Two recent cases in state appellate court show the risks of sharing privileged communications with public relations consultants. But they also provide practical guidance on how to protect the confidentiality of attorney-client communications and attorney work product when dealing with media and public relations firms. While the opinions in Pennsylvania and California might reflect the cases’ individual facts, they offer important lessons for avoiding claims of privilege waiver when using PR consultants during litigation. Most notably, they remind companies to make sure the information shared relates to a necessary role in the litigation. This can be demonstrated by using outside counsel in the PR firm hiring process.
Pennsylvania
In March 2017, the Pennsylvania Superior Court required disclosure of a lawyer’s confidential opinion letter after the client shared it with a PR firm retained by the client. BouSamra v. Excela Health, Pennsylvania’s first appellate decision discussing this issue, involved two physicians who held staff privileges at an Excela-operated hospital.1 After Excela discovered that the physicians provided unnecessary treatments, it hired outside counsel to advise it regarding potential public statements about the physicians. Outside counsel wrote an opinion letter, and Excela forwarded this legal analysis to an independent PR team that it hired to create a media plan about the alleged misconduct.

After public disclosure, one of the physicians sued Excela and sought a copy of outside counsel’s opinion letter in discovery. The trial court concluded that Excela waived privilege by sending the letter to the PR consultant, and the superior court agreed. The appellate court recognized that attorney-client privilege and the attorney work product doctrine could apply to these communications. Nevertheless, it concluded that the privilege had been waived when the client gave the letter to the PR firm.

California
Also in March 2017, the Court of Appeal of California required disclosure of correspondence between a lawyer and a PR consultant. Behunin v. Superior Court, the state’s first appellate court decision discussing attorney-client privilege in the context of third-party media and PR consultants, involved an unsuccessful business deal between Behunin and members of the Schwab family.2 To induce settlement, Behunin’s attorney hired a PR consultant to create a website with information about the Schwabs.

The Schwabs sued for defamation and invasion of privacy. In discovery, they requested information exchanged between Behunin, his attorney and the PR consultant about the website. Behunin objected, saying the information was protected by attorney-client privilege, but the trial court ruled otherwise, which was upheld on appeal. The appellate court recognized that attorney-client privilege could extend to communications with third-party consultants in some circumstances. But it, too, concluded that the privilege had been waived.

Attorney-Client Privilege
Courts determining whether there is waiver of the attorney-client privilege typically use one of two tests: a “necessity” test or a broader “functional equivalence” test.3 The tests are not mutually exclusive.4 The BouSamra and Behunin courts applied the narrower “necessity” test, but neither foreclosed future litigants from asserting privilege for communications if they are supported by the broader test.
Necessity Test
These decisions and courts outside of Pennsylvania and California recognize that “public relations strategy is an important element in the preparation or presentation of a party’s claim or defense.” Therefore, using a PR firm does not mean information cannot be protected. But both courts said, however, that the parties asserting privilege did not prove that disclosing the privileged documents was necessary for rendering legal advice.

The necessity test was applied narrowly in BouSamra and Behunin and requires parties to meet a high standard. But not all cases using this test have concluded that privilege was waived.

For example, the Southern District of New York, in In re Grand Jury Subpoenas, found that communications with a third-party PR firm were privileged. In this case, the high-profile target of a criminal indictment hired an attorney, who hired a PR firm to “influence public opinion in order to advance the [target]’s legal position.” The court concluded that: “(1) confidential communications. (2) between 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 or receiving advice. (5) directed at handling the client’s legal problems are protected by the attorney-client privilege.”

The court acknowledged that its decision turned on the fact that the attorney hired the PR consultant. It cautioned that the target “would not have enjoyed any privilege for her own communications with [the PR firm] if she had hired [the firm] directly, even if her object in doing so had been purely to affect her legal situation.”

Functional Equivalence Test
The BouSamra decision did not refer to the functional equivalence test - a factual analysis into whether a third party is the functional equivalent of an actual employee for purposes of ascertaining privilege - but it did reject Excela’s argument that the PR firm was an actual part of its operations. The Behunin court mentioned the functional equivalence test, but found it inapplicable because Behunin did not raise the issue, and there was nothing in the record to suggest that a functional equivalence relationship existed. Future litigants should consider whether to raise the issue of functional equivalence, as neither court precluded the test’s future applicability.

Other courts have used the “functional equivalence” test instead of, or in addition to, the “necessity” test to decide whether attorney-client privilege protects communications. For example, in Grand Canyon Skywalk Development LLC, counsel for the Hualapai Tribe hired a PR firm “to protect the name of the tribe and make it look more reasonable in the
eyes of the public.\textsuperscript{14} The Nevada district court concluded that there was “little doubt” the PR firm should be treated as a functional employee and highlighted that there was “no evidence that [the PR firm] undertook to provide general public relations services to the Tribe beyond the legal dispute.”\textsuperscript{15}

\textit{In FTC v. GlaxoSmithKline}, the D.C. Circuit similarly found that third-party consultants were the functional equivalent of actual employees.\textsuperscript{16} GSK had retained the services of PR and government affairs consultants.\textsuperscript{17} It submitted an affidavit noting that the consultants were integrated into their respective teams and were treated like full-time employees. In light of these facts, the court found no need to distinguish between the consultants and the corporate employees for purposes of assessing privilege.\textsuperscript{18}

\textbf{Attorney Work Product}

The \textit{BouSamra} court also considered applying the work product doctrine - a doctrine designed to protect materials prepared by an attorney in preparation for litigation - to the opinion letter Excela forwarded to the PR firm. The court concluded that the letter was protected under the doctrine, but found that Excela waived the protection when it shared the letter with the PR firm.\textsuperscript{19} The \textit{Behunin} court did not address the work product doctrine because Behunin provided no legal argument or authorities to support applying the doctrine.\textsuperscript{20}

Courts outside of Pennsylvania and California have addressed and applied the work product doctrine, even when communications with a third-party consultant would have resulted in waiving the attorney-client privilege.

For example, in \textit{Haugh v. Schroder Investment Management North America Inc.}, Haugh’s attorney hired a publications consultant who was also licensed to practice law in another state.\textsuperscript{21} The Southern District of New York concluded that Haugh’s documents were not protected by attorney-client privilege because she had not shown that the communications with her consultant, or between her consultant and her attorney, were necessary for her attorney to provide legal advice. Nevertheless, the court concluded that Haugh’s documents were “covered by the work product privilege, as they were all prepared by a party, her agent, attorney or consultant in anticipation of litigation.”\textsuperscript{22}

\textbf{Takeaways}

The \textit{BouSamra} and \textit{Behunin} opinions show the potential risks of disclosing information to third-party media and PR consultants, even when they are retained in connection with litigation. The courts narrowly interpreted the exception to the waiver rule - and its application differs across jurisdictions.
For those who want to use PR consultants, the cases provide guidance on how to proceed while protecting and preserving privilege:

• Clients should consider whether their attorneys should retain the services of the third-party consultants, instead of the client itself. Alternatively, clients can involve attorneys in the hiring process.

• The agreement with the consultant should show that the consultant will play a necessary and clearly defined role in the litigation.

• The consultant and the attorney should directly communicate in connection with the representation.

Finally, given the fact-specific analysis applied by some courts in determining privilege issues, a court may still say the privilege was waived because of some minor factual distinction, even if every one of the above precautions is taken. Therefore, it is important to exercise caution when deciding what to share with third parties.

Endnotes


3. These tests largely have been developed through the New York federal district courts, but courts outside New York have relied on these tests as well. See, e.g., Grand Canyon Skywalk Development LLC v. Cieslak, Nos. 15-01189, 13-00596, 2015 U.S. Dist. LEXIS 107457 (D. Nev. Aug. 13, 2015).

4. See id. at *23-27.

5. See BouSamra at *15-*16 (noting that the attorney-client privilege may be preserved if the presence of the third party is “necessary or, at the very least, useful, for purposes of the lawyer’s dissemination of legal advice.”); see also Behunin at *17.

6. See BouSamra at *16-*19 (noting that Excela had not produced evidence that it or its outside counsel hired the PR firm to assist in providing legal advice and commenting that there was no proof outside counsel and the firm had ever even directly spoken about the matter for which outside counsel was retained) and Behunin at *25 (noting
that Behunin had produced no evidence that his, or his attorney’s, communications with the consultant were reasonably necessary to develop a litigation strategy or induce settlement).

7. See, e.g., Grand Canyon Skywalk Development LLC v. Cieslak at *23 (noting that, in high-profile cases, some courts believe a PR strategy is an important element of the party’s defense); In re Grand Jury Subpoenas Dated March 24, 2003 (In re Grand Jury), 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003).

8. See In re Grand Jury Subpoenas at 330 (explaining that lawyers may need PR consultants to “perform some of their most fundamental client functions”); but see Behunin at *29 (distinguishing In re Grand Jury on the facts and on the grounds that the In re Grand Jury court applied the federal common law on attorney-client privilege, which is broader than “California law and does not require a finding [that] the communication was reasonably necessary for the attorney to provide legal advice.”).


10. Id.

11. See BouSamra at *19.

12. See Behunin at *31-*33.

13. See, e.g., Grand Canyon Skywalk Development LLC at *38-*39; FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002); In re Copper Antitrust Litig., 200 F.R.D. 213, 215, 220 (S.D.N.Y. 2001) (holding that a PR firm hired to assist internal PR employees was the “functional equivalent” of an employee).


15. Id. at *39-40.
16. See FTC at 148.

17. Id.

18. Id.

19. See BouSamra at *24-*27.

20. Behunin at *36 n.11.


22. See id. at *8, *15.

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