

21st Century Media's Role in Legal Outcomes Merits Consideration of Privilege for Public Relations Advisors

by Andrew R. Sutton

Abstract

The advent of the digital era in news delivery - desktop publishing, blogs, message boards, websites and round-the-clock news networks - has created a mass media culture where public image is paramount and where up-to-the-minute news delivery steers public opinion like never before.

Because 21st century media sates America's appetite for scandalous exploits and sensational tales, it possesses staggering power. Realizing this, those in the legal realm strategically use the media to court advantage in their legal endeavors.

In a 2003 opinion letter published by the Washington Legal Foundation, Clark S. Judge, Managing Director of the White House Writers Group, wrote of "aggressive tactics of plaintiff attorneys" and "the art of waging broad and sophisticated campaigns using numerous spokespeople and addressing multiple audiences, not just the court and its officers".

In response to these tactics, defense attorneys are employing public relations professionals to advise them in matters of media relations and crisis communications. In recognition of the escalating involvement of public relations professionals as players on the legal strategy team, and to preserve the confidential nature of communications between attorneys, PR advisors and clients, the concept of privilege for public relations professionals must be examined.

Background

The role of public relations advisors in legal strategy mandates their inclusion in most, if not all, attorney-client conversations. Presently, the law recognizes limited privilege for public relations advisors only when a) they are hired by the legal team and b) only in communications pertaining to the client's legal case. This approach can prove problematic though, as under current law, advisors can be subpoenaed to testify in cases involving their clients. As it stands now, advisor-client communications outside those involving the case-at-hand are not protected and are admissible as testimony. This places the PR advisor in a no-win situation. They can a) refuse to testify and go to jail or b) violate the very trust that keeps them employable, ruin their career and damage an important client.

Proposal

Recognition of privilege for public relations advisors has been subject to varying interpretations up and down the court system. However, in 2003, U.S. District Court Judge Lewis Kaplan caused a shift in thinking when he voiced his belief that "(1) Confidential communications (2) between lawyers and public relations consultants (3) hired by 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" (Judge).

For the sake of consistency throughout the nation's courtrooms, to level the playing field between prosecutors and defendants, to strengthen the ideal of the presumption of innocence, to encourage the free flow of information between clients, attorneys and public relations advisors and to preserve the institutional integrity of the public relations profession, permanent recognition of privilege should be extended to public relations advisors.

Definition of Public Relations Advisor

A public relations advisor is professional under contract, to a client, that interprets opinion, crafts messages, prescribes communication strategies and tactics and disseminates information on behalf of the client to its various stakeholders.

Rationale for Privilege

The rationale for extending permanent privilege to public relations advisors is supported by three arguments:

Privilege Contributes to the Justice System by Strengthening the Ideal of Presumption of Innocence

In today's media-engaged legal world, where defendants more often are tried in the court of public opinion than in a court of law, privilege levels the playing field in the media battle between the state and the defendant.

Privilege Creates an Environment for Uninhibited Communication Between Attorneys, Clients and Public Relations Advisors

Privilege negates the possibility that a defendant's past conversations with a public relations advisor can be used against them in court. Privilege also secures confidentiality in trial-related communications, so attorneys, clients and public relations advisors can engage in unguarded and productive dialogue.

Privilege Preserves the Institutional Integrity of the Public Relations Profession

As a profession, public relations relies on its ability to offer uncut opinion and strict confidentiality to clients. Solidifying the promise of privacy and non-disclosure will strengthen the trust bond between clients and PR advisors and will preserve the institutional integrity of the public relations profession.

Strengthening the Ideal of Presumption of Innocence

Prosecutors manipulating the media to steer public opinion are retarding our legal system. Their actions are circumventing the burden of proof required in a court of law to attain a guilty verdict in the eyes of the public. States' attorney are maneuvering with immunity, castigating defendants through the media and persuading the viewing public of a defendant's culpability, all with the protective cloak of privilege.

If this is to be the future of law, and it appears that it is, defense attorneys deserve the right to fire their own salvo in the battle being waged on the public airwaves. Doing so requires careful and confidential planning with clients, attorneys and public relations advisors.

Judge Lewis Kaplan supports this notion. "In some cases, the advocacy of a client's case in the public forum will be important to achieve a fair and just result in pending or threatened litigation" (Creamer 1).

By granting the defense its own cloak of privilege, the advantage now enjoyed by prosecutors will be cast aside and the playing field between opposing sides will be leveled.

However, if prosecutors continue to drive, unimpeded, to the proverbial hoop, and continue to color the public's perceptions of defendants, the ideal of presumption of innocence will cease to exist 10 years from now.

Creating an Environment for Uninhibited Communication

In times of crisis, such as a high-profile court case, a public relations advisor must be able to understand every aspect of a defendant's plight and be able to communicate openly with every stakeholder on the defense team.

Extending privilege to public relations advisors would give them the ability to confer confidentially with attorneys and their clients. This is an important notion because, if public relations strategies and tactics are intercepted by the opposition's legal team, scrubbed free of context, and presented to the court, they can actually harm the defense.

For example, if a PR advisor autonomously commissions an opinion poll to determine media strategy, and the poll returns a negative outcome for the client, the defense is unable to suppress this information and keep it from being used against them by the prosecution.

Consider innocuous conversations between clients and public relations advisors that may have occurred decades ago. As the law exists now, those conversations, regardless of their relevance to the case, can be manipulated by the prosecution and are admissible in court.

Privilege would protect all communications between a public relations advisor and a client.

This notion is not to be taken lightly. In a high profile case in New York, U.S. District Court judge Lewis Kaplan struck down a prosecutor's attempt to force grand jury testimony of a PR advisor regarding conversations with a client. His rationale in doing so was that if attorneys can't maintain an open dialogue with clients and discuss strategy with the input of public relations advisors, their function would be seriously undermined (Hood 8).

Kaplan's opinion also nods to the cornerstone of the public relations industry - maintaining confidentiality between public relations advisors and their clients.

Preserving the Institutional Integrity of the Public Relations Profession

At the heart of the public relations business is the advisor's ability to listen to clients without judgment, gather and interpret the public's opinion of the client

and create and disseminate information on behalf of the client, all while maintaining confidentiality.

Public relations advisors are privy to sensitive corporate material, human indiscretions, family secrets, hostile take-over plans and hosts of other confidential information. If clients can't trust their advisors to maintain secrecy, even in the face of a subpoena, the value of the public relations profession plummets.

As the law now stands, a 25-year-old public relations advisor, fresh out of college, struggling to pay back student loans while building a name for himself and building a family at the same time, stands no chance against a subpoena.

He lacks the experience, the financial resources and the intestinal fortitude to resist the demand to testify against one of his clients. The lack of privilege gives him no choice. He simply must tell what he knows – all while ruining his career and compromising his ethical framework.

For this young public relations advisor, extending privilege removes this scenario from the realm of possibility.

For the institution of public relations, privilege solidifies the trust clients put in their advisors.

Because it strengthens the ideal of presumption of innocence, creates an environment for productive dialogue and preserves the integrity of the public relations profession, each of which impact us in one way or another, extending the concept of privilege to public relations advisors benefits society and the greater good.

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Sources

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