rule, the court listed three limited exceptions where the attorney-client privilege will extend to communications that include third parties:

First, situations where the third party is literally essential to communications between the attorney and the client, like an interpreter.

Second, situations where the third party is deemed a "functional equivalent" of a corporate employee.

And lastly, situations involving "consultants used by lawyers to assist in performing [certain] tasks that go beyond advising a client as to the law." In other words, the consultant is needed to help provide particular legal advice or "to achieve a circumscribed litigation goal."

In the Universal case, the court said the communications with BrandLink didn't fit any of those categories.

Occasionally, attorneys try to protect attorney-client privilege by using the second category and arguing that the PR firm (or other consultant) is functionally acting as a corporate employee.

Courts look at several factors to make this determination, including: whether the consultant exercised independent decision-making; possessed information held by no one else in the company; served as a company representative to third parties; maintained an office at the company; or spent a substantial amount of time working for the company.

In the *Universal* case, the court held that BrandLink employees did not exhibit the qualities of a corporate employee.

More commonly however, attorneys argue that the communications fit into the third category — namely that the PR pro is necessary for the lawyer to render legal advice.

Courts will consider seven key factors (among other things) to decide if a PR firm is facilitating legal advice or helping achieve a specific legal goal:

- Whether the PR firm contracted with the attorney directly or the client;
- If the engagement agreement describes the work as a facilitating legal services;
- If the attorney is copied on all communications with the PR firm;
- If the PR firm has kept those communications confidential;

- Whether the PR firm's bills were sent to the attorney or to the client;
- Whether those bills describe how the work helped the attorney provide legal advice;
- whether the legal-related PR work was kept separate from general PR work

In *Universal*, the court held that BrandLink also did not fit this category. First, it was hired by Universal, not its lawyer. Also, the court stressed, BrandLink was engaged for business purposes (though it also helped the lawyers).

Finally, there was no evidence BrandLink's communications were intended to help the lawyers with a legal task as opposed to helping the client with publicity.

The court would have been more likely to extend the attorney-client privilege if BrandLink was hired to help Universal's attorneys analyze consumer perception and the likelihood of confusion between the two company's brands.

Accordingly, given the importance of attorney-client privilege, PR firms should immediately raise the issue of how to protect that privilege when a crisis or litigation arises.

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