NYIPLEF's 7th Annual Scholarship Event

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Greenberg Traurig LLP, One Vanderbilt Avenue, New York, NY 10017

"When Crisis Strikes: Protecting Privilege and Confidentiality Under Pressure"

CLE Materials

Below is a survey of key U.S. decisions on whether disclosing attorney–client communications to outside public-relations or advertising consultants waives privilege, along with patterns, tests courts apply, and concrete takeaways for working with such vendors.

This summary was generated using AI. All case citations were checked for accuracy.

Big-picture framework

Courts start from the rule that attorney–client privilege is waived by disclosure to third parties. Two routes can preserve protection when a PR/advertising consultant is involved:

- **Kovel extension:** Under *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961), courts may extend privilege to a non-lawyer consultant if the consultant's involvement is necessary to help the lawyer provide legal advice (i.e., the consultant functions as a "translator" of information essential to legal counsel's work). The Kovel case provided some protection to client communications with an accountant who was a law firm employee, with Judge Friendly noting:

> Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege…; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, 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; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. **What is vital to the privilege is that the communication be made in**

confidence for the purpose of obtaining legal advice from the lawyer. (emphasis supplied).

- **Work-product doctrine:** Separate from privilege, materials prepared by or for counsel in anticipation of litigation can be protected even if shared with a consultant, provided the disclosure does not substantially increase the risk of adversaries obtaining the material and is tied to litigation strategy.

The more the communications look like general reputation management or business communications rather than enabling legal advice or litigation strategy, the more likely a waiver.

Representative cases: outcomes and reasoning

Cases finding waiver (or rejecting privilege)

- **Universal Standard Inc. v. Target Corporation, No. 18 Civ. 6042 (GWG) (SDNY May 6, 2019):** Communications between and among lawyers, client and PR agency relating to litigation were not privileged because any legal concerns about a press release could have been communicated directly between client and counsel; the PR agency was not the functional equivalent of an employee, lacked independent decision-making authority on the press release, did not hold unique information unavailable to Universal Standard, did not work exclusively or maintain an office at Universal Standard, and did not seek legal advice from counsel to guide its own work. Because the communications were related to the business decision whether to publicize the lawsuit via press release, and not to investigative or analytical tasks aiding litigation strategy, the communications were also not protected by work product.
- **Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (SDNY 2000):** Communications with a PR firm were not privileged where the PR firm's role was general reputation management and media strategy. The court stressed that merely routing communications through counsel or copying counsel is insufficient; the PR firm must be necessary to obtain legal advice, not business/PR advice.
- Courts frequently reach similar results for engagements with marketing or advertising agencies, finding waiver where the agency's tasks center on brand, advertising, or campaign messaging not demonstrably necessary for legal advice.

Cases recognizing protection (narrow, fact-specific)

- **FTC v. GlaxoSmithKline, 294 F.3d 141 (D.C. Cir. 2002):** Privilege can extend to outside consultants where they are necessary to the provision of legal advice. GSK's corporate counsel provided a affidavit detailing that they "worked with these consultants in the same manner as they d[id] with full-time employees; indeed, the consultants acted as part of a team with full-time employees regarding their particular assignments" and, as a result, the consultants "became integral members of the team assigned to deal with issues [that] ... were completely intertwined with [GSK's] litigation and legal strategies."
- **In re Bieter Co., 16 F.3d 929 (8th Cir. 1994):** Privilege can extend to a non-employee consultant who is the functional equivalent of an employee, facilitating communications between client and counsel.

- **Schaeffler v. U.S., 806 F.3d 34 (2d Cir. 2015):** (i) The attorney-client privilege was not waived by provision of documents to a consortium of banks sharing a common legal interest in the tax treatment of a refinancing and corporate restructuring resulting from an ill-fated acquisition originally financed by the consortium; and (ii) the work-product doctrine protects documents analyzing the tax treatment of the refinancing and restructuring prepared in anticipation of litigation with the IRS.
- Some courts have upheld work-product protection for PR consultant communications created primarily to assist counsel with litigation strategy (e.g., message testing or press planning that is tightly linked to anticipated motions, jury pool concerns, or settlement leverage), especially where counsel directs the work and distribution is strictly limited.

Case with Mixed Results (some communications protected; some not)

- **In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), aff'd on related grounds:** Communications between a high-profile target, her lawyers, and a PR firm were privileged:

> This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. For example, lawyers may need skilled advice as to whether and how possible statements to the press—ranging from "no comment" to detailed factual presentations—likely would be reported in order to advise a client as to whether the making of particular statements would be in the client's legal interest. And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions. In consequence, this Court holds 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 found two specific communications between the client and the PR firm that were not at the behest of lawyers or directed at helping the lawyers formulate their strategy were not privileged.

What courts look for: patterns across decisions

- **Necessity vs. usefulness:** It is not enough that PR/advertising input is helpful. Courts ask whether involvement of the consultant was necessary for counsel to provide legal advice or to conduct litigation, akin to a translator, accountant, or functional corporate agent.

- **Counsel direction and purpose:** Protection is more likely where communications are created at the direction of counsel, for the primary purpose of obtaining or conveying legal advice, or for litigation strategy—not general PR goals.
- **Integration and "functional equivalent":** If the consultant is embedded as the functional equivalent of an employee (long-term, integrated, attending internal meetings, bound by confidentiality, and acting as an internal agent on legal issues), privilege is more plausible.
- **Segregation of business from legal:** Mixed-purpose communications tilt against privilege. Courts parse document-by-document and often compel production of business/PR portions while protecting discrete legal advice or attorney mental impressions.
- **Confidentiality and distribution:** Broad circulation (to business teams, multiple vendors, or media drafts) defeats privilege/work product. Tight controls and explicit confidentiality undertakings support protection.

Practical guidance for PR and advertising engagements

- **Engage through counsel with a Kovel letter.** Have outside or in-house counsel retain the PR/advertising firm, define the scope as necessary to obtain or deliver legal advice and litigation strategy, and document the necessity.
- **Ensure counsel's active involvement.** Have attorneys direct the consultant's work, participate in key communications, and tie deliverables to legal objectives (e.g., impacts on jury pool, regulatory exposure, settlement leverage, or specific litigation filings).
- **Narrow the scope and segregate workstreams.** Separate ordinary-course PR/marketing from litigation/legal communications. Create distinct teams, project names, and folders. Avoid mixing press campaign drafts with legal analyses.
- **Label and limit distribution.** Mark communications as for the purpose of obtaining legal advice and/or prepared in anticipation of litigation. Keep circulation to those who need to know (counsel, client decision-makers, and the specific consultant individuals).
- **Prefer work product where applicable.** For materials primarily aimed at litigation strategy or anticipated proceedings, document the litigation nexus. Avoid disclosing such materials beyond the consultant in ways that undermine confidentiality.
- **Audit and train.** Provide short guidance to the consultant's team on privilege hygiene, including avoiding gratuitous PR-only commentary in legal threads and not forwarding legal communications within the vendor's broader organization.

Quick comparison: typical outcomes

Scenario	Likely Result	Rationale
General PR campaign messaging shared with counsel and PR firm	Waiver (not privileged)	Business/PR purpose predominates; not necessary to obtain legal advice
Counsel-directed PR memo analyzing media risks tied to jury pool and upcoming motion practice, kept	Possible privilege/work product	Counsel's purpose and necessity tied to litigation; narrow distribution

Scenario	Likely Result	Rationale
confidential		
Advertising agency developing brand campaign with occasional legal input on risk	Waiver (not privileged)	Ordinary-course marketing; legal advice incidental
Consultant embedded as functional equivalent of employee, assisting counsel on regulatory response and public disclosures	Possible privilege	Functional-equivalent/Kovel factors; close tie to legal advice
Broadly disseminated talking points sent to executives, PR firm, and outside vendors	Waiver and loss of work-product protection	Loss of confidentiality; substantial risk of disclosure to adversaries

Bottom line

- Disclosing attorney–client communications to PR or advertising consultants often waives privilege unless you can show the consultant's participation was necessary to enable legal advice and communications were tightly controlled.
- Courts apply Kovel narrowly in PR/advertising contexts and will parse documents line-by-line. Embedding the consultant into the legal advisory process, documenting necessity, and rigorously separating business communications from legal strategy significantly improve the odds of preserving protection.
- Even where privilege fails, work-product protection may still apply if the materials are primarily for litigation and confidentiality is preserved.

See also: Roy Simon, "Attorney-Client Privilege & Public Relations Firms," New York Legal Ethics Reporter, July 2003 (available at https://www.newyorklegalethics.com/attorney-client-privilege-public-relations-firms/ (last accessed January 26, 2026).

Attachment: *Universal Standard, Inc. v. Target Corp.*, No. 18 Civ. 6042 (GWG) (SDNY May 6, 2019).