

## **Something Came Between Me and My Calvins**

By: Julie R. Rubin

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Public relations counselors have a larger role in litigation than ever before. And this involvement is likely to increase over the next decade as media-savvy clients jockey for position in and out of the courtroom. If you're an attorney who hires public relations counselors to help with litigation, documents shared with or generated by PR counselors may not be subject to the attorney-client and work product privileges, even if they contain the attorney's most intimate and critical notes.

Recently, the United States District Court for the Southern District of New York ordered Calvin Klein's PR firm to produce litigation-related documents provided to it by counsel during an acrimonious battle with a licensee. The PR firm was engaged by CK's lawyers to put the best possible spin on the litigation and to protect the valuable CK label from public criticism during trademark litigation.

Prior to the litigation, CK had already employed the venerable Robinson, Lerer & Montgomery as its PR firm. CK's lawyers then further engaged RL&M to consult with counsel on litigation issues and to control and massage the public's perception of this very public

litigation. This relationship naturally led to an exchange and sharing of documents and ideas relating to the litigation, including documents that otherwise may have been protected by the attorney client privilege and work product doctrine had they been generated by counsel or client to the other.

During discovery, the defendant, a jeans and underwear licensee, subpoenaed RL&M to produce documents relating to the litigation. CK's counsel, Boies, Schiller & Flexner said, "No." Counsel produced some documents responsive to the subpoena, but refused to produce a litany of documents they claimed were shielded by the attorney client privilege and work product doctrine. The attorney client privilege protects confidential communications made between counsel and client for purposes of obtaining legal advice. The work product doctrine ensures the privacy of counsel's thoughts, ideas and general strategies relating to anticipated or on-going litigation. In response to CK's refusal to cough up the requested documents, the defendant filed a motion to compel. The court's ruling against CK is likely to have a damaging and lasting impact on the professional relationship among PR firms, lawyers, and their mutual clients.

The court's decision opens up to disclosure many of the documents that attorneys thought were sheltered under one or both of these privileges. Simply put, this holding means, at least in the influential Southern District of New York, that a PR counselor has virtually no basis for refusing to produce documents on the grounds of the attorney client privilege or work product doctrine – even when directly hired by counsel in anticipation of litigation.

So what can a PR consultant or a lawyer learn from this case that relates to the attorney-client privilege?

First, just because an attorney gives case-related documents to a consulting PR firm their disclosure is not protected. To be protected, those documents must contain confidential communications from the client made for the purpose of obtaining *legal advice, not spin*. And believe me, a sharp judge will delve into the real purpose.

Second, since no attorney client privilege can exist between a client and a PR firm outside the litigation universe, none exists simply because a lawyer becomes part of the relationship equation. There must be something more.

Third, even assuming that the documents were somewhat related to legal advice and not PR spin, the documents are still at risk for production. If the documents were shared with the PR firm merely for the purpose of obtaining PR services and counsel, the attorney-client privilege has been waived and the documents are subject to discovery. To be covered by the privilege, the PR firm must provide a service that enables the lawyer to advise her client on legal issues. An example that comes to mind is the retention of a damages expert who consults on issues related to damages but does not render an opinion. Simply consulting on the likely public perception of a litigation maneuver will not shield the documents.

There are also a few principles to be learned from this case as relate to the work product doctrine:

First, PR advice is *never* work product. Never. The work product doctrine creates a barrier that protects the lawyer's thoughts, ideas and strategy regarding anticipated or on-going litigation. The work product doctrine does *not* protect the thoughts, ideas or strategy with respect to manipulating or controlling public reaction to litigation.

Second, -- PR and legal counsel should not despair -- where documents otherwise fall within the ambit of the work product doctrine, this protection is *not* waived simply because the documents bearing the lawyer's work product (*i.e.*, her thoughts, ideas or strategy) are shared with a consulting PR firm, *provided* the PR firm holds the documents and the information therein in the strictest of confidence. For example, the work product doctrine should hold steadfast where a lawyer shares a strategy idea with a PR firm for purposes of determining the likely public reaction once the idea is executed, *and* the PR impact is a substantial consideration in the path ultimately chosen by the lawyer.

Finally -- and this goes for both the attorney-client privilege and work product doctrine -- remember that these rules apply equally to documents and testimony. Don't be lulled into thinking that a "telephone only" policy protects the communication. Likely, it does not. Conversations may garner no more protection than documents, and instructions by counsel not to testify on the grounds of attorney-client privilege or work product doctrine may be overruled if conduct has not met the stringent requirements set out by this U.S. District Court.

Granted, a case in the Southern District Court is not controlling precedent inside or outside the Southern District. Nevertheless, there are those who feel this case is well reasoned

and its holdings may be applied by other judges dealing with similar facts. In this arena, being forewarned is being forearmed.

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