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Communications Between Public Relations Firm and Counsel Held Not Privileged

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Behunin v Superior Court, __ Cal. Rptr. 3d ___ 2017 WL 977095 (March 16, 2017)

Brief Summary

The Second District of the California Court of Appeal ruled that communications between counsel and a public relations firm hired by the attorneys were not protected by the attorney-client privilege. The dispute arose out of real estate investment litigation initiated by the lawyer's client against Charles Schwab and his son Michael.

Complete Summary

In *Behunin* the public relations firm was engaged by the law firm to set up a Website containing information linking the Schwabs and their real estate investments in Indonesia to the former Indonesian dictator Suharto and his family. The Schwabs filed a defamation case against their litigation adversary and the attorney. The Schwabs asserted the Website was designed solely to foment a defamatory smear campaign that asserted the defendants actively engaged in business with Suharto family members who were connected to and in some cases convicted of criminal conduct.

The motion seeking the discovery was made in the context of an anti-SLAPP motion by the lawyer and the client. The Schwabs sought a delay in ruling on the motion until discovery was taken as to communications between the attorney and the public relations firm. The discovery referee and the presiding judge both concluded that the privilege objections were not sustainable. The appellate court accepted a writ of mandate and stayed discovery until it ruled on the findings of no privilege.

The Court was required to determine whether the communications fell within several exceptions to the general rule that communications with non-clients, that disclose otherwise confidential client information, are not privileged. California has codified the exception in Section 952 of the Evidence Code by essentially treating certain third parties as the equivalent of clients. In particular, a communication to a non-client to further the interest of the client or a communication necessary for the accomplishment of the purpose for which the lawyer is consulted is protected from disclosure. The first exception is generally referred to as the "agency exception" and the second is generally referred to as

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the "joint concern" exception.

Since these exceptions are codified in California and Section 952 has been liberally applied to a wide variety of consultants, it was generally assumed that the privilege would be liberally applied in California to public relations firms hired by lawyers. Thes firms have historically played critical roles in consulting on negative publicity that arises out of high profile investigations or lawsuits.

Nationally, there has been a split of authority on the issue as between states such as New York where such objections have been overruled in several cases and certain federal courts which have applied the federal common law privilege which is similar to that of California. The federal courts have been more liberal in extending the privilege to all members of the crisis resolution team including public relations consultants. *E.g., In re Grand Jury Subpoenas*, 265 F.Supp 2d 321, 323-24 (S.D.N.Y. 2003).

The court began its analysis by noting the question was one of first impression and that:

There is no "public relations privilege" in California and the courts cannot create one.

2017 WL 977095 at p.*6.

The court proceeded to review California decisions including those in which courts concluded that the exception to the privilege had been properly applied. The court noted that the agency exception had been applied in manner consistent with that of California in other jurisdictions when the public relations firm becomes deeply involved in the decision making process in order to minimize negative public relations impacts. In those situations the firm becomes equivalent in its function to employees of the company that would have the protection of the privilege in the ordinary course.

The court then reviewed the second line of cases regarding the role of public relations firms that are not part of the resolution team but advise on how best to protect the company's interests in light of the fact that the client's legal problem has been widely publicized and criticized. The court held that the privilege may be extended in that situation because the engagement may form an integral role in assisting counsel in best representing the client and protecting its interests. The court emphasized that this included services rendered after participating in confidential communications with counsel with the object of restoring balance and creating a level playing field for the client. This included situations where the negative anti-client media "drum beat" could influence the decisions of regulators or prosecutors and interfere with the client's ability to get a fair trial both in the court and the court of public opinion.

By contrast the court clearly frowned on the practice of enlisting a public relations firms to initiate and expand media warfare to influence the outcome of the litigation. The court found that such indirect that efforts to assist counsel in obtaining a more favorable outcome did not satisfy the joint concern exception.

The court found this to be the fatal flaw in the position of the attorney and client. There was no foundation that the public relations firm was actively assisting the attorneys in developing litigation strategy. Moreover, there was no evidence that the smear campaign was developed for the benefit of counsel to assist him in his legitimate role of developing the best possible settlement strategy for the client in the lawsuit on the merits. Rather, the design of the negative press campaign appeared only to have the collateral objective of creating more leverage for counsel in settlement negotiations. The fact that counsel had established the engagement did not support the conclusion that the anti-Schwab Website was established as a legitimate component on the lawyer's performance of legal services for the client in the lawsuit.

Finally the court found that the arrangement failed to satisfy the requirements of the common interest exception. The common interest exception was not designed to protect the overlapping interests of the law firm and the public relations firm in furthering the interests of the identical client.

Significance of Decision

Unfortunately for clients and practitioners alike this is not a well settled area of the law. A good starting point is to know the laws of the jurisdiction governing the client's liability. There are still jurisdictions in which there is no exception to the strict attorney-client privity and communication requirements to avoid a waiver of the privilege. Many of these states have not refined their rules on the privilege since their admission to their to the Union. Other states recognize only very narrow

exceptions as the extent to which communications with non-clients are protected.

In those states it is still best to consult with a public relations firm on the best strategy for communicating the company's public pronouncements. However, there must be an awareness that any advice rendered will not be protected, even if counsel ultimately serves as the spokesperson for the company. Thus, it is best to segregate the rendition of legal and public relations advice in such jurisdictions.

In states like California, which is highly protective of the privilege, the best strategy is to clearly document the engagement, the firm's role and to state that the predominant (or even exclusive) role of the public relations firm is to assist counsel in representing the company. Thus, as in many states, California will look at the "predominant purpose" of the engagement of those involved in a legal investigation to evaluate whether the privilege applies. *Costco Wholesale Corp. v. Superior Court,* 47 Cal. 4th 725 (2009).

Further, a "full integration" versus "mouthpiece" relationship between the public relations firm and the overall *Upjohn* team charged with investigating the liability risk should be considered. The agency relationship cases have generally been easier to defend. The more involved the firm in the overall investigation and problem solving process as consultants, the more difficult it is the courts to treat the public relations firm differently from any other corporate representative for the purposes of protecting the privilege.

But again evaluating state law is important because full integration also means divulging the most sensitive information if the privilege is deemed not to hold.

Finally, the courts are much more protective of defensive use of public relations firms to counter rush to judgment media bias against the company as the *Behunin* case observed. Affirmatively litigating the case in the press entails greater risk of waiver than setting the record straight.