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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

My company has been sued in very high profile litigation that not only concerns potential liability for a large amount, but that could affect our perception and relationships in the marketplace. We are forming a task force of in-house and external counsel to work with management to defend the case, and would like to hire a crisis/PR consultant to help advise the team on how legal strategy may be received by the court and potential jurors, as well as how it will be perceived among our customers and how best to manage the company's messaging. But, by including a consultant of this type, do we risk waiving privilege on communications among task force members?

A: Ordinarily, inclusion of a third party in otherwise privileged conversations between lawyer and client waives the privilege. There are two lines of cases that establish limited exceptions to this general rule: (1) when a third-party consultant is necessary to "translate" information or facilitate communication to enable the lawyer to provide legal advice, *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); and (2) when the third party consultant has a role that is so integrated into the client's operations that she or he is the "functional equivalent" of the client's employee. In *re Bieter Co.* (8th Cir. 1994). These rationales have been applied to PR professionals. E.g., In *re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (privilege not waived PR professionals necessary to assist lawyers with media climate to influence prosecutors not to bring charges, following *Kovel*); *Viacom, Inc. v. Sumitomo Corp.* (In *re Copper Market Antitrust Lit.*), 200 F.R.D. 213 (S.D.N.Y. 2001) (PR firm integrated into the company's staff, possessed authority to act on behalf of the company, was "functional equivalent" of client).

But most cases have found the presence of PR professionals to waive attorney-client privilege, because their involvement is found not to be necessary for legal advice or more focused on ordinary public relations (not "translation" of information for lawyers) and/or because they do not have the authority or client-integration to be the "functional equivalent" of the client. E.g., *Anderson v. SeaWorld Parks and Entertainment, Inc.*, 329 F.R.D. 628 (N.D. Cal. 2019) (although crisis management consultant provided PR advice about legal strategy to legal team, it was not necessary to translate or facilitate communication between lawyer and client); *LG Electronics USA, Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 965 (N.D. Ill. 2009) (communications with PR firms did not meet "functional equivalent" test when company monitored work and had final say on all decisions).

However, work product protection may apply to materials shared with PR professionals, even when attorney-client privilege does not. See, e.g., In *re Johnson & Johnson Talcum Powder Products, Sales Practices, and*

Products Liability Lit., 2021 WL 3144945, at *9 (public relations consultants were not adversaries, therefore no waiver of work product by disclosure to them) (D.N.J. July 26, 2021).

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

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