Preserving Privilege and Maintaining Client Confidences When Dealing With Third-Party Consultants During a Crisis

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I. Introduction

In times of crisis, corporations often seek urgent legal advice from counsel. In formulating a rapid response, counsel is forced to work under pressure to collect and comprehend volumes of data. These situations may require counsel to utilize the help of third-party consultants. For instance, in response to the increasing number of company data breaches, the retention of a third-party forensic investigator is often necessary because information technology departments commonly lack the expertise or technology required to preserve electronically stored information. Additionally, these departments commonly lack the expertise to conduct a thorough investigation of a breach on their own. Counsel may also rely on third-party consultants in response to a whistleblower action under the Dodd-Frank Act or as part of an internal investigation into violations of the Foreign Corrupt Practices Act, where the services of forensic accountants and technology experts are integral to the comprehension of complicated financial transactions and the use of computer review platforms. Notably, in any high-profile data breach, litigation, or regulatory enforcement action, counsel may also need to immediately bring a large-scale public relations firm into the fold.

In each of these scenarios, the attorney-client privilege guards against disclosure of confidential communications, between attorney and client, made for the purpose of providing legal advice.[1] But what happens when the client or counsel communicates with third-party consultants? Will such communications be privileged?

Generally, the attorney-client privilege is waived when a privileged communication is disclosed to a third party.[2] However, when a third-party consultant "assist[s] the lawyer in the rendition of professional [legal] services,"[3] the "agency exception"[4] to waiver may apply. This exception to the general waiver rule is commonly referred to as the *Kovel* doctrine. In the landmark case *United States v. Kovel*,[5] the Second Circuit ruled that a client's communications with an accountant, hired by the client's attorney, were privileged because the accountant was functionally equivalent to a foreign language translator who helped the attorney understand his "client's story."[6]

But application of the *Kovel* doctrine to communications between counsel and third party consultants is not automatic. For example, in *Fine v. ESPN, Inc.*,[7] the United States District Court for the Northern District of New York recently declined to apply the doctrine to communications between the defendant in a defamation suit, defense counsel, and the defendant's public relations firm. Even though the public relations consultants incorporated the advice of counsel into press releases, the court determined that the work of the third-party consultants did not assist in the provision of legal advice.[8] Similarly, in *Scott v. Chipotle Mexican Grill, Inc.*,[9] the United States District Court for the Southern District of New York held that the *Kovel* doctrine did not apply to communications with a human relations consultant in an employment-related class action lawsuit.[10] Consequently, case law reveals that in times of crisis—no matter how rapid a response is required—client and counsel should remain cognizant of the need to properly preserve privileged communications and client confidential information with third-party consultants and should make sure to take all necessary steps to do so.

II. Attorney-Client Privilege and the "Agency Exception" to Waiver

Upjohn Co. v. United States[11] remains the leading case on attorney-client privilege in the corporate context. Extending the attorney-client privilege to corporate communications, the United States Supreme Court in *Upjohn* ruled that the attorney-client privilege protected interview notes and memoranda (i) prepared and collected by in-house counsel (ii) as part of a factual investigation to determine the nature of alleged illegal activities and to enable in-house counsel "to be in a position to give legal advice to the company" in light of the fact that (iii) the interviewed employees were "sufficiently aware" of the legal purpose and confidentiality surrounding the investigation.[12] In support of its holding, the Court recognized that the purpose of privilege was "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[13]

The current formulation of the *Kovel* doctrine provides that "the 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."[14] Notably, the *Kovel* doctrine is a federal common law doctrine; thus, it applies in federal court, unless such court sits in diversity to decide a state law claim or defense where the state privilege law governs the dispute.[15] According to the more stringent New York formulation of the "agency exception" to the general waiver rule of the attorney-client privilege, the party asserting the privilege

must demonstrate the following: "(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."[16] To satisfy the "necessary" prong, the third party's involvement must be "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."[17] As a result, it is more difficult to preserve privilege under New York law than under federal common law.[18]

III. The Work Product Doctrine

The work product doctrine is a related privilege that prevents discovery of "1) a document or tangible thing; 2) that was prepared in anticipation of litigation; and 3) was prepared by or for a party or by his representative," unless the party seeking discovery makes a showing of substantial need and a lack of undue hardship.[19] The rationale of the work product doctrine is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries."[20] The doctrine protects materials prepared by attorneys and their agents.[21] The party asserting work product protection bears the burden of establishing its applicability.[22]

IV. Extending the Attorney-Client Privilege to Third-Party Consultants

A closer look below at the application of the *Kovel* doctrine and the agency exception to waiver reveals how and where the attorney-client privilege may be extended and what situations would preclude its extension.

A. Accountants

As established in *Kovel*, the attorney-client privilege readily extends to communications with accountants. The Second Circuit continues to rely upon *Kovel*, and it has more recently stated that the attorney-client privilege "is held to cover communications made to certain agents of an attorney, including accountants hired to assist in the rendition of legal services."[23] Still, in *United States v. Adlman*,[24] the court found that communications with an accounting firm were not privileged since there was "virtually no contemporaneous documentation"[25] to support the view that the accountants operated in a legal capacity. *Adlman* illustrates the canon from *Kovel* that "if the advice sought is the accountant's rather than the lawyer's, no privilege exists,"[26] a canon which holds true independent of the type of consultant.

B. Forensic Investigators/Technology Experts

Though lawyers have a professional responsibility to "stay abreast of technological advances,"[27] forensic investigators and technology experts have specialized skills that can help counsel, especially in a crisis situation, provide fully informed legal advice. As a result, courts have extended the attorney-client privilege to communications with such consultants—especially in the context of data breach litigation, a bourgeoning practice area.

In class action litigation arising out of the high-profile data breach of customer payment information at Target, for example, the Minnesota District Court recently held that the attorney-client privilege extended to communications with a "Data Breach Task Force," comprised of outside technology consultants.[28] In this case, Target assembled the Data Breach Task Force after discovering the possibility of a data breach and the consequent exposure to litigation.[29] Target adopted a laudable "two-track investigation" that allowed the court to easily delineate which communications were privileged.[30]

On the (non-privileged) first-track of the overall investigation, Target conducted an "ordinary-course investigation," focused on determining what happened and remediation of the data breach. In addition, a team of consultants hired by credit card companies affected by the breach conducted a similar investigation.[31] These investigations occurred for business purposes, as opposed to a legal purpose, and thus privilege did not attach to the "first-track" of the overall investigation.

On the (privileged) second-track of the overall investigation, Target created the Data Breach Task Force, hiring a separate team of consultants to help its lawyers provide fully informed legal advice: "Target's lawyers needed to be educated about the breach so that they could provide Target with legal advice and protect the company's interests in litigation that commenced almost immediately after the breach became publicly known."[32] The court ultimately applied the agency exception to waiver to the second-track of the overall investigation, holding that email communications between Target, its counsel, and the Data Breach Task Force were privileged.[33]

Similarly, in *Genesco, Inc. v. Visa U.S.A. Inc.*,[34] the court applied the *Kovel* doctrine, holding that privilege extended to communications with a "computer security consultant"[35] retained by outside counsel to assist in an investigation of a cyber attack. Mirroring Target's approach, Genesco similarly used a two-track approach: the company determined that its outside counsel "should conduct an investigation of the [i]ntrusion, separate and apart from the investigation already being conducted [by adverse parties,] . . . for the purpose of providing legal advice . . . and in anticipation of litigation[.] . . . Genesco Counsel identified the need to retain a computer security consultant to assist them in conducting the [p]rivileged [i]nvestigation."[36]

These cases demonstrate that careful planning, such as adopting a two-track approach to the investigation of a data breach, allows for extension of attorney-client privilege to communications with third-party forensic investigators and technology experts.

C. Public Relations ("PR") Consultants

Extension of the attorney-client privilege to communications with public relations consultants who assist in times of crisis is a rare and unlikely exception to the general rule. A well-known 2003 decision concerning the insider trading suit against Martha Stewart[37] marked the broadest application of the *Kovel* doctrine: it extended privilege to the PR firm that Martha Stewart's lawyers hired to help counteract the media blitz that demanded prosecution of Ms. Stewart. The court held "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."[38] Since then, however, later courts have declined to extend privilege to communications with PR consultants: the Martha Stewart case has been deemed an outlier[39] and its holding has been limited to the particular facts of the case.[40]

Courts in the Second Circuit have distanced themselves from the Martha Stewart decision, which applied federal common law, and have emphasized that New York privilege law does not apply the agency exception unless the PR consultant's work is "necessary" to the provision of legal advice. In *Egiazaryan v. Zalmayev*,[41] the court—while sitting in diversity and applying New York State law—held, in a defamation action, that communications with a PR consultant were not privileged because the coordination of a media campaign was not "legal advice."[42] Moreover, the court found no showing that the consultant's involvement was "necessary to facilitate communications" between the client and counsel.[43] The court distinguished the Martha Stewart case and an earlier case that extended privilege to communications with PR consultants because "they were not diversity cases, each applied the principles of federal common law rather than New York State privilege law."[44]

In *Fine v. ESPN, Inc.*,[45] another recent defamation suit, the court similarly held that communications with a PR firm were not privileged.[46] The plaintiff sought discovery of documents related to a university's internal investigation into allegations of sexual abuse by an employee.[47] The university hired a PR firm to write press releases and manage the media during the investigation.[48] The university claimed that communications with the PR firm were privileged; but the court rejected such a premise, holding that, despite incorporating advice of the university's lawyers into press releases and other documents, communications were not disclosed to the PR firm to assist in the provision of legal advice.[49] In the end, the university did not satisfy the strict standard for the agency exception to waiver to apply under New York law.[50]

D. Management Consultants

The extension of privilege to communications with management consultants applies only when the consultant has technical expertise that demonstrably assists counsel in the provision of legal advice. An instructive case is *Scott v. Chipotle Mexican Grill, Inc.*,[51] a class action lawsuit turning on the employment classification of "Apprentices" working at Chipotle restaurants.[52] Chipotle hired a human resources management consultant to conduct a "job function analysis" and argued that the consultant's report was privileged.[53] The court held that *Kovel* did not apply because neither the consultant nor her report provided any "specialized knowledge" that the attorneys could not have gained on their own.[54] Moreover, the court explained that "[i]t strains credulity to imagine that an attorney evaluating wage and hours laws would not be able to speak with employees or interpret those laws on his own."[55] While management consultants can be a valuable addition to a crisis response team, *Scott* reveals that privilege will not be preserved simply because a consultant makes counsel's job easier—the consultant, instead, must provide a unique service or expertise that helps counsel provide fully informed legal advice.

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E. Financial Consultants

Depending upon the nature of a corporate crisis, a financial consultant may be a crucial member of a crisis management team. However, corporate officers and counsel should be mindful of the court's strict approach in determining whether communications with financial consultants, such as valuation experts and investment bankers, fall under the attorney-client privilege umbrella. For example, in *Sieger v. Zak*,[56] the Second Department held that a financial consultant hired by the majority shareholder and CEO of a closely held corporation, in the context of a buyout of the minority shareholders, was not an "agent" of the corporation for the purpose of making communications related to the stock purchase agreement privileged.[57] As a result, the agency exception to the general waiver of privilege rule did not apply—the corporate defendant was required to disclose potentially damaging communications between the CEO, corporate counsel,

and the financial consultant, which could reveal that such parties acted in concert to undervalue the corporation at the time of the buyout of the minority shareholders.[58] Similarly, in *United States v. Ackert*,[59] the Second Circuit Court of Appeals held that communications between corporate counsel and an investment banker regarding the tax consequences of a strategic transaction—which the IRS challenged in court—were not privileged because, unlike in *Kovel*, counsel did not rely on the investment banker to help "translate" information or better understand the facts.[60] On the contrary, counsel sought additional information about the transaction from the banker, thus the attorney-client privilege did not apply.[61]

V. Interaction of Privilege and Client Confidentiality

Protecting a client's privileged communications from unauthorized disclosure is inherently tied to a lawyer's fundamental duty to preserve the confidentiality of client communications under Rule 1.6 of the New York Rules of Professional Conduct (the "Rules"). The ethical duty of confidentiality is far broader than the attorney-client privilege: it applies to an attorney in all scenarios and at all times (unless disclosure is permitted or required by law), and applies not only to privileged communications with clients, but also to all information gained during or relating to the client representation, whatever the source of such information.[62]

With the pervasive impact of technology in the practice of law and the increasing use of third-party providers (e.g., cloud services, legal process outsourcing, etc.), the Rules and accompanying Comments have emphasized the need for a lawyer to exercise reasonable care to avoid inadvertent disclosure or unauthorized access to client confidential information. Rule 5.3 similarly imposes a duty on attorneys to adequately supervise and monitor third-party non-lawyer consultants retained to assist the lawyer in rendering legal services to the client.[63] Under Comment 3, attorneys must make reasonable efforts to ensure that the services of a non-lawyer consultant are provided in a manner that is compatible with the professional obligations of the lawyer.[64] This ethical duty to adequately supervise non-lawyer consultants to avoid disclosure of confidential client information is an ongoing obligation of every lawyer, but it is particularly critical in a client crisis scenario. A practical first step for counsel to take to further comply with the duty of confidentiality is to ensure that third-party consultant engagement letters include a carefully drafted confidentiality provision.

VI. Conclusion

Crisis situations underscore the crucial role played by outside counsel to preserve attorney-client privilege and to maintain confidentiality of client information. Where the crisis scenario involves complex litigation facing the client, outside counsel must act quickly and effectively to retain skillful and experienced third-party consultants in highly specialized or technical fields. However, the attorney-client privilege terrain remains to be filled with ambiguous case law. Moreover, the standards for application of the "agency exception" to the general waiver rule for privilege under federal and New York law remain in tension.[65] While it appears that federal law would allow privilege to extend to third-party consultants who assist in providing legal advice or improve the lawyer's understanding of communications between the lawyer and client, New York law is far more restrictive, stretching the privilege doctrine only to where the consultant's involvement is "necessary" (not merely useful or supportive), i.e., nearly indispensable or serving a special or unique purpose in facilitating or aiding the lawyer's rendering of legal advice.[66]

Therefore, when a crisis erupts for a client, it is vitally important for outside counsel to work closely with the client and its in-house attorneys from the outset in any initial communications with third-party consultants. Outside counsel should also carefully structure and document any third-party consulting relationships to ensure client confidential information is protected. Finally, counsel should monitor, control, and analyze the flow of information with consultants to assess whether there is a likelihood that privilege may apply to any consultant relationship and its corresponding communications in order to protect the client in crisis.

Endnotes

1. *See, e.g.*, *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (the attorney-client privilege applies to "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice").
2. See, *e.g.*, *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) ("disclosure to a third party . . . eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege").
3. Joseph M. McLaughlin, 3 Weinstein's Federal Evidence § 503.01 (LexisNexis, 2d ed. 2003).
4. *See Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 431 (S.D.N.Y. 2013).
5. 296 F.2d 918, 918 (2d Cir. 1961).
6. *See Kovel*, 296 F.2d 918, 921.
7. *See Fine v. ESPN, Inc.*, No. 5:12-CV-0836 LEK/DEP, 2015 WL 3447690, at *1 (N.D.N.Y. May 28, 2015).
8. *Id.* at *11 (stating that "[i]f public relations is merely helpful but not necessary to the provision of legal advice, the agency exception does not apply").
9. *See Scott v. Chipotle Mexican Grill, Inc.*, 94 F. Supp. 3d 585, 585 (S.D.N.Y. 2015), *motion for relief from judgment denied*, No. 12-CV-08333 ALC/SN, 2015 WL 2182674, at *1 (S.D.N.Y. May 7, 2015).
10. *Id.* at 592.
11. 449 U.S. 383, 383 (1981).
12. *See Upjohn Co.*, 449 U.S. at 394-95.
13. *Id.* at 389.
14. *See Scott*, 94 F. Supp. 3d at 592 (quoting *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999)).

15. Fed. R. Evid. 501.
16. *See Egiazaryan*, 290 F.R.D. at 431 (quoting *Don v. Singer*, No. 105584-06, 2008 WL 2229743, at *5 (N.Y. Sup. Ct. 2008)).
17. *See Nat'l Educ. Training Grp., Inc. v. Skillsoft Corp.*, No. M8-85 (WHP), 1999 WL 378337, at *4 (S.D.N.Y. June 10, 1999).
18. *See, e.g.*, *McNamee v. Clemens*, No. 09 CV 1647 SJ, 2013 WL 6572899, at *6 (E.D.N.Y. 2013) (declining to extend privilege in a defamation action governed by New York law to communications between Roger Clemens, the baseball player, and his public relations consultants because *in camera* review of the allegedly privileged documents showed that "standard public relations" services provided by the consultants were not "necessary so that [Clemens' counsel] could provide Clemens with legal advice").
19. *Id.* at *7; *see also* Fed. R. Civ. P. 26(b)(3) (stating that Rule 26(b)(3) "provides the general rule that material prepared by or at the request of an attorney in anticipation of litigation is not subject to discovery").
20. *See United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947)).
21. *See Costabile v. Westchester, N.Y.*, 254 F.R.D. 160, 164 (S.D.N.Y. 2008).
22. *See In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003).
23. *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).
24. 68 F.3d 1495, 1495 (2d Cir. 1995).
25. *See Adlman*, 68 F.3d at 1500.
26. *See Kovel*, 296 F.2d at 922.
27. Opinion 842, N.Y. St. B., Ass'n Comm. On Prof'l. Ethics (Sept. 10, 2010), http://www.nysba.org/CustomTemplates/Content.aspx?id=1499 (quoting Opinion 782, N.Y. St. B. Ass'n Comm. On Prof'l. Ethics (Dec. 8, 2004), http://www.nysba.org/CustomTemplates/Content.aspx?id=5385); *see also* N.Y. Rules of Prof'l. Conduct R. 1.1 cmt. 8 (McKinney 2015) (as part of a lawyer's duty to provide competent representation "a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information").
28. *See In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522 (PAM/JJK), 2015 WL 6777384, at *3 (D. Minn. Oct. 23, 2015) [hereinafter *Target*].
29. *See Target*, MDL No. 14-2522 (PAM/JJK), 2015 WL 6777384, at *3.
30. *Id.*, at *2.
31. *See Target*, MDL No. 14-2522 (PAM/JJK), 2015 WL 6777384, at *2.
32. *Id.*
33. *Id.* at *3-4.
34. 302 F.R.D. 168, 168 (M.D. Tenn. 2014).
35. *Id.*at 180.
36. *Id.*
37. *See In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 322 (S.D.N.Y. 2003) [hereinafter *Martha Stewart Litigation*].
38. *See Martha Stewart Litigation*, 265 F. Supp. 2d at 331.
39. *See Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1198 n. 20 (Mass. 2009), *holding modified in other part by McCarthy v. Slade Associates, Inc.*, 972 N.E.2d 1037, 1037 (Mass. 2012) (the *Martha Stewart Litigation* is "in the minority").
40. *See Ravenell v. Avis Budget Grp., Inc.*, No. 08-CV-2113 (SLT), 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012) (the *Martha Stewart Litigation* which "arguably extended the [Kovel doctrine] the furthest" is limited by its specific holding and context).
41. 290 F.R.D. 421, 421 (S.D.N.Y. 2013).
42. *Id.* at 431.
43. *Id.*
44. *Id.*
45. *See Fine v. ESPN, Inc.*, No. 5:12-CV-0836 LEK/DEP, 2015 WL 3447690 at *1 (N.D.N.Y. May 28, 2015).
46. *Id.* at *11.
47. *Id.* at *1.
48. *Id.* at *10.
49. *Id.* at *11.
50. *See Fine*, 2015 WL 3447690 at *11.
51. *See Scott v. Chipotle Mexican Grill, Inc.*, 103 F. Supp. 3d 585, 585 (S.D.N.Y. 2015), *motion for relief from judgment denied*, No. 12-CV-08333 ALC/SN, 2015 WL 2182674, at *1 (S.D.N.Y. May 7, 2015).
52. *See Scott*, 94 F. Supp. 3d at 590.
53. *Id.* at 593.
54. *Id.* at 594-95.
55. *Id.* at 595.
56. *See Sieger v. Zak*, 874 N.Y.S.2d 535, 535 (N.Y. App. Div. 2009).
57. *Id.* at 538.
58. *Id.*
59. *See United States v. Ackert*, 169 F.3d 136, 136 (2d Cir. 1999).
60. *Id.* at 139.
61. *Id.* at 139–40.
62. N.Y. Rules of Prof'l. Conduct R. 1.6 cmt. 3 (McKinney 2015).
63. N.Y. Rules of Prof'l. Conduct R. 5.3 (McKinney 2015).
64. N.Y. Rules of Prof'l. Conduct R. 5.3 cmt. 3 (McKinney 2015).
65. *See supra* note 44.
66. *See supra* note 17.

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