Can Confidential Communications with a Public Relations Consultant Be Privileged?

Avoiding Liability

By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.

Attorneys will sometimes retain a public relations consultant in high-profile cases. In some instances, attorneys retain them to deal with the media in an effort to put the client in the best light possible in the face of substantial adverse media coverage. Regardless of the reason attorneys retain them, this raises the question of whether privilege attaches to confidential communications among a client, his or her counsel and the public relations consultant until if and when the consultant makes public the information conveyed in such communications. Two recent cases, decided just one day apart, address the law of privilege as it applies to communications with a public relations consultant.

In *Buhunin v. The Superior Court*, 2017 WL 977095, Cal. Rptr.3d (Ct. of App, Cal.), a defamation action, the court considered the question of whether privilege applies to communications among defense counsel, his client and a public relations firm retained to create an internet website. According to plaintiffs, this strategy was a ploy to pressure plaintiffs in the current action to settle the underlying action, where they were defendants, to avoid any further adverse publicity via the website.

The plaintiffs contend that the website "stole the design and format of [plaintiffs' company's] investment services website and then replaced its content with numerous false, misleading, and libelous statements about [them]." Plaintiffs alleged that "[t]he entire website was dedicated to trying to smear [one of the plaintiff's] reputation by falsely associating him with infamous Indonesian dictator Suharto and the atrocities committed by his regime." One of the plaintiffs also contend that "the website falsely suggested the [plaintiffs] were doing business with the dictatorial regime in Indonesia through surviving members of Suharto's family, some of whom have been convicted of murder, bribery and seizing land by force."

Defendant filed a motion to strike plaintiffs' defamation complaints, contending that they were asserted for the purpose of "inhibit[ing] [defendant's] constitutionally-protected petitioning activity of filing the [initial] lawsuit against the [plaintiffs]." In response, plaintiffs filed a motion seeking leave to take discovery concerning the malice element of their defamation causes of action concerning statements made on the website. Specifically, plaintiffs sought discovery from defendant lawyer, his client and the public relations consultant "regarding communications among the three of them relating to the website."

The key to finding privilege is that the consultant offered information that was "necessary or, at the very least, useful, for purposes of the lawyer's dissemination of legal advice."

The trial court limited discovery to whether the client and defendant lawyer "published the statements on the website and, if so, whether they published the statements with malice." The defendant lawyer and the client objected to the discovery request that ensued from the court's ruling, contending, among other reasons, that the discovery sought was "protected from disclosure by the attorney-client privilege and work product doctrine," although they never briefed the work product doctrine objection. Accompanying the objections, defendant and the client provided extensive privilege logs.

The defendant lawyer and his client moved for a protective order, and plaintiffs filed a motion to compel. The matter was referred to a discovery master who recommended that the court overrule the objections, which the trial court did. The defendant lawyer and his client took an immediate appeal to the Court of Appeal.

The issue presented here concerns whether a communication by a client and/or his counsel with a third party — in this case the public relations consultant — would be considered a privileged communication. Such a communication remains privileged "when…reasonably necessary for the accomplishment of the purpose for which the lawyer … was consulted…" The court notes that the general rule, under California law, is that the privilege automatically applies when addressed to a confidential communication between an attorney and his or her client, but the burden shifts to the attorney and client to show privilege when such communication is made to a third party. The rationale behind this shift in the burden is that, with respect to communications to a third party, "the proponent is in a better posture to come forward with the specific evidence explaining why confidentiality was not broken."

In this case, the appellate court affirmed the trial court, recognizing that no "public relations privilege" exists in California, finding that the defendant attorney and his client had failed to establish application of the privilege because the current situation did not fall within the two categories of exception wherein the privilege is applied to communications to third parties. One exception is "where the third party has no interest of his or her own in the matter, but a litigant must disclose a confidential communication to the third party because the third party is an agent or assistant who will help to advance the litigant's interests." The second exception is kindred to the joint defense doctrine, "where the third party is not in any sense an agent of the litigant or attorney but is a person with interests of his or her own to advance in the matter, interests that are in some way aligned with those of the litigant…" The appellate court found that the communications in this instance to the public relations consultant did not fit into either category and, therefore, are not privileged.

The court cites *Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. 2013), a diversity case interpreting New York law involving the issue of whether communication with a public relations consultant is privileged. The court there finds that the test for whether the communication to a third party is privileged is whether there is "(1) a reasonable expectation of confidentiality under the circumstances, and (2) [that] disclosure to the third party was necessary for the client to obtain informed legal advice." Moreover, according to the

continued on Page 11

Can Confidential Communications with a Public Relations Consultant Be Privileged?

continued from Page 4

Egiazaryan court, "the 'necessity' element means more than just useful and convenient but rather requires that the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."

Just as in *Egiazaryan,* the court agreed the communication with the consultant was not privileged because the "public relations support is merely helpful, but not necessary to the provision of legal advice." The court noted a lack of evidence to establish that the communication was "reasonably necessary to develop a litigation strategy or to induce the [defendant] to settle." The court recognized that there may be instances that such communication may be privileged but that the burden to establish privilege was not met in this case.

The other recent case, *Bousamra v. Excela Health,* 2017 WL 959488, A.3d (Pa. Super.), a contractual interference case in which plaintiffs sought production of a privileged letter and emails written by defense counsel to her client with respect to the legal ramifications if defendant publically named plaintiffs, at a media event, as physicians who had performed unnecessary surgery for financial gain. Unlike in *Behunin,* it was the client and not the lawyer who both retained and then forwarded their counsel's communications to a public relations consultant. Also unlike in *Behunin*, the responding party objected and briefed on both the attorney/client privilege and the work product doctrine. The trial judge overruled both objections on the basis that client waived both privileges when it forwarded these communications to the consultant. The Superior Court affirmed.

The Superior Court cites with approval Restatement (Third) of the Law Governing Lawyers, § 70, which provides that "privileged person" includes "agents of the lawyer who facilitate representation." But that provision did not apply here because the consultant was not the lawyer's agent.

The key to finding privilege is that the consultant offered information that was "necessary or, at the very least, useful, for purposes of the lawyer's dissemination of legal advice." The consultant's "presence was not necessary or even highly useful to the question of whether to publicly name the doctors." But the lawyer's letter was drafted without any input from the consultant, and so the court found that this standard was not satisfied as well.

The court also rejected the argument that the consultant "was part of [the attorney's] operation rather than a third party." After all, if the consultant had been an employee of the lawyer's law firm, that would have preserved the privilege.

The Superior Court did agree that the communications constitute work product, but that objection was defeated for the same reason as had the attorney/client privilege objection — by the waiver caused by forwarding such communications to a third party who was not the attorney's agent and who had not assisted the lawyer in rendering an opinion.

The lesson that both *Behunin* and *Bousamra* teach is that the lawyer, not the client, must retain the consultant, that the communications with such must be confidential, and that such communications much assist the lawyer in forming a legal position and advising the client. Any communication that falls short of that standard would not be privileged.