The Applicability of the Attorney-Client Privilege to Non-Attorney Members of the Legal Team

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Given the complexity of issues often facing attorneys in both litigation and transactional practices, attorneys often need to utilize the expertise of non-attorney professionals—accountants, public relations experts, and many other types of consultants—to assist them in representing clients. The need to consult with such non-attorney professionals in many cases is obvious; for instance, an attorney who represents a criminal defendant with a viable insanity defense will need to consult with a psychiatrist. Attorneys who include non-attorney professionals on the legal team must be sensitive to the fact that including them in communications that would otherwise be protected by the attorney-client privilege may result in loss of the privilege. This paper will discuss the basic rules and case law governing when the attorney-client privilege protects communications with non-attorney consultants. It also will provide practical suggestions on how to maximize the probability that such communications will be deemed privileged.

The General Rule: *Kovel*

As a general matter, disclosing attorney-client communications to a third party waives the attorney-client privilege. There is a well-established exception for third parties, such as secretaries, paralegals, and clerks, who are employed to assist the attorney in rendering legal advice. Consultants who "have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body" also come within the attorney-client privilege, such as jury consultants and personal communication consultants "who assist in advising how a client should behave while testifying." *In re Grand Jury Subpoenas Dated*

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Mar. 24, 2003, 265 F. Supp.2d 321, 330-31 (S.D.N.Y. 2003); *see also United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975) (recognizing attorney-client privilege between a criminal defendant and psychiatrist hired by defense counsel in preparation for trial).

This principle has been applied more broadly as well, beginning with the seminal case of *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). In *Kovel*, the law firm employed an accountant, who was held in criminal contempt for refusing to testify about his conversations with the law firm's client. On appeal, Judge Friendly assessed whether the attorney-client privilege protects communications between the law firm's client and the accountant. Recognizing that there are situations "where the lawyer needs outside help," the court found that when the accountant assists in the "effective consultation between the client and the lawyer which the privilege is designed to permit," the privilege should protect the communications. *Id.* at 922.

The *Kovel* court analogized the use of an accountant to the use of a foreign language translator because "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." *Id.* If the attorney directs the client to communicate with the accountant, "who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege." *Id.* In an often-cited passage, the *Kovel* court stated: "What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*. If what is sought is not legal advice but only accounting service, . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *Id.* (internal citations omitted, emphasis in original). This statement, along with the court's emphasis on the translator analogy, has provided the foundation for all subsequent case law regarding the applicability of the attorney-client privilege to any non-attorney consultant, not just accountants.

1. *Must be Consulted for Legal Advice*

As in all situations involving the attorney-client privilege, the party claiming the benefit of the privilege has the burden of establishing all of the essential elements to qualify for the protections of the privilege. *See In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998). Therefore, an attorney who wishes to consult with a non-attorney professional must seek to establish that that the non-attorney professional's advice will facilitate legal advice from the beginning of the engagement. It the attorney consults with the non-attorney professional simply to obtain the consultant's advice itself, such as accounting, tax, or public relations advice, the communications will not be protected by the attorney-client privilege. For example, because the attorney-client privilege is to be narrowly construed, courts generally find that the privilege does not apply if it is not clear that an accountant was used for the facilitation of legal advice.

In *Cavallaro v. United States*, 284 F.3d 236 (1st Cir. 2002), individuals who owned multiple businesses sought estate planning advice from a law firm. Their children, acting as agents of one of the businesses, received tax planning advice from an accounting firm. In the context of a tax investigation, the government issued a third-party recordkeeping summons to the accounting firm. The targets of the tax investigation moved to quash on various grounds, including a claim that certain documents of the accounting firm were privileged because the accounting firm helped the law firm provide legal advice. The district court rejected the argument, finding that the individuals "did not produce any contemporaneous documentation" that suggested that the relationship between the accounting firm and the individuals had "changed in a way that would trigger the privilege." *Id.* at 248. The First Circuit affirmed, stating that "the evidence is strong that Ernst & Young [the accounting firm] acted to provide accounting advice rather than to assist Hale and Dorr [the law firm] in providing legal advice." *Id.* at 248-49. The court noted that prior to a specific meeting, the

accounting firm provided accounting advice independent of the law firm; after the meeting, "the evidence supports the conclusion that [the firms] continued to work on their respective, separate tracks, albeit in a more coordinated way." *Id.* The court noted that when the client first hires an accountant for accounting advice and then later hires an attorney for legal advice, "it is particularly important" for the party to show that the accountant acted in a way necessary for the lawyer to provide legal advice. *Id.* at 249.

At issue in *United States v. Adlman*, 68 F.3d 1485 (2d Cir. 1995), were memoranda prepared by an accounting firm regarding the tax consequences of a proposed corporate reorganization. The accounting firm was the corporation's accountant and auditor and therefore had provided a great deal of advisory services to the corporation. The corporation claimed that, in this particular instance, its in-house tax counsel engaged the accounting firm to assist in his rendering of legal advice regarding the tax implications of the proposed transaction. The government claimed that the accounting memoranda were simply tax advice given to the corporation as part of the accounting firm's "larger role as a consultant" to the corporation. *Id.* at 1499. The district court agreed with the government and noted evidence that the accounting firm rendered extensive services to the corporation related to the reorganization and that these services were billed without differentiation. *See id.* The Second Circuit affirmed, noting that the party claiming the benefit of the privilege carries the burden of establishing all elements of the privilege and stated that in this case "the facts are subject to competing interpretations." *Id.* at 1500. The court noted that the accounting firm provided extensive advisory services to the corporation, both as to the reorganization and in general. The Second Circuit emphasized the fact that "virtually no contemporaneous documentation" supported the view that the accounting firm was "in this task alone" working under a different arrangement, and it also pointed to the accounting firm's billing statements, which "lump[ed] the work done in this consultation together with its other accounting and

advisory services" to the corporation. *Id.* Because of the lack of evidence to support the corporation's assertion that the memoranda were prepared to assist the attorney in providing legal advice, the privilege did not apply. *See also United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994) (holding that communications between corporation's in-house counsel and outside engineering firm, where the firm had been hired to conduct environmental studies on soil and oversee remedial work, were not privileged; firm had not been employed specifically to assist counsel in rendering legal advice or "to put information gained from defendants into usable form for their attorneys to render legal advice").

2. *Emphasis on Translator Role*

Courts have emphasized that, to be covered by the attorney-client privilege, the non-attorney consultant must be translating or interpreting information given to the attorney by the client. In *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999), the Second Circuit found that the privilege did not extend to conversations between counsel and the non-lawyer consultant — an independent investment banker — "notwithstanding our assumption that those conversations significantly assisted the attorney in giving his client legal advice about its tax situation." Even though the attorney consulted with the investment banker to better provide legal advice to his client, the communications were not protected by the attorney-client privilege because "the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." *Id.* The court described *Kovel* as recognizing that "inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client." *Id.* In this case, however, the lawyer "was not relying on [the banker] to translate or interpret information given to" the lawyer by his client. *Id.*

Emphasizing the same point, the court in *In re G-I Holdings*, 218 F.R.D. 428, 434 (D. N.J. 2003), stated that the *Kovel* court "carefully limited the attorney-client privilege between an accountant and a client to when the accountant functions as a 'translator' between the client and the attorney." To establish and maintain the privilege, "third parties must act as 'go betweens' to assist the communication between a client and an attorney." *Id.* at 435. In *G-I Holdings*, the court found that the corporation hired the accountant as a tax consultant, not a translator. As evidence of this, the court noted the in-house counsel's description of the arrangement. As described by the in-house attorney, the accountant "assisted us in understanding the tax and tax accounting ramifications of the proposed structure, which assistance was necessary in order for us to provide legal advice and counsel." *Id.* According to the court, the accountant was hired "to explain tax concepts to in-house counsel so that in-house counsel could then render legal advice to [the company's] senior management." *Id.* Since he was hired for his tax advice, and did not act as a translator or facilitator between the attorney and the client, the court held that the attorney-client privilege did not apply. *Id.* at 435-36.

The Rules Lack Clarity or Certainty

Although the Supreme Court has stated that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all," *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), great uncertainty exists as to the applicability of the privilege to non-attorney consultants. The precise boundaries are hard to delineate clearly and may not be uniform across jurisdictions. This uncertainty is perhaps best demonstrated by two cases arising in the same district court regarding the applicability of the attorney-client privilege to media professionals.

In *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000), the district court found that documents sought from a public relations firm hired by the plaintiff's

attorney did not "contain or reveal confidential communications from the underlying client, CKI, made for the purpose of obtaining legal advice." The court said that the public relations firm, "far from serving the kind of 'translator' function served by the accountant in *Kovel* . . . is, at most, simply providing ordinary public relations advice[.]" *Id.* Citing *Kovel* and *Ackert*, the court stated:

> The possibility that such activity may also have been helpful to [attorneys] in formulating legal strategy is neither here nor there if [the consultant's] work and advice simply serves to assist counsel in assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice.

Id. at 55. Because the public relations firm "did not appear to have been performing functions materially different from those that any ordinary public relations firm would have performed if they had been hired directly" by the client, the district court held that the privilege did not protect the communications. *Id.*

In another case from the Southern District of New York, however, the court concluded that the ability of an attorney to perform important client functions — such as "advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions" — would be "seriously undermined" if attorneys could not engage in frank discussions with the attorneys' public relations consultants. *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 F. Supp.2d 321, 330 (S.D.N.Y. 2003). According to the court, discussions with the public relations consultants would not occur if the attorneys were unable to inform the consultants of some non-public facts, including the lawyers' strategies and tactics, without fear that the consultants might be forced to disclose those conversations. Therefore, the court held that "(1) confidential communications (2) between the lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving and receiving

advice (5) directed at handling the client's legal problems are protected" by the attorney-client privilege. *Id.* at 330-31.

Noting the tension between its holding and that in *Calvin Klein*, the court in *Grand Jury Subpoenas* referred to some distinguishing facts in the cases but stated that the court in *Calvin Klein* "assumed an answer" to the issue of whether an attorney's public and media advocacy for a client is a legal service that warrants extension of the privilege to communications that include public relations consultants. What constitutes legal advice and what is considered translating or interpreting between an attorney and client is not clearly delineated in the case law.

In yet another case arising in the Southern District of New York, the district court found that a public relations firm had essentially been incorporated into the corporation to perform a corporate function that was necessary in the context of a government investigation, litigation, and heavy media coverage. Because of this, the court found that the public relations consultants can be equated with the corporation "for purposes of analyzing the availability of the attorney-client privilege to protect communications" to which the consultants were a party. *Copper Market Antitrust Litigation*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001). Due to the fact that the public relations consultants in this specific case were "the functional equivalent of a [corporate] employee," the court said that *Kovel* and its progeny are "inapposite." *Id.* at 220. This case may be of limited applicability due to some unique facts. The public relations firm essentially took over the corporate role because the Japanese company lacked experience in dealing with Western media. Furthermore, the court made multiple references to the fact that the public relations firm was the company's "agent" and "possessed authority to make decisions" on behalf of the company. *Id.* at 219-220. These cases — all involving media consultants and all from the Southern District of New York — powerfully demonstrate the disparate applications of *Kovel* and its progeny.

How Best to Preserve the Attorney-Client Privilege
When Consulting with Non-Attorney Professionals

If an attorney decides to include a non-attorney professional in attorney-client communications, certain steps should be taken to maximize the likelihood that the communication will be protected by the attorney-client privilege.

1. *Timing*

If a client communicates with the non-attorney professional before he consults with the lawyer, that discussion is almost certainly not privileged. The *Kovel* court recognized that this might be an arbitrary line between the situations in which a client first communicates with the accountant and when the client first consults with an attorney and the accountant is present. 296 F.2d at 922. Nevertheless, an attorney or client who wishes to protect communications made between a client and a consultant must make sure that the attorney is consulted first and directs the communication.

2. *Structure of the* Kovel *Relationship and Contemporaneous Documentation*

Attorneys should structure their relationship with non-attorney consultants so as to maximize the probability that a court will view the relationship as facilitating the attorney's ability to provide legal advice, as opposed to simply providing the professional's regular advice to the client. The attorney, not the client, should formally retain the non-attorney consultant. Furthermore, the retainer agreement should spell out clearly that the consultant is being retained as a facilitator as opposed to a consultant. In *G-I Holdings*, the court noted that the party claiming the privilege "cannot provide the Court with bills or retainer agreements indicating [the consultant's] retention as a facilitator, as opposed to that as a consultant[.]" 218 F.R.D. at 436. The court also noted that no documents indicate the centrality of the consultant's "role as a facilitator." *Id.*

The bills themselves also are crucial to the establishment of an attorney-client privileged relationship. First, the consultant should bill the attorney, not the client. *See Cavallaro*, 284 F.3d at 248 (noting that, although this arrangement is not a requirement, the accounting firm sent its bill to the client, not the attorney). Second, the bill must describe specifically the translating and facilitating functions performed by the consultant, rather than simply describing general consulting services. *See G-I Holdings*, 218 F.R.D. at 436 n.2 (noting that "[t]he absence of contemporaneous documentary proof, such as a separate retainer agreement or individualized billing statements, strongly supports" the argument that the consultant was performing regular consulting services).

3. *Exercise Particular Care with Consultants Already Retained by the Client*

When using a consultant that the client also uses for other purposes — such as an accounting firm that handles other tax or accounting issues or a public relations firm that regularly advises the client as to media issues — the attorney must exercise particular care. The attorney should give serious consideration to using a different consultant than those already retained by the client. Many courts cite a previous relationship as evidence that the consultant is performing regular consulting work, rather than performing a special role as facilitator of legal advice. To overcome this implication, the relationship should be separately and contemporaneously documented as described above. *See G-I Holdings*, 218 F.R.D. at 436 & n.4; *Cavallaro*, 294 F.3d at 248-49; *Adlman*, 68 F.3d at 1501. However, contemporaneous documentation, while necessary, may not be sufficient if the consultant is not considered to be facilitating communications between the attorney and the client. In *Calvin Klein*, the law firm retained the public relations firm to act "as a consultant to [the law firm] for certain communications services in connection with [the law firm's] representation" of the client. 198 F.R.D. at 54. Nevertheless, the court concluded that the public relations firm did not appear to be performing a function different from those that "any ordinary public

relations firm would have performed if they had been hired directly by CKI (as they also were), instead of by CKI's counsel." *Id.* at 55.

4. *Control the Flow of Information on a Need to Know Basis Only*

An attorney also should control carefully the flow of information to the consultant. *Kovel* states explicitly that the attorney does not need to be present at all discussions between the client and the consultant. *See Kovel*, 296 F.2d at 922. Even if not present, however, the attorney should carefully control the communications between the consultant and the client. The attorney always should consider whether the consultant's services and presence at discussions are needed "for the purpose of obtaining legal advice from the lawyer." *Id.* The attorney also must control the flow of information because the applicability of the privilege is so uncertain. Despite the attorney's best efforts, it is impossible to guarantee that communications with a non-attorney consultant will remain privileged. Accordingly, the attorney may elect not to share with the non-attorney consultant certain information the disclosure of which the attorney would not wish to risk.

Applicability of the Attorney Work Product Doctrine

In some circumstances, even if a court concludes that communications between a non-attorney consultant and an attorney are not protected by the attorney-client privilege, the court nonetheless could find that the communications are protected by the attorney work product doctrine. *See, e.g., United States v. ChevronTexaco Corp.*, 241 F. Supp.2d 1065 (N.D. Cal. 2002). Before relying solely on the protections afforded by the attorney work product doctrine, however, an attorney must recognize the limitations of that doctrine. Unlike a party seeking the protections of the attorney-client privilege, a party seeking attorney work product immunity must establish that the materials it seeks to protect are documents prepared "in anticipation of litigation" by a party or the party's representative. Fed. R. Civ. P. 26(b)(3). In addition, unlike the absolute protections afforded attorney-client

privileged communications, an opposing party can overcome attorney work product immunity if it can show that it has a "substantial need" for the documents and that it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* If this showing is made, the court will compel disclosure of the materials, protecting only "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

In *Adlman*, the Second Circuit rejected the view that attorney work product immunity protects only documents created "primarily" or "exclusively" for litigation. 134 F.3d 1194, 1198 (2d Cir. 2002). According to the court, a document is prepared "in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* at 1202. Application of the doctrine can be uncertain where the documents were prepared for both litigation and business purposes, but case law suggests that documents that assist in a business decision are still protected if they were created because of the prospect of litigation. *See In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 221 (S.D.N.Y. 2001) (citing 8 Wright et. al, *Federal Practice and Procedure* § 2024 (2d ed. 1994)). Furthermore, "documents prepared in anticipation of litigation need not be created at the request of an attorney." *Id.*

Thus, in many situations in which courts have held that communications with non-attorney consultants are not protected by the attorney-client privilege, courts nevertheless have applied the attorney work product doctrine to protect materials prepared by the consultant in anticipation of litigation. *See, e.g., Haugh v. Schroder Inv. Mgmt. North America Inc.*, No. 02 Civ. 7955 DLC, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003). Confusion and uncertainty abound in this area of the law as well, however, particularly in connection with the retention of public relations consultants. In *Haugh*, the court concluded

that the party had not demonstrated that the public relations consultant "performed anything other than standard public relations services" or that the communications were necessary for the attorney to provide legal advice. *Id.* at *3. Accordingly, the court held that communications with the consultant were not protected by the attorney-client privilege. Nevertheless, the court held that all of the documents prepared by the consultant were protected by the attorney work product doctrine "as they were all prepared by a party, her agent, attorney, or consultant in anticipation of litigation." *Id.* at 5.

The court in *Calvin Klein*, however, viewed the application of the attorney work product doctrine to public relations consultants differently. *See Calvin Klein*, 198 F.R.D. at 55. In that case, the court stated that "it is obvious that as a general matter public relations advice, even if it bears on anticipated litigation, falls outside the ambit" of the attorney work product doctrine because the purpose of the rule "is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." *Id.* Accordingly, the court in *Calvin Klein* held that the attorney's own work product that is shared with the public relations consultant and is maintained in confidence is protected by the attorney work product doctrine, but the consultant's work product is not. *Id.*

Conclusion

The basic principle that will determine whether communications involving a non-attorney consultant will receive the protections of the attorney-client privilege is whether the communication is "made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*." *Kovel*, 296 F.2d at 922. As discussed, the case law does not clearly define those circumstances in which a consultant is facilitating the attorney's ability to render legal advice. Despite this lack of doctrinal certainty, the sheer complexity of many cases will require attorneys to retain consultants skilled in various specialized areas, including accountants,

public relations professionals, and financial experts. To maximize the likelihood that a court will apply the attorney-client privilege to communications with non-attorney consultants, an attorney must (i) participate in the initial communication, (ii) structure the *Kovel* relationship and document this relationship appropriately, (iii) exercise particular care with consultants previously or currently retained by the client, and (iv) carefully control the flow of information to the consultant. Attorneys also must be mindful of the attorney work product doctrine, which can protect documents created in anticipation of litigation. In light of the uncertainty in the law, the attorney must monitor the use of non-attorney consultants constantly to maximize the likelihood that the attorney-client privilege or attorney work product immunity will apply and minimize the potential harm to the client if either is found not to apply.