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Cover Page Footnote
J.D. candidate, Fordham University School of Law, 2005; B.A. Fordham University, 2002. I am especially greatful to my husband, mother, and father for their love, understanding, support, and tolerance. I wish to dedicate this Comment to my mother, Svetlana, who as always been an inspiration to me.

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SHOULD PUBLIC RELATIONS EXPERTS EVER BE PRIVILEGED PERSONS?[1]

*Deniza Gertsberg**

INTRODUCTION

Over the past decade, the media fixation with pursuing crime stories has made it increasingly difficult for persons accused of a crime to enjoy a fair judicial process.[2] The media's concentration on trials to increase ratings and profits delivers what the voyeuristic public wants to see: raw human emotion discharged through greed, sex, and murder.[3] It is no longer true that any publicity is good publicity.[4] Witness the trials of O.J. Simpson and Martha Stewart.[5] Their celebrity status granted them the misfortune of having to face two trials—the legal trial and the trial by the court of public opinion.[6] Even defendants with no prior celebrity status often become infamous overnight when accused of a crime.[7] Me-

* J.D. candidate, Fordham University School of Law, 2005; B.A. Fordham University, 2002. I am especially greatful to my husband, mother, and father for their love, understanding, support, and tolerance. I wish to dedicate this Comment to my mother, Svetlana, who as always been an inspiration to me.

1. In this Comment, public relations firms, public relations consultants, and public relations experts are used interchangeablely without implying any doctrinal difference.

2. Elisabeth Semel & Charles M. Sevilla, *Talk to the Media About Your Client? Think Again*, 21 CHAMPION 10, 11 (1997).

3. *Id.* at 10; *see* Carol Ann Kell, *Putting Your Client Out Front*, N.J. L.J., June 16, 1997, at 31 ("[T]he reality is that what is communicated in the media is often perceived by the public as gospel.").

4. *See, e.g.*, Vanessa Blum, *Waging War in the Court of Public Opinion*, LEGAL TIMES, Nov. 1, 1999, at 15.

5. *See* Robert W. Tracinski, *Martha and the Tall Poppies*, CNSNEWS.COM, Jan. 12, 2004, *at* http://www.cnsnews.com/ViewCommentary.asp?Page=\Commentary\archive\200401\COM20040112a.html (last visited Nov. 2, 2004) ("As the Martha Stewart case finally goes to trial, it is clear that Ms. Stewart has already been convicted in the court of public opinion.").

6. *See* George Brewer, *The Trial of O.J. Lipstadt*, REVISIONIST, 2001, *available at* http://www.vho.org/tr/2001/2/tr06ojlipstadt.html; Peter Henderson & Lauren Weber, *Kobe's Sponsors Await Trial of Public Opinion*, REUTERS, July 19, 2003, *available at* http://www.uktop100.reuters.com/latest/mcdonalds/top10/20030719-bryant-marketing.asp ("In the court of law, he is innocent until proven guilty. When a district attorney presses charges, he is guilty until proven innocent in the court of public opinion.").

7. *See* Mawiyah Hooker & Elizabeth Lange, *Limiting Extrajudicial Speech in High-Profile Cases: The Duty of the Prosecutor and Defense Attorney in Their Pre-Trial Communications with the Media*, 16 GEO. J. LEGAL ETHICS 655, 666-67 (2003) ("The characterization [of Steven J. Hatfill, the suspected anthrax mailer] as a 'person

dia has "enormous power" to influence the course of legal proceedings.[8] The result for clients whose lawyers are not trained in public relations could be devastating.[9]

This phenomenon[10] broadens an attorney's role.[11] Not only is a lawyer obligated to pursue lawful strategies in the court of law, but a lawyer must also ensure that the client's right to a fair trial is not undermined by negative media campaigns that ignite public outrage, induces prosecutors to bring more severe charges, and possibly influence the jury pool.[12] Yet, lawyers are taught how to litigate, negotiate, and practice law according to precedent. They are not taught how to "spin."[13] Untrained and unskilled in ad-

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of interest' must have had some negative effect on the public because this once prominent professional has lost one job and has been suspended from another.").

8. *See* JAMES F. HAGGERTY, IN THE COURT OF PUBLIC OPINION: WINNING YOUR CASE WITH PUBLIC RELATIONS 5 (2003).

9. *See* Tracinski, *supra* note 5.

10. The media feeding frenzy is a "phenomenon" only in the sense that the availability of sources that deliver the "news" has increased exponentially. *See* Christine Brennan, *Hubbub Surrounding Bryant Case Hits Ridiculous Heights*, USA TODAY, Aug. 7, 2003, at C9; *available at* http://www.usatoday.com/sports/columnist/brennan/2003-08-06-brennan_x.htm ("There are hundreds of cable outlets, thousands of radio shows, hundreds of thousands of Web sites and chat rooms—and they all have oodles of airtime and space to fill."); *see generally* David Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993) (arguing that although most people get their information about the criminal justice system through the media, the information is often misleading and frequently wrong).

11. The negative influence of publicity on the outcome of litigation is not a new phenomenon in American history. *See* Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 635-36 (1991) ("'Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts'") (quoting Irwin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring)); Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816 (1995) (discussing Aaron Burr's highly publicized trial and his ability to get a fair trial where newspapers had published affidavits of two prosecution witnesses). Minow and Cate also discuss the increased number of cable channels dedicated to dissecting high-profile cases. Minow & Cate, *supra*, at 635.

12. Joseph W. Martini & Charles F. Wilson, *These Days Spin Is In: Defending Your Client in the Court of Public Opinion*, CONN. L. TRIB., Dec. 1, 2003, at 5; *see* Erin McClam, *Stewart Judge Begins Questioning Jurors*, ASSOCIATED PRESS, Jan. 22, 2004, *at* http://www.rednova.com/news/stories/6/2004/01/22/story147.html (last visited Nov. 2, 2004) (discussing the difficulty the judge faced in the Martha Stewart trial when selecting an impartial jury who could be "fair despite the heavy pretrial publicity").

13. The term "spin control" originated in the halls of politics to describe how politicians and their spokespeople coordinate and manipulate commentary for purposes of controlling public opinion. *See* JOHN A. MALTESE, SPIN CONTROL: THE WHITE HOUSE OFFICE OF COMMUNICATIONS AND THE MANAGEMENT OF PRESIDENTIAL NEWS 23 (2d ed. rev. 1994); *see also* David Levy et al., *Have a Media Plan Before*

dressing the media, many lawyers require "outside help"[14] from public relations firms when representing clients who endure highly publicized trials. A public relations consultant or firm can help attorneys understand the effects of publicity on the judicial proceeding.[15] The attorney can thus respond with an appropriate legal strategy that attempts to minimize the negative effects of publicity.[16]

Lawyers cannot be sure that confidential information and communications exchanged with a public relations firm will be protected by the attorney-client privilege.[17] This uncertainty injures clients because they are less likely to be frank with attorneys if attorney-client privilege applies only some of the time.[18] A lawyer who does not know the full facts cannot represent her client using her fullest efforts.[19]

Traditionally, disclosure of confidential information to a third party was viewed as a waiver of the attorney-client privilege.[20]

Crisis Strikes, NAT'L L. J., Aug. 19, 2002, at C13 ("There are only two guys in every media saga—a good guy and a bad guy. . . . Without the proper insight and training, the lawyer loses control.").

14. *See* Semel & Sevilla, *supra* note 2, at 64 (stating that "because attorneys are trained for the courtroom, not the press conference, mistakes are likely even if one is prepared"); *see also* Harris, *supra* note 10, at 785 (describing that while "[t]elevision ensures that jurors are empanelled with ridiculous expectations," the lawyers are "blind to anything but the intricacies of procedure"). The term "outside help" is from *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

15. *See* HAGGERTY, *supra* note 8, at 6-7.

16. *Id.*

17. Cases described in this Comment with similar facts addressing privilege being extended to public releations firms, result in diverse holdings. *Compare* Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000) (declining to extend the privilege to information sought from a public relations firm), *and* Haugh v. Schroder, Inv. Mgmt. N. Am., 02 Civ. 7955, 2003 U.S. Dist. LEXIS 14586 (S.D.N.Y. Aug. 25, 2003) (holding that the privilege does not protect communications with a public relations consultant), *with* In re Grand Jury Subpoena Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (extending the attorney-client privildge to some, but not all, communications between the client, the lawyers, and the public relations firm).

18. *See infra* Part I.A.3.

19. *See id.*

20. *See* Goddard v. Gardner, 28 Conn. 172, 175 (1859) (finding that when a third party is present at communication between attorney and client, the communication is not covered by the privilege); Springer v. Byram, 36 N.E. 361, 363 (Ind. 1894) ("It is settled law that if parties sustaining confidential relations to each other hold their conversation in the presence and hearing of third persons, whether they be necessarily present as officers, or indifferent bystanders, such third persons are not prohibited from testifying to what they heard."); Bacon v. Frisbie, 80 N.Y. 394, 401 (1880) ("It may be that if a client chooses to speak his mind to his counsel, in the presence and hearing of persons unrelated to him in the matter, that what is said is not privileged.").

There is an exception, however, for third parties who have a necessary role in assisting the lawyer as a consulting expert or an agent.[21] This Comment addresses the issue of whether, and under what circumstances, a lawyer's communications with a public relations expert, whose advice and assistance is only valuable to the extent that it is communicated fully and freely with the attorney, will be protected by privilege. This Comment focuses on the role of public relations firms in the criminal law context, where constitutional concerns often arise.

Part I of the Comment explores the boundaries of the attorney-client privilege and explores how the privilege developed through the years.[22] Part II examines the traditionally limited view of a lawyer's role and indicates how the advent of mass media has forced the defense lawyer to do more than litigate in the court of law.[23] Part III examines cases involving public relations firms and the attorney-client privilege.[24] The section explores such issues as whether a public relations firm may be considered a privileged person because it plays a significant enough role in assisting the attorney in representing her client.[25] Resolving these issues involves determining (1) what courts consider legitimate legal services, as opposed to business services, and (2) whether the public relations expert, as a third party, gives sufficiently important assistance to the lawyer in rendering legal services, as opposed to (a) not giving assistance that is really needed; (b) assisting the lawyer in non-legal services; or (c) giving assistance to the client and not the lawyer.[26] Part IV scrutinizes the cases discussed in Part III and suggests that the decision reached by the *Stewart* court is more rational and consistent with modern legal practice.[27] The Comment also argues that in cases where the public relations firm acts as a consulting expert to an attorney representing a highly publicized criminal defendant, the firm should be considered a privileged person for the purposes of the attorney-client privilege.[28] Finally, this Comment

21. In re Hill, 786 F.2d 3, 6 n.4 (1st Cir. 1986) (paralegal); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976) (handwriting analyst)); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 874-75 (1998) (citing United States v. Nobles, 422 U.S. 225, 238-39 (1975) (investigator) [hereinafter Rice, *Eroding Concept*].

22. *See infra* notes 30-113 and accompanying text.

23. *See infra* notes 114-68 and accompanying text.

24. *See infra* notes 169-225 and accompanying text.

25. *See infra* notes 170-94 and accompanying text.

26. *See infra* notes 169-225 and accompanying text.

27. *See infra* notes 226-30 and accompanying text.

28. *See infra* notes 226-30 and accompanying text.

concludes that in order to maintain fairness in the judicial process for those accused of a crime, our system of adjudication must recognize that, in certain circumstances, the assistance of public relations firms will be required, and the attorney-client privilege must not be denied.[29]

I. BACKGROUND

A. Attorney-Client Privilege

Attorney-client privilege is the oldest rule of privilege known to common law.[30] It evolved from a tradition of the English courts where the privilege belonged to the lawyer and was grounded on humanistic considerations, enabling the attorney to "comply with his code of honor and professional ethics."[31] The code of a gentleman thus shielded attorneys from being compelled to testify in court what they had been told by their clients.[32] Today the privilege rests with the client, and it is the client who determines whether to assert or waive it.[33]

Whether embodied in the common law, state law, or federal law[34] the broad outlines of the attorney-client privilege attaches: "(1) where legal advice of any kind is sought (2) from a profes-

29. *See infra* notes 231-51 and accompanying text.

30. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (citing JACK B. WEINSTEIN AND MARGARET A. BERGER, WEINSTEIN'S EVIDENCE §§ 503(2)-503(d)(5)(1) (1987) and EDITH L. FISCH ON NEW YORK EVIDENCE § 517 (2d ed. 1977)); *see* Marjorie Cohn, *The Legal Profession: Looking Backward: The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1234-39 (2003) (explaining the historical roots of the attorney-client privilege); Rice, *supra* note 21, at 868-69.

31. In re Grand Jury Subpoena Dated March 24, 2003, 265 F. Supp. 2d. 321, 330 (S.D.N.Y. 2003) (quoting EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES 108 (2002)); *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE § 68 (2002).

32. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE § 68 (2002).

33. *Id.* In circumstances where the client is unable to personally assert the privilege, the attorney can assert it on the client's behalf. *See* In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) (stating that the defendant need not be present to assert the privilege).

34. FED. R. EVID. 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, per-

sional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived."[35] "The privilege must also be invoked before any disclosure of the communication sought to be protected has occurred."[36]

The Restatement (Third) of the Law Governing Lawyers defines the attorney-client privilege broader than did Judge Kearse in the above definition.[37] It expands the privilege to "privileged persons," not just clients and their attorneys.[38] While it is the communication that is privileged, and not the underlying facts,[39] the privilege extends to writings as well. For example, the production of a privileged paper in possession of a person within privileged relations cannot be compelled.[40] Furthermore, there is a rebuttable presumption that all communications between an attorney and

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son, government, State, or political subdivision thereof shall be determined in accordance with State law.

35. In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1036 (2d Cir. 1984). Another frequently quoted definition of the attorney-client privilege is from Judge Wyzanski in *United States v. United Shoe Machine Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950), which uses a more comprehensive test:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of the law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client . . . .

36. Emily Jones, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of* United States v. Adlman, 18 PACE L. REV. 419, 422 (1998).

37. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE § 68 (2002).

38. The Restatement states that the attorney-client privilege may be invoked with respect to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." *Id.* It further defines communications in section 69 as "any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression." *Id.* § 69. Section 70 defines "privileged person" as "the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation." *Id.* § 70.

39. *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1037 (stating that the "attorney-client privilege protects communications rather than information").

40. J.P. Ludington, Annotation, *Persons Other Than Client or Attorney Affected By, or Included Within, Attorney-Client Privilege*, 96 A.L.R. 2D 125, 127 (2004).

client are privileged, with the burden of showing that an attorney-client relationship exists, as well as the confidential character of communication, resting on the party objecting to the introduction of the evidence.[41]

1. *General Constraints on the Application of the Attorney-Client Privilege*

The attorney-client privilege is a limited doctrine[42] that only becomes "absolute" after the privilege attaches.[43] First, as already mentioned, the privilege only applies to communications not the underlying facts.[44] In addition, a conversation is not privileged automatically just because it is between a client and her attorney.[45] Second, most courts agree that when an attorney functions as a business or economic advisor, the attorney-client privilege does not

41. *See, e.g.*, United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996) (stating that "the party claiming the privilege carries the burden of demonstrating that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived"); *accord* United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir. 1987) (stating that "[i]n order to establish the applicability of the attorney-client privilege to a given communication, the party asserting the privilege must affirmatively demonstrate a non-waiver"), *aff'd in part and vacated in part on other grounds*, 491 U.S. 554 (1989); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) (holding that "the proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived").

42. *See* Rice, *Eroding Concept*, *supra* note 21, at 861 n.19 (stating that "[m]ost courts have accepted Professor Wigmore's pronouncement that because the 'benefits [of the privilege] are all indirect and speculative [and] its obstruction is plain and concrete . . . [the privilege] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'").

43. *See id.* at 856 n.6 ("Under federal law and the law of most states, once the attorney-client privilege has attached to confidential communications between the attorney and client, the privilege is absolute.").

44. *See* Alliance Constr. Solutions, Inc., v. Dep't of Corrs., 54 P.3d 861, 865 (Colo. 2002) ("[I]t is important to note that the privilege only protects against disclosure of communications and does not protect the underlying facts on which the communication is based. In other words, 'the client may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'") (quoting Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court of Denver, 718 P.2d 1044, 1049 (Colo. 1986)).

45. *See* United States v. Tel. & Data Sys., Inc., No. 02-C-0030-C, 2002 U.S. Dist. LEXIS 15510, at *6 (W.D. Wis. July 16, 2002) (stating that "simply transmitting information to an attorney does not cloak it in the privilege: 'a communication is not privileged simply because it is made by or to a person who happens to be a lawyer'") (quoting United States v. Evans, 113 F.3d 1457, 1463 (7th Cir. 1997)); Energy Capital Corp. v. United States, 45 Fed. Cl. 481, 485 (2000) ("Thus, information does not become privileged simply because it came from counsel, and when documents or conversations are created pursuant to business matters, they must be disclosed.") (citing Allendale Mut. Ins. Co., v. Bull Data Sys., Inc., 152 F.R.D. 132, 137 (N.D. Ill. 1993)).

attach.[46] Third, the presence of third parties not privileged to the communications that occurs between a lawyer and a client waives the attorney-client privilege.[47] Lastly, confidentiality is regarded as a fundamental aspect of the attorney-client privilege.[48]

2. *Attorney-Client Privilege and "Privileged Parties"*

The Restatement's broader definition more accurately captures the scope of the modern day attorney-client privilege when it defines it as communications made between "privileged persons," in confidence, for the purpose of obtaining or providing legal assistance for the client.[49] A "client" also includes individuals who had preliminary communications with regard to retention of counsel but eventually decided to hire a different attorney.[50] It is "universally accepted that agents of both of the attorney and the client, who were vital to the legal assistance sought, could be brought within the circle of confidentiality."[51] The privilege thus covers secretaries, paralegals, and law clerks.[52] It also extends to experts

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46. *See Energy Capital Corp.*, 45 Fed. Cl. at 485 (holding that the attorney-client privilege does not protect either factual information or business advice); *see also* In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (1984) ("the privilege is triggered only by a client's request for legal, as contrasted with business, advice.") (citing In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982)); Dep't of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (stating that "when a lawyer acts as a business or economic advisor, there is no special relationship to give rise to a privilege to protect his advice from disclosure") (citing Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 80 (S.D.N.Y. 1986)).

47. *Evans*, 113 F.3d at 1462.

48. *See* Rice, *Eroding Concept*, *supra* note 21, at 859 n.12. Rice mentions that Professor Wigmore believes that confidentiality is one of four fundamental conditions necessary to the establishment of a privilege. *Id.*

The four fundamental conditions delineated by Wigmore are:

> 1) The communications must originate in confidence that they will not be disclosed.
>
> 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> 3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> 4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Id.

49. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE § 68 (2002).

50. *See* Irvin v. Mason, 59 Pa. D. & C.4th 129, 132-33 (C.P. Ct. of Allegany County 2002) (citing Commonwealth v. Mrozek, 657 A.2d 997 (Pa. 1995)).

51. *See* Rice, *supra* note 21, at 874.

52. *See* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976) (stating that "[g]iven the complexities of modern existence few, if any, lawyers

hired to assist with the investigation,[53] or provide scientific or technical assistance in preparation for trial.[54]

Despite the misgivings of some courts,[55] the circle of privileged persons has widened.[56] The attorney-client privilege includes a client's outside consultants hired to perform business and later retained by the attorneys to assist in litigation because of their knowledge and experience.[57] It also covers consultants who are essential to lawyers in performing tasks that go beyond advising a client to the law.[58] This includes non-testifying expert witnesses, psychiatrists,[59] accident reconstruction experts,[60] consultants that gauge the state of public opinion for venue change purposes, and jury consultants.[61]

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could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers and similar aides").

53. NLRB v. Harvey, 349 F.2d 900, 906-07 (4th Cir. 1965) ("Circumstances may exist where a lawyer finds it necessary to employ a detective to enable him adequately to furnish legal services to his client. In such a situation the client's communication, including those relating to the hiring of the detective, would be privileged because the legal services are indistinguishable from the non-legal.").

54. *See* Commonwealth v. Noll, 662 A.2d 1123 (Pa. 1995) (holding that where a third party (accident reconstruction expert) is retained by an attorney to assist the attorney in giving legal advice to the client, information which the attorney or the client furnishes this third party is protected by the attorney-client privilege); Rice, *supra* note 21, at 875 (describing how attorney-client privilege came to include those "investigating or providing scientific or technical assistance in preparation for litigation").

55. *See* In re Grand Jury Subpoenas Dated January 20, 1998, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (citing United States v. Bryan, 339 U.S. 323, 323 (1950)) ("The primary assumption [is] that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."); *see also* United States v. Nixon, 418 U.S. 683, 710 (1974) (stating that the privilege is neither "lightly created nor expansively construed"); Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190 (4th Cir. 1991) ("This court has consistently stated that the privilege must be strictly construed.").

56. *See* In re Hill, 786 F.2d 3, 6 n.4 (1st Cir. 1986) (paralegal); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976) (handwriting analyst).

57. *See* Rice, *Eroding Concept*, *supra* note 21, at 875 n.61 (noting cases in the early 1990s where communications between outside consultants and attorneys were held protected by the attorney-client privilege).

58. In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (holding that jury consultants can be covered by the privilege).

59. United States *ex. rel.* Edney v. Smith, 425 F. Supp. 1038, 1043-46 (E.D.N.Y. 1976).

60. *See* Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa. 1995).

61. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326.

3. *Justification for the Attorney-Client Privilege*

The growing body of regulatory law which adds to the complexity and specificity of legal obligations often requires that persons untrained in the law seek professional legal assistance.[62] In order for attorneys to represent their clients competently they need to know all the information.[63] Attorney-client privilege encourages "full and frank communication" between attorneys and clients.[64] Clients will not fear that statements made in confidence to their attorneys will be subsequently[65] subject to disclosure by an adversary.[66] Such full disclosure by the client allows attorneys to render the best possible legal advice.[67] Only when a client has informed the lawyer of all the facts can a lawyer encourage "compliance with the ever growing and increasingly complex body of public law,"[68] thus "facilitat[ing] the administration of justice."[69] Additionally,

62. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE § 68 cmt. c (2002).

63. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) ("Without the attorney–client privilege, that right and many other rights belonging to those accused of crime would in large part be rendered meaningless.").

64. UpJohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The purpose of the privilege [is to] 'encourage clients to make full disclosure to their attorneys.'") (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)); *see* Hunt v. Blackmun, 128 U.S. 464, 470 (1888) (stating that the privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

65. Davenport Group v. Strategic Inv., No. 14426-NC, 1995 Del. Ch. LEXIS 109, at *3 (Del. Ch. Aug. 24, 1995) ("If the attorney-client privilege becomes vulnerable, the truthfulness and extent of disclosure will decrease correspondingly.").

66. *Schwimmer*, 892 F.2d at 243 ("It also recognizes that a lawyer's 'assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'") (quoting *Hunt*, 128 U.S. at 470); *see* Trammel v. United States, 445 U.S. 40, 51 (1980) ("These privileges are rooted in the imperative need for confidence and trust . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

67. Fisher v. United States, 425 U.S. 391, 403 (1976); *see* Alliance Constr. Solutions, Inc. v. Dep't of Corr., 54 P.3d 861, 864 (Colo. 2002) ("In order to provide effective legal advice, an attorney must have a full understanding of the facts underlying the representation.") (citing Gordon v. Boyles, 9 P.3d 1106, 1123 (Colo. 2000) and Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986)).

68. Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1699 (1995); *see Schwimmer*, 892 F.2d at 243 (noting that the "rule of confidentiality recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client") (quoting *Upjohn*, 449 U.S. at 389).

69. Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968) (quoting Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 322 (7th Cir. 1963)).

some commentators believe the attorney-client privilege may also discourage frivolous lawsuits in cases where the attorney finds, after full disclosure, that his client's case is too weak to pursue.[70]

Attorney-client privilege serves an important societal interest of effective representation to clients who disclose all the relevant information.[71] The privilege also encourages an attorney to use her fullest efforts to develop her client's case when she knows all the facts and is confident that she will not be subsequently compelled by her adversary to disclose her communications.[72] Thus, the privilege is central to our adversarial system of justice since it assures a client's right to a fair judicial process.[73] The Supreme Court, for example, has held that "[a] lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."[74]

In criminal cases particularly, the privilege protects a defendant who faces the broad power of government.[75] "[T]he right of parties within our justice system to consult professional legal experts is rendered meaningless unless communications between attorney and client are ordinarily protected from later disclosure without client consent."[76] If candid communications between an attorney and

70. Michael Sweeney, Lecture at Fordham Law School (Oct. 23, 2003); *see also Upjohn*, 449 U.S. at 390-91 ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.").

71. People v. Gionis, 892 P.2d 1199, 1204-05 (Cal. 1995).

> The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client. Without the ability to make full disclosure of the facts to the attorney, the client risks inadequate representation . . . by encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation.

Id.

72. *See* Davenport Group v. Strategic Inv., No. 14426-NC, 1995 Del. Ch. LEXIS 109, at *3 (Del. Ch. Aug. 24, 1995).

73. Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 587 (2003).

74. Upjohn Co. v. United States, 449 U.S. 383, 391 (1981).

75. In re Grand Jury Proceeding Dated March 24, 2003, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) ("Target, like any investigatory target or criminal defendant, is confronted with the broad power of the government."); *see* Cole, *supra* note 73, at 471 (arguing that "it is fair to question some of the tactics that law enforcement officials have been employing as they combat crime").

76. Alliance Constr. Solutions v. Dep't of Corr., 54 P.3d 861, 865 (Colo. 2002) (citing Wesp v. Everson, 33 P.3d 191, 196 (Colo. 2001)); *see also* Cole, *supra* note 73, at 587 (arguing that the attorney-client privilege "may well be the pivotal element of the modern American lawyer's professional functions").

her client are not protected, then the two parties to a controversy are on unequal footing.[77] In criminal cases, if clients are discouraged or unwilling to frankly confide in their attorney because of uncertainty over whether their communications are protected, then our legal system moves away from its goal of administrating justice.[78]

4. *Countervailing Principles*

Despite being recognized as the oldest privilege in the common law tradition and serving a useful purpose in maintaining the integrity of our legal system, the attorney-client privilege has to be balanced against other important societal interests.[79] Judges often have to weigh a client's right to effective, competent representation and the public's right to evidence, the interests of society in solving crime, and the vindication of victims' rights.[80] The balancing becomes even more difficult in a criminal proceeding because of the defendant's constitutional rights.[81] The Second Circuit, for example, has "severely restricted" the scope of discovery in criminal proceedings.[82]

Nevertheless, many courts adhere strongly to the "fundamental maxim . . . recognized for more than three centuries . . . that the public . . . has a right to every man's evidence."[83] According to this view, the attorney-client privilege is "in derogation of the search

77. *See generally Alliance Constr. Solutions*, 54 P.3d at 864 (stating that the effectiveness of legal representation depends in part on the attorney's ability to gain a full understanding of the factual scenario underlying the representation).

78. *Id.* at 864-65.

79. In re Grand Jury Proceedings Under Seal v. United States, 947 F.2d 1188, 1190 (4th Cir. 1991) ("In deciding when the privilege arose, we are mindful that the privilege is 'inconsistent with the general duty to disclose and impedes the investigation of the truth.' This court has consistently held that the privilege must be strictly construed.") (quoting United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984)).

80. In re Grand Jury Subpoena Dated January 20, 1998, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1974), for the position that "the 'fundamental maxim' recognized for more than three centuries . . . [is] that the public . . . has the right to every man's evidence").

81. United States v. Nobles, 422 U.S. 225, 238 (1975) ("The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.").

82. United States v. Dessange Inc., No. S2 99 CR. 1182, 2000 U.S. Dist. LEXIS 3734, at *7 (S.D.N.Y. Mar. 27, 2000).

83. *In re Grand Jury Subpoena Dated January 20, 1998*, 995 F. Supp. at 334 (citing *Bryan*, 339 U.S. at 331).

for the truth."[84] Holding the public's right to evidence on a higher plane, some judges rule that the privilege "should be narrowly construed."[85] Typically, the decisions reflect a view that the privilege is seen as a barrier to learning the truth.[86] Judges that subscribe to such a view often protect only those communications that are between a client and her lawyer.[87]

Another reason for a strict interpretation of the attorney-client privilege is a fear that extending the privilege will invite abuse. The fear is grounded in concrete examples that recently shocked the country, from tobacco litigation to Enron, where, at least in the tobacco case, the attorney-client privilege was used for fraudulent purposes.[88] For example, the tobacco companies had potentially damaging studies and scientific experiments conducted through legal counsel so they could be suppressed if they ultimately proved unfavorable to the companies' interests. Compounding the problem was the companies' public avowal that the products were safe and that all such studies and experiments were conducted by impartial scientists and would be fully disclosed, regardless of the outcome.[89]

Retrospectively, there is no doubt that the attorney-client privilege was abused when attorneys were used to cover up damaging studies.[90] Determining whether an abuse of the privilege has taken

84. United States v. Tele. & Data Sys., Inc., No. 02-C-0030-C, 2002 U.S. Dist. LEXIS 15510, at *5 (W.D. Wis. July 16, 2002).

85. Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 02 Civ. 7955, 2003 U.S. Dist. LEXIS 14586, at *7 (S.D.N.Y. Aug. 25, 2003) (citing United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999)).

86. Cyril V. Smith, *Attorney-Client Privilege Ain't What it Used To Be*, BALTIMORE BUS. J., Dec. 2003, at 2, *available at* http://baltimore.bizjournals.com/baltimore/stories/2003/12/22/focus2.html.

87. *See* John Doe Co. v. United States, 350 F.3d 299, 302 (2d Cir. 2003) (holding that the attorney-client privilege does not apply to documents between the attorney and the investigator because at the time they were created they were not intended by the parties to be confidential); United States v. Bein, 728 F.2d 107, 113 (2d Cir. 1984) (finding no attorney-client privilege when no attorney was present when the conversation took place between the client and the client's accountant).

88. Paul R. Rice, *How the Tobacco Industry Lost Its Attorney Client Privilege*, LEGAL TIMES, May 4, 1998, at 27 [hereinafter Rice, *Tobacco Industry*], *available at* http://www.acprivilege.com/articles/article4.html.

89. *Id.* Rice notes how Philip Morris "went a step further. They had their lawyers request and supervise these communications (reports, studies, etc.) thereby using the credibility of the attorneys to make it appear as though each communication were an instrumental part of the legal assistance being rendered." *Id.*

90. *Id.*; *see also Document: Potential Smoking Habits of 5-Year-Olds Reviewed*, Mar. 7, 1998, *at* http://www.cnn.com/US/9803/07/minn.tobacco/ (last visited Nov. 2, 2004) (stating that the judge in the Minnesota tobacco case found that the "tobacco companies 'blatantly abused' attorney-client privilege").

place is particularly difficult during the trial, however, since the information requested by challenging attorneys relates in some ways to legal assistance.[91] While a crime/fraud exception exists to pierce the attorney-client privilege,[92] the fact that the privilege was used for illegal purposes reinforces the idea shared by an increasing number of legal professionals, including those in the Department of Justice and the SEC, that the attorney-client privilege should be limited.[93]

5. Kovel *and Its Progeny*

The seminal case for extending attorney-client privilege to third-party consultants was *United States v. Kovel*, decided by the Second Circuit in 1961.[94] In *Kovel*, a former IRS agent with accounting skills who was employed by a law firm specializing in tax law, claimed attorney-client privilege for the work he performed in connection with one of the firm's clients.[95]

In *Kovel*, the court used a two-step process to decide that the attorney-client privilege should be extended. First, the *Kovel* court recognized that the privilege would apply in situations where a non-English speaking client provided his confidential information to an interpreter employed by the attorney to translate for the attorney.[96] Second, the court concluded that since accounting con-

91. *See* Rice, *Tobacco Industry*, *supra* note 88, at 27.

92. *Id.* (explaining that "[t]he crime/fraud exception is based on the recognition that when the client seeks the lawyer's assistance to commit a crime or fraud, whether or not the lawyer is or becomes aware of the client's unlawful aim, the privilege serves no useful purpose and its protection should be withdrawn").

93. *See* Cole, *supra*, note 73, at 548-49. The Justice Department's Bureau of Prisons Amendments (in effect since October 31, 2001), give the Attorney General the power, "in cases where 'reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism,' to order monitoring of communications between that inmate and his attorney or attorney's agents." *Id.*

94. 296 F.2d 918 (2d Cir. 1961).

95. *Id.* at 919.

96. *Id.* at 921. The court held that there are actually four instances to which the attorney-client privilege would apply when an attorney is dealing with a client speaking a foreign language:

> (1) where attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story;
> (2) where the attorney employs the help of non-lawyer employee in the room to help out;
> (3) where the client brings a translator;
> (4) where the attorney sends the client to a non-lawyer proficient in foreign language, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation so that the attorney can give the client proper legal advice.

cepts could be as incomprehensible as a foreign language, "the presence of an accountant . . . ought not destroy the privilege."[97] The *Kovel* court stressed, however, that not all accountants are included within the protection of the privilege, noting that "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."[98]

The court's decision laid the groundwork for broadening the category of privileged persons because it recognized that during the course of representation, attorneys may need the assistance of consultants when dealing with matters they are unskilled and untrained to perform.[99] Yet, the *Kovel* decision suggested that courts should apply a high standard before a third party will be considered "privileged" for the purposes of the attorney-client privilege.[100] Indeed, the third party has to be "necessary, or at least highly useful" to the attorney's representation of a client before the party may be brought within the "circle of confidence."[101]

The *Kovel* court recognized two categories of third parties who could be brought into the circle of confidence.[102] The first category includes those who are essential to the attorney, without whom representation would be extremely difficult or impossible, as the interpreter analogy illustrates.[103] Today this category encompasses third-parties such as translators, investigators, scientific experts, and accountants.[104] The second category holds agents of the attorney, whose work is sufficiently important that it deserves protection, such as law clerks, assistants, and "aides of other sorts."[105] This second category includes persons who may not be translating documents for the attorney, but because of the "complexities of

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Id.

97. *Id.* at 922.

98. *Id.* The presence of the accountant has to be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer . . . ." *Id.*

99. *Id.*

100. *Id.*

101. *Id.* "Circle of confidentiality" is a term used by Professor Rice. *See* Rice, *Eroding Concept*, *supra* note 21, at 874.

102. *Kovel*, 296 F.2d at 921-22.

103. *Id.* at 922.

104. *See* Rice, *Eroding Concept*, supra note 21, at 874-75 n.57-58.

105. *Kovel*, 296 F.2d at 921; *see also* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1046 (S.D.N.Y. 1976) ("Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides.").

modern existence,"[106] they are often indispensable to the attorney's ability to represent a client.[107]

The *Kovel* decision and its progeny established a framework with several overarching principles that courts use to measure the boundaries of the privilege. First, in addition to the requirement of confidentiality, the advice that is sought must be "legal,"[108] not business advice. Business advice would include "attorney's work in drafting 'by-laws, promissory notes, security agreements, incorporation documents, partnership documents and tax information.'"[109] Therefore, third parties who provide business advice are not considered privileged because the information is not considered "legal advice."[110]

Second, the *Kovel* decision suggests that parties who are agents of the client could be "privileged persons" if their presence "further[s] the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."[111] Furthermore, the concept of the "agent" was broadened to include outside consultants retained to perform business services and whose knowledge and experience from that service was important to the legal assistance later sought.[112] Despite the expansion of the privilege in the corporate context, recent abuses of the attorney-client privilege suggest that the attorney-client claims of corporations will be subject to heavier scrutiny.[113]

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106. *Kovel*, 296 F.2d at 921.

107. *Id.*

108. Energy Capital Corp. v. United States, 45 Fed. Cl. 481, 485 (2000) ("The attorney-client privilege pertains to legal advice.").

109. *Id.* (quoting Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 227 (D.D.C. 1995)).

110. *Kovel*, 296 F.2d at 922 (holding that "if the [accounting] advice sought is the accountant's rather than the lawyer's no privilege exists").

111. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE § 70 (2002).

112. *See* In re Bieter, 16 F.3d 929, 937 (8th Cir. 1994) (holding that communications between an independent consultant hired by the client and the client's lawyer were protected by the attorney-client privilege where the purpose of communications were to seek legal advice); Viacom Inc. v. Sumitomo Corp., 200 F.R.D. 213, 220 (S.D.N.Y. 2001) (extending the attorney-client privilege to a public relations firm hired by the firm at the inception of litigation because the firm was considered a functional equivalent of the company's employee).

113. *See* United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995) (finding that the attorney-client privilege does not apply because the required elements of the attorney-client privilege were not met); *see also* United States v. Ackert, 169 F.3d 136, 138 (2d Cir. 1999) (holding that attorney-client privilege is not extended to an invest-

II. THE CHANGING ROLE OF A LAWYER

Justice Holmes once wrote that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[114] As Justice Holmes' observation indicates, the potential effect of negative press coverage of the judicial process has long been a concern of the judicial system.[115] One way the judicial system dealt with the negative publicity was to restrict the lawyer's interaction with the press.[116]

The American Bar Association, when it promulgated 30 Canons of Legal Ethics in 1908, dealt with publicity about pending or anticipated litigation in Canon 20.[117] This Canon broadly denounced lawyers who trafficked in litigation information by talking about their cases in the news media.[118] It provided: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned."[119] Such strong views against extrajudicial speech reflect the profession's general position that the traditional role of an attorney is in the courtroom.[120]

Despite the American Bar Association's efforts to control lawyers' communication with the press, the promulgation of Canon 20 did not stem the aggressive press coverage. History records the highly publicized trials of Sacco and Vanzetti,[121] the Lindbergh kid-

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ment banker who provided tax advice to an in-house counsel because the investment banker did not function as a "translator" under the *Kovel* doctrine).

114. *See* Moses, *supra* note 11, at 1811 (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

115. *See, e.g., id.* at 1816 (referring to the highly publicized trial of Aaron Van Burr, *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g).

116. *See* Moses, *supra* note 11, at 1819-22 (discussing attempts to control attorney speech).

117. John C. Watson, *Litigation Public Relations: The Lawyer's Duty to Balance News Coverage of Their Clients*, 7 COMM. L. POLY. 77, 92 (2002) (explaining that the Canons were an effort by the ABA to supplement judicial attempts at reducing outside influences on jurors).

118. *Id.*

119. Donald Rotunda, *Dealing With the Media: Ethical, Constitutional, and Practical Parameters*, 84 ILL. B.J. 614, 615 (1996).

120. So hostile was the Canon towards lawyer communication with the press that, even though it recognized "extreme circumstances" where a public statement could be made, it was still antagonistic toward such extrajudicial speech. *See id.*

121. *See* Moses, *supra* note 11, at 1817. The murder trial shocked the world and photos of them appeared in Boston newspapers almost immediately after their arrest. *Id.*

napper,[122] and Dr. Sheppard.[123] To this day speculations about the guilt or innocence of Sacco and Vanzetti and the defendant in the Lindbergh case persist.[124] The sensational Sheppard case, other cases, [125] and the Warren Commission's Report, [126] encouraged the ABA to establish its own committee to "take steps to bring about a fair balance between the right of the public to be informed and the right of the individual to a fair and impartial trial."[127]

The resulting Reardon Commission proposed Rule 1.1, which was adopted in part by the ABA in its Model Code of Professional Responsibility, DR 7-107.[128] Even though six decades elapsed after the Canons were published by the ABA, the Reardon Commis-

122. *Id.* at 1817-18. The Lindbergh kidnapping case generated tremendous publicity. A well-known journalist called for the conviction and electrocution of the defendant Bruno Hauptman well before the trial began. *Id.*

123. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). Dr. Sheppard, accused of murdering his wife, petitioned the court claiming that he was denied a fair trial because the court failed to protect him from the massive, pervasive, and prejudicial publicity of his prosecution. *Id.* The Supreme Court reversed Dr. Sheppard's murder conviction upon finding that the trial court failed to protect Sheppard from "inherently prejudicial publicity which saturated the community" and prejudiced the jury. *Id.* at 363.

124. *See* Moses, *supra* note 11, at 1818 n.31 (citing WILLIAM YOUNG & DAVID E. KAISER, POSTMORTEM: NEW EVIDENCE IN THE CASE OF SACCO AND VANZETTI 3-9 (1985) for the position that the passionate controversy over whether one or both of defendants were framed persists); *see also* Bob Groves, *The Case Against Lindbergh: What if There Was No Kidnapping*, RECORD (Hackensack, NJ), Apr. 18, 1993, at L1.

125. *See* Moses, *supra* note 11, at 1818. "Not a term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts." Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) (overturning a murder conviction in a small town based on pretrial publicity that made it impossible for the defendant to receive a fair trial).

126. *See* Report of the President's Commission on the Assassination of President Kennedy, at 227 (1964) [hereinafter Warren Report], *available at* http://history-matters.com/archive/jfk/wc/wr/html/WCReport_0126a.htm. The Warren Commission concluded that the media played a role in the murder of the alleged killer, Lee Harvey Oswald, by nightclub owner Jack Ruby. *See* Gentile v. State Bar, 501 U.S. 1030, 1067 (1991). Chief Justice Rehnquist quoted the recommendation of the Warren Commission that: "Representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial." *Id.*

127. *See* Moses, *supra* note 11, at 1819 (citing ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 77 (1966)).

128. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1983). The Rule, divided into three parts, controls extrajudicial speech of lawyers, by prohibiting statements that a lawyer knows or reasonably should know would have a substantial likelihood of materially prejudicing an adjudicative process. *Id.* It gives examples of what constitutes "likely to prejudice materially," as well as examples of permitted statements that a lawyer may make. *Id.*

sion still concentrated its efforts on attorney extrajudicial speech.[129] It failed to recognize that a lawyer, not trained in the art of public relations, is often incapable of mitigating the negative publicity that often adversely affects the course of a client's legal proceedings.[130]

The Commission saw lawyers as a big part of the problem and sought to restrict lawyers' communications with the media. The Commission believed that because "lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations . . . lawyers' statements are likely to be received as especially authoritative."[131] Although challenges to the Rule[132] resulted in a somewhat more flexible[133] Model Rule 3.6,[134] the Rule was once again modified after the Court's decision in *United States v. Gentile*.[135]

While sensational media was limited in the past to print and television, today its reach potential has grown exponentially.[136] The public is flooded with images and photographs from numerous sources that deliver the information at incredible speeds.[137] Not only has traditional print media become more abundant, but television networks and the Internet have expanded its reach.[138]

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129. *See* Moses, *supra* note 11, at 1820-21.

130. *Id.* at 1822.

131. *Gentile*, 501 U.S. at 1052.

132. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (striking down the Illinois version of DR 7-107); Watson, *supra* note 117, at 94 (discussing various lawyers' associations challenging the Rule).

133. The Rule is more flexible because it has made a special provision permitting an attorney to make extrajudicial statements. It states:

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1995).

134. *Id.*; *see also* David Boyd, *Form Over Substance? Fostering the Evolution of National Standard for Attorney Conduct*, SACRAMENTO LAW., Nov.-Dec., 2002, *at* http://www.sacbar.org/members/saclawyer/nov_dec2002/ethics.html (last visited Nov. 2, 2004). At least 44 states have adopted Model Rules and the rest use the Rules predecessor, the Model Code. *Id.*

135. *See* Watson, *supra*, note 117, at 97 ("Comments in the Annotated Model Rules of Professional Conduct . . . reported that Model Rule 3.6 was 'substantially amended' in August 10, 1994, to meet the concerns expressed in *Gentile*.").

136. *See* Minow & Cate, *supra* note 11, at 632, 635.

137. *Id.* at 633.

138. *See* Harris, *supra* note 10, at 786.

The prosecutors and the media are intertwined where each influences the other. Objective information, such as details of a crime, photographs of a victim or of the defendant, or even discussions about the net worth of a celebrity figure under regulator scrutiny, is framed to inflame the community.[139] Intense public reactions may influence prosecutors to bring initial or heavier charges.[140] A public saturated with every facet of the case, analyzed by legal TV experts, may prejudice the jury pool.[141]

The relationship between media, prosecutors, and the public opinion is complex. Prosecutors influence public opinion with information they release about the crime and the defendant.[142] Public opinion also influences prosecutors, and the prosecutors' responses are reflected in the charges.[143] Such "media-prosecutor alliances" usually result in the dissemination of unbalanced information.[144] In fact, prosecutors have lied on numerous occasions to advance the interests of their case.[145] Those accused of crime are often not met with the fundamental presumption of innocence; instead, there is a "presumption of guilt"[146] because the Justice Department and law enforcement slowly gnaw away at this bedrock principle.[147] A defense lawyer thus "gets started with the playing field tilted negatively, with the presumption of innocence buried under official pronouncements of guilt or castigation by the victim and his or her family."[148]

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139. *Why Martha Stewart is Going to Lose Everything, "It's A Greed Thing,"* INB, Dec. 3, 2002, *at* http://www.internetnewsbureau.com/archives/2002/dec02/marthas.html (last visited Nov. 2, 2004).

140. *See* Moses, *supra* note 11, at 1837 ("Prosecutorial discretion has been called a lawless area and ultimately a political choice."); *see also* Joel Cohen & Bennett L. Gershman, *The Spin, Confidentially*, NAT'L L.J., July 21, 2003, at 22 (stating that opinions about O.J. Simpson may have led prosecutors to forgo seeking the death penalty; public opinion also played a role in the re-indictment of Bernard Goetz, who was initially not indicted for shooting at a group of young black men, but was brought before a grand jury with no new evidence after making incendiary public statements).

141. *See* Minow & Cate, *supra* note 11, at 632.

142. *See* Watson, *supra* note 117, at 102.

143. *See* Cohen & Gershman, *supra* note 140, at 22 (noting that public opinion may affect a prosecutor's decision to drop or reconsider a defendant's criminal charges).

144. *See* Watson, *supra* note 117, at 85.

145. *See* Cohen & Gershman, *supra* note 140, at 22 (underscoring the irony that Martha Stewart was prosecuted and convicted for lying about a crime that she was not even tried for, while prosecutors who have lied to advance their case go unpunished).

146. *See* Watson *supra* note 117, at 89.

147. Stephen W. Grafman, *End an Ignoble Spectacle*, NAT'L L.J., Aug. 11, 2003, at 31 (noting how the media circus surrounding the defendant erodes the bedrock principle).

148. *See* Semel & Sevilla, *supra* note 2, at 65.

While the rules of Professional Responsibility caution lawyers from contacting the media, many practitioners have begun to recognize that if they do not step into the spotlight and attempt to explain the situation, their client will experience difficulty obtaining a fair trial and may self-incriminate by responding to media attacks.[149] A New York jurist has noted that "[l]awyers now feel that it is the essence of their function to try their case in the public media."[150]

In fact, the American Bar Association has begun to recognize that the modern practice of law involves communicating with the media.[151] In August of 1994, American Bar Association amended Model Rule 3.6.[152] The Rule allows an attorney to "make a necessary response to protect a client from undue prejudicial effect of recent publicity . . . ."[153]

The ABA revisions reflect a general recognition among practitioners and theorists that the adversarial relationship that serves as a key element of the American judicial system is being expanded to outside the courtroom.[154] The amended rule implicitly signals that the outside forum is a proper arena where the attorney's duty to zealously represent her clients remains paramount.[155]

Some commentators suggest that in criminal cases a lawyer's attempts to balance the inaccuracies of the media may gain constitutional importance because the defendant's Sixth Amendment rights are implicated. [156] One commentator argues that a defendant has a right to a "public defense" when a defendant's constitutional right to a fair trial is endangered by negative press coverage.[157] The argument is supported by the proposition that

149. *See* Watson, *supra* note 117, at 84. Avoiding the media or answering with a "no comment" could backfire on the client creating an implication of guilt. *Id.* at 88.

150. *Id.* at 84.

151. *Id.* at 97.

152. *See* Watson, *supra* note 117, at 97.

153. *Id.*

154. *Id.* at 98.

155. *Id.*

156. *See* Grafman, *supra* note 148 (claiming that "[b]randing a person a criminal by . . . public exposure is Constitutionally offensive, a modern-day scarlet letter that besmirches our judicial process"); Semel & Sevilla, *supra* note 2, at 64 (discussing Professor Garcia's study which indicated that the Supreme Court has failed to 1) acknowledge "the connection between freedom of expression and the ideal of a fair trial," 2) refused to place restraints on press access or reporting of courtroom proceedings in criminal cases, and 3) "not compensated for this freedom by according more leeway to a defendant who has been the subject of pretrial publicity").

157. *See* Watson, *supra* note 117, at 83 (quoting Max D. Stern's idea that a "defendant has a right to a public defense to balance the negative consequences the defen-

since a defendant has a First Amendment right to respond to the charges in the news media, the defendant's attorney should be able to exercise this right on the defendant's behalf.[158]

The Supreme Court addressed a similar issue in *Gentile v. State Bar*.[159] In *Gentile*, the defense attorney believed that the pre-indictment press coverage prejudiced the potential jury pool and thus the outcome of the eventual trial.[160] The attorney attempted to mitigate the circumstances by holding a news conference on behalf of his client.[161] The State Bar brought disciplinary charges against the defense attorney for violating a Nevada Supreme Court Rule prohibiting extrajudicial speech.[162] A plurality of the Court held that an attorney has a limited First Amendment right to speak to the media to mitigate the effects of adverse publicity.[163] The Court overturned Gentile's disciplinary conviction and held that to be prohibited, an attorney's extrajudicial speech must pose a "substantial likelihood of material prejudice."[164] The court decided not to apply the "clear and present danger" test normally applied in First Amendment cases.[165]

The legacy that the *Gentile* decision leaves behind is the plurality opinion, written by Justice Kennedy, which looks into the future.[166] Justice Kennedy recognized that an attorney's role is much broader than litigating inside a courtroom.[167] Justice Kennedy wrote:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper mo-

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dant suffers when the public and the pool of potential jurors are informed by the news media of the arrest or indictment").

158. *Id.*

159. 501 U.S. 1030 (1991). Doctrinally, the Supreme Court considered whether, in order to be prohibited, extrajudicial speech by attorneys must pose a "clear and present danger" to a judicial proceeding, a test usually applied to First Amendment issues, or whether some lesser standard could apply. *Id.* at 1031.

160. *Id.* at 1042.

161. *Id.*

162. *Id.* at 1033.

163. *Id.* at 1033-35, 1043.

164. *Id.* at 1063, 1074-75.

165. *Id.* at 1074-75.

166. *Id.* at 1043.

167. *Id.*

tives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.[168]

III. ANALYSIS OF THE CASE LAW

The Second Circuit recently addressed the issue of applicability of the attorney-client privilege to public relations firms in three cases.[169] Although all three cases had vastly different factual conditions, each of them addressed whether the attorny-client privilege should extend to public relations firms. The courts' reasoning in each case were all somewhat different. The following section will discuss the facts and the courts' holdings.

A. *In re Grand Jury Subpoenas Dated March 24, 2003*

Before being formally charged,[170] Martha Stewart was investigated for a year and half by the Securities and Exchange Commission in connection with her sale of ImClone stock the day before the Food and Drug Administration announced that it would not approve the cancer drug.[171] Stewart's attorneys hired a public relation firm to balance "[the] often inaccurate press reports . . . [that] created a clear risk that the prosecutors and regulators . . . would feel public pressure to bring some kind of charge against her."[172]

168. *Id.*

169. There is a fourth case that extends attorney-client privilege to public relations firms. *See* H.W. Carter & Sons, Inc., v. Williams Carter Co., No. 95 Civ. 1274, 1995 U.S. Dist. LEXIS 6578 (S.D.N.Y. May 16, 1995). Aside from accepting *Kovel*'s holding, the court engages in little analysis of its reasons for extending the attorney-client privilege. *Id.*

170. Michael McMenamin, *St. Martha: Why Martha Stewart Should Go to Heaven and the SEC Should Go to Hell*, REASONONLINE, Oct. 2003, *at* http://www.reason.com/0310/fe.mm.st.shtml (last visited Nov. 2, 2004). Stewart was eventually charged with insider trading, securities fraud, and obstruction of justice. *Id.* The fraud charges were later dismissed. *See* Allan Chernoff, *One of Martha's Charges Dismissed*, CNN Money, Feb. 27, 2004 *at* http://money.cnn.com/2004/02/27/news/companies/martha.html (last visited Oct. 4, 2004).

171. *See* McMenamin, *supra* note 170. The author argues that Stewart was unfairly singled out. *Id.* He calculates that Stewart saved a "mere" $45,000, compared to others, such as CEO Sam Waksal's friends who made $600,000 and $30 million on the sale of ImClone stock on December 27 and 28. *Id.* The ImClone colorectal drug, Erbitux, later received approval from the Swiss government and the FDA. *See Erbitux (TM) (Cetuximab) Receives FDA Approval to Treat Irinotecan Refractory or Intolerant Metastatic Colorectal Cancer*, GLOBEINVESTOR, Feb. 12, 2004, *at* http://globeinvestor.com (last visited Nov. 2, 2004).

172. In re Grand Jury Subpoena Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003).

During the grand jury investigation the United States Attorney's office subpoenaed the communications and documents from the public relations firm.[173] It is worth noting that although the court's entire decision supports the expansion of the attorney-client privilege to public relations firms in certain circumstances, the court did not find that in the particular case those circumstances existed.[174] Nevertheless, the court's decision takes a step into broadening the boundaries of the *Kovel* doctrine.[175]

The court's precedent is groundbreaking in several respects. First, the court acknowledges that the job of an attorney has broadened as a result of the constant barrage of mass media surrounding high profile clients.[176] The court also accepts that part of a lawyer's legitimate legal services can include defending a person in the court of public opinion because "in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation."[177] Adopting Justice Kennedy's position in *Gentile*, the court endorsed the view that "[a]n attorney's duties do not begin inside the courtroom door." [178]

Second, the court recognized that the complex relationship that exists between prosecutors and the media can affect the fairness of the judicial process.[179] The court acknowledged that prosecutors are influenced by public opinion in deciding whether to bring charges, declining to prosecute or leaving matters to civil enforcement proceedings, or in deciding which particular offenses to charge (a decision which has important consequences during the sentencing phase of the trial).[180] The court also noted that prosecutors, through the media, often engage in activities that "color public opinion" not only to the detriment of the person's general reputation but to her ability to obtain a fair trial.[181]

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173. *Id.* at 322-23.

174. *Id.* at 331-32 (stating, after *in camera* review, that conversations held between the public relations consultant and Martha Stewart were not made for the purposes of obtaining legal advice).

175. *Id.* at 331.

176. *Id.* at 330 ("[D]ealing with the media in a high profile case probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed."); *see also id.* at 326-27 ("[T]here has been a strong tendency to view the lawyer's role more broadly.").

177. *Id.* at 330.

178. *Id.* at 327 (citing Gentile v. State Bar, 501 U.S. 1030, 1043 (1991)).

179. *Id.* at 330.

180. *Id.*

181. *Id.* The court mentions that while prosecutors, media, and law enforcement personnel influence public opinion, public opinion also influences prosecutors in their

The *Stewart* court also recognized that many lawyers are "amateurs" when dealing with high profile cases and may require the assistance of public relations "consultants."[182] In fact, the court went so far as to recognize that a lawyer's ability to perform some of her most "fundamental client functions," such as client advising, seeking to avoid charges, and zealously seeking acquittal or vindication, would be "undermined seriously" if lawyers could not engage in a frank discussion of "facts and strategies" with the lawyers' public relation firms.[183]

The *Stewart* court treated public relations firms as consultants and compares their role to that of non-testifying experts or jury consultants.[184] This brings the public relations firm closer to *Kovel's* "essential category" in which the experts advise and assist the attorney in client representation. Such characterization carves out a niche where public relations firms could be considered privileged persons. The non-testifying experts and jury consultants remain in the background, helping the attorney formulate legal advice and strategies.[185] In adopting the comparison, the court invoked a similar image of a public relations firm—a consultant, assisting the attorney in an area in which she is not trained, in order to formulate a legal strategy for her client.

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decision making process. *Id.* This is perhaps the most accurate reflection on the state of things since it is not yet clear whether it is the hungry public that drives the media to meet the demand, or whether the media feeds public opinion with what it wants to deliver. *See* Semel & Sevilla, *supra* note 2, at 10 ("[O]ne question remains whether the media is giving the public what the public truly wants or dictating to the public what the media wants to sell. Perhaps there exists a more complex supply-and-demand relationship.").

182. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 330-31. The court specifies that lawyers may need skilled advice as to:

> [W]hether 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.

Id.

183. *Id.* at 330-31.

184. *See id.* at 331.

185. *Id.* at 326 (explaining that such experts advise the attorneys "[o]n matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, [and] how a client should behave while testifying in order to impress jurors favorably").

In expanding the *Kovel* doctrine, by including one more possible category of privileged persons, the *Stewart* court emphasized several requirements. First, the communications must be "confidential."[186] The Restatement defines confidential information as information that the communicating person believes "no one will learn the contents of . . . except a privileged person."[187] The *Stewart* court adopted this definition of confidentiality.[188]

Second, the information sought from the third party must be for the purpose of giving or receiving legal advice,[189] as opposed to "saving" a public image for a client's business purposes.

The *Stewart* court's third requirement emphasized that it is the lawyer who must hire the public relations firm.[190] Had Stewart hired the public relations firm herself, even if she had done it to "affect her legal situation," no attorney-client privilege would have been recognized.[191] The last requirement is somewhat at odds with the *Kovel* decision. In *Kovel*, the court recognized that an agent or an expert of a client could be considered a privileged person—so long as the communication was made in confidence for the purpose of obtaining legal advice.[192] One likely explanation for this adaptation of the *Kovel* doctrine is that the *Stewart* court is attempting to demarcate boundaries of where "legal advice" ends and "business purposes" begin with respect to public relations consultant.

The *Stewart* court also did not require that an attorney be present when communications between a client and the third party occur,[193] subject to the provision that the communications be directed by an attorney for the purposes of giving or obtaining legal advice.[194]

B. *Calvin Klein* Litigation-December 4, 2000

The attorneys for the plaintiff, Calvin Klein ("CK"), hired a public relations firm in anticipation of a high profile civil suit filed

186. *Id.* at 331.

187. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: ATTORNEY-CLIENT PRIVILEGE—"IN CONFIDENCE" § 71 (2000).

188. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 324.

189. *Id.* at 331.

190. *Id.*

191. *Id.*

192. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

193. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 331. *But see* United States v. Bein, 728 F.2d 107, 112 (2d Cir. 1983) (holding that a private meeting between a client and an accountant following the rendering of legal advice by the client's attorney was not subject to the protection of the privilege).

194. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 331.

against a licensee and its chief executive.[195] CK's lawyers argued that the purpose of hiring the public relations consultant was defensive.[196] The public relations firm was primarily retained to help the attorneys provide legal advice as well as to "assure that the media crisis that would ensue—including responses to requests by the media about the law suit . . . would be handled responsibly."[197] When the defendants sought documents from the public relations firm, CK's attorneys invoked the attorney-client privilege to block communication and document production.[198]

The court rejected all of plaintiff's arguments that recognized the public relations firm as a privileged person.[199] Not swayed by the plaintiff's "vague and largely rhetorical contentions," the court rejected the arguments on three grounds.[200] First, the court found that "few, if any, of the documents at issue appear to contain or reveal confidential communications from the . . . client."[201] Second, the court found that the public relations firm was not assisting the attorneys in developing legal strategies or rendering advice.[202] One possible explanation for this conclusion is that the court was unconvinced that a public relations firm with a preexisting relationship with the client was hired to do anything else than help to maintain a good public image for the client's business.[203] Third, the court held that the privilege must be narrowly construed[204] and not be expanded to public relations firms whose activities may "also" have been helpful to the client's attorneys.[205]

There are several possible interpretations of the case. One view is that the facts in the case did not support the extension of the attorney-client privilege. The plaintiff's pre-existing relationship with the public relations firm makes it difficult to determine

195. Calving Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 54-55.
200. *Id.*
201. *Id.* at 54.
202. *Id.* at 54-55 (noting that the public relations firm gave "ordinary public relations advice").
203. *See id.* at 54.
204. *Id.*
205. *Id.* Note that the court's use of the word "also" strongly suggests that it viewed the role of the public relations firm predominantly to improve/save the client's business reputation, thereby failing to qualify for attorney-client privilege protection. *Id.* The court found that "the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." *Id.* (quoting United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)).

whether the public relations firm was indeed assisting the attorneys in the rendition of legal services or whether the public relations firm functioned primarily for the client's business purposes.[206] For example, the *CK* court was skeptical of the role that the public relations firm played in the litigation.[207]

The facts suggest that the court may never view a public relations firm as a privileged person.[208] The *CK* court applied *Kovel's* "translator" analogy, but found that the public relations firm did not "translate" any document.[209] Furthermore, the court found that

> nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists, or investigators [or, here, a public relations firm] on their payrolls . . . should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the [third party is] operating under their own steam.[210]

The court thus concluded that the public relations firm provided "ordinary public relations advice."[211] This view suggests that the court does not recognize the possibility that a public relations firm could assist an attorney in the representation of a client. The *CK* court, therefore, declined to extend the protection of attorney-client privilege to public relations firms.[212]

C. *Haugh v. Schroder Investment Management North America, Inc.*

In *Schroder*, an employment age discrimination case, the plaintiff's attorney hired a public relations consultant in a suit against the employer alleging unlawful age discrimination.[213] The defendants sought certain communications and documents,[214] including fifteen e-mails exchanged between the consultant and the client, as

206. *Id.* at 54.

207. *Id.* at 54-55. The court concluded that the public relations firm's activities, such as "reviewing press coverage, making calls to various media to comment on developments in the litigation and even 'finding friendly reporters,'" cannot be considered sufficiently important to be brought within the circle of confidence. *Id.*

208. *Id.* at 54.

209. *Id.*

210. *Id.* (quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)) (alteration in orginal).

211. *Id.*

212. *Id.*

213. Haugh v. Schroder Inv. Mgmt. N. Am., 02 Civ. 7955, 2002 U.S. Dist. LEXIS 14586, at *2 (S.D.N.Y. Aug. 25, 2003).

214. *Id.* at *1.

well as the a sixteenth e-mail, which was communicated between the consultant and the client's attorney.[215] The plaintiff asserted attorney-client privilege, claiming that the public relations consultant provided advice and assistance that enabled the attorney to render legal services.[216]

The *Schroder* court did not find that the consultant performed anything other than "standard" public relations services for the plaintiff, and thus declined to extend the attorney-client privilege.[217] The court also claimed to have followed the principle enunciated in *Calvin Klein*. The court's analysis, however, reveals that it relied more on the reasoning and analysis of Judge Kaplan's decision in the *Martha Stewart* case, than on the *Calvin Klein* decision.[218]

The *Schroder* court specifically stated that it did not decline to follow the *Martha Stewart* decision, noting that there was no need to determine whether *In re Grand Jury Subpoenas* was decided correctly.[219] Second, the court expressly stated that the case before it was decided on its facts—suggesting that under different circumstances the outcome may have been different.[220]

Third, the *Schroder* court relied on Judge Kaplan's terminology in *In re Grand Jury Subpoena*[221] to find that the plaintiff did not show any "nexus" between the consultant's work and the attorney's role in preparing the plaintiff's complaint or the plaintiff's case.[222] Fourth, factually the *Schroeder* case is closer to Martha Stewart's grand jury case than to the *CK* case. Just as in Martha Stewart's grand jury case, the *Schroder* case involved communications that were predominantly transmitted between the plaintiff and the public relations consultant. Likewise, just as Judge Kaplan found that there was no showing that established the nexus sufficiently close to the provision or receipt of legal advice,[223] Judge

215. *Id.*

216. *Id.*

217. *Id.* at *8.

218. *Id.*

219. *Id.* at *9.

220. *Id.* at *1 ("The asserted attorney-client privilege cannot extend to a public relations consultant on *the facts of this case.*") (emphasis added).

221. *Id.* at *9; *see also* In re Grand Jury Subpoena Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) ("[T]here has been no showing that [communications between the public relations consultant and Martha Stewart] has a *nexus* sufficiently close to the provision or receipt of legal advice.") (emphasis added).

222. *Schroder*, 2003 U.S. Dist. LEXIS 14586, at *9.

223. *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 332.

Cote found that "no requests for legal advice" were made in the requested e-mails.[224]

The court in *Schroder* also relied on the *Calvin Klein* decision to hold that the plaintiff has not shown that the public relations consultant was "'performing functions materially different from those that any ordinary public relations advisor would perform."[225] While the holding has several interpretations, it is clear that plaintiffs would have to articulate specifically when and how the public relations consultant aided the lawyer in the rendition of legal services to make the communications privileged.

IV. PUBLIC RELATIONS EXPERT: A PRIVILEGED PERSON IN CERTAIN CIRCUMSTANCES

The cases addressed in the previous section raise significant questions with respect to the scope of the attorney-client privilege and how it applies to public relations experts. When, if ever, is communicating with the media a legal service as opposed to a business service? As the previous section indicated, not everything that a lawyer does is a legal service for the purpose of the attorney-client privilege. Although lawyers are constitutionally allowed to communicate with the media on behalf of their clients within the scope of the ethical rule, that does not necessarily mean that a lawyer's communications with the media are always or perhaps ever a legal service. It is conceivable that bolstering a client's reputation, as in *Gentile*, does not advance the litigation but serves an auxiliary purpose. If the lawyer is lobbying for the client, is that a legal service? Perhaps communication with the media is more legitimately viewed in certain kinds of cases, for example, in high profile criminal cases. The cases discussed in the previous sections lead to the conclusion that, at least in those circumstances, talking to the media could be an aspect of the legal representation for the purposes of attorney-client privilege.

Assuming that talking to the media constitutes legitimate legal services, what legitimate, important roles might the public relations expert play in assisting the lawyer, and what confidential communications are necessary to enable the expert to perform those roles? The public relations expert's role can be seen from two perspectives. First, the public relations expert might give advice to the lawyer about how the lawyer should communicate with the media.

224. *Schroder*, 2003 U.S. Dist. LEXIS 14586, at *6.

225. *Id.* at *8 (quoting Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)).

In carrying out this function, the issue is whether the public relations expert needs to talk to the client or learn otherwise privileged information, or can the public relations expert give the advice in the abstract?

A second view of the public relations expert's role is that of the lawyer's "mouthpiece"—an agent who engages with the media on the lawyer's behalf. This also raises the question of whether such a function is important enough. Why can the lawyer not communicate directly with the media? Furthermore, the "mouthpiece role" creates ambiguities. When is the public relations expert acting as the lawyer's mouthpiece, which, under *Kovel*, may be legitimate, and when is the public relations expert acting as a client's "mouthpiece," which presumably is not proper for the purposes of attorney-client privilege? The following discussion addresses these questions, and offers recommendations to attorneys so they can ensure that their communications with the public relations expert are privileged.

A. When is Lawyer Communication with the Media a Legitimate Legal Service?

Several of the cases discussed in Part III suggest that in certain circumstances, and especially in criminal cases, a lawyer's interaction with the media constitutes a legitimate legal service. Our society views criminal charges with greater seriousness than civil offenses, and thus imposes greater punishments. Although in both civil and criminal contexts the client's reputation can become sullied, it is only in the criminal context that one stands the chance of a prison sentence and the creation of a criminal record. The Sixth Amendment speaks to the gravity of a criminal charge by guaranteeing the right to a fair trial to a criminal defendant. Yet, as the media delivers sensational news reports and as public outrage grows about a particular case, the prosecutors may be influenced to indict or bring more severe charges since they carefully consider public opinion polls in making charging decisions.[226] In fact, prosecutorial discretion has been called a lawless area and ultimately a political choice.[227]

226. *See In re Grand Jury Subpoena*, 265 F. Supp. 2d at 330; Cohen & Gershman, *supra* note 140, at 22.

227. *See generally* Morrison v. Olson, 487 U.S. 654, 727-31(1998) (Scalia, J., dissenting) (explaining that a prosecutor has vast power and immense discretion with respect to criminal investigations, and that the primary check against abuse of this prosecutorial discretion is political).

It is these situations where the lawyer would be carrying out her fundamental duties to her client by interacting with the media to keep a prosecutor from indicting or from overreacting to public opinion by bringing excessive charges. Under these conditions, as the *Martha Stewart* court suggests, if a lawyer interacts with the media to strategically aim a message at those officials whose charges are of great consequences to the type of punishment a client could receive and whose actions often determine a client's freedom, it should be considered a legitimate legal service. In fact, it is the lawyer's duty to seek to avoid or narrow charges, zealously seek acquittal or vindication, and advise the client of the legal risks of speaking publicly. The plurality in the Supreme Court's decision in *Gentile* recognized and indirectly encouraged lawyers to pursue "lawful strategies to obtain dismissal of an indictment or . . . of charges."[228] Thus, under circumstances where heavy negative news coverage threatens to taint the judicial process by adversely influencing the prosecutors, a lawyer's communication with the media is less likely to be a business service. Since prosecutors are responsive to public opinion, lawyers should have the opportunity to balance out the news coverage. Clients should not have to endure higher charges simply because the prosecutors want the public to know that they are tough on crime.

Although prosecutors are influenced by public opinion, they too play a role in setting the public discourse with the information that they reveal to the public via the media. In this complex prosecutor-media interaction, even legitimate information linked to a client can project guilt. Such coverage has the possibility of tainting the jury pool. It is unlikely, however, that a lawyer's actions to influence the jury pool will be ethical under the current rules of professional responsibility. The Justices in *Gentile* explicitly reiterated this view when they noted that even if the lawyer has constitutional rights to freedom of speech, she still has ethical obligations that she swore to uphold.[229] Those obligations include following the precepts of Model Rule 3.6, which, even with its "fair reply" provision, is still highly restrictive of attorney interaction with the media.

Influencing the jury pool has never been an acceptable goal, and that is, in fact, the reason why lawyers were historically highly restricted from interacting with the media. The *Gentile* Court em-

228. Gentile v. State Bar, 501 U.S. 1030, 1043 (1991).

229. *See id.* at 1072-73 (stating that the speech of those participating before a court can be restricted).

phasized that the outcome of a criminal trial is to be decided by impartial jurors based on the evidence presented at trial, and thus any extra judicial statements by lawyers supplying their version of the facts is seen as a threat to the fair process.[230] It is worth noting that in none of the three cases evaluated in the previous section did the parties claiming protection of the privilege express their motive for hiring a public relations expert as to aid them in influencing the jury pool. While influencing the jury pool may not be ethical conduct, a lawyer should nonetheless be allowed to communicate with the media when she reasonably believes that prejudicial publicity will encourage prosecutors to indict or bring excessive charges.

B. Are Public Relations Experts Important Enough?

As the above discussion indicates, communicating with the media to counteract damaging news coverage that threatens to undermine a client's right to a fair process could be an essential part of a lawyer's legal services. Yet, many attorneys are not public relations experts since they are taught how to litigate and negotiate in a legal setting, not how to advocate on a client's behalf in a public forum.[231] There have been many reported instances where a lawyer, inexperienced in dealing with the media but feeling that she must respond to the harmful coverage, injured her client's case by speaking out.[232] Therefore, many attorneys, as the court in the *Martha Stewart* grand jury trial acknowledged, may need to turn to a public relations expert because they realize that the experts are more than mere conveniences, they are an integral part of the legal effort.[233]

i) *Public Relations Experts as Advisors*

Public relations experts help the lawyer deal with the morass of public relations engagement. They provide skilled advice regarding possible statements to the various forms of media ranging from "no comment" to detailed factual presentations, and how such statements may be reported.[234] They advise the attorney on whether the client should speak to the media at all, and if so,

230. *Id.* at 1070.

231. *See generally* Moses, *supra* note 11 (explaining that there are clients who have won in the courtroom, but have nevertheless been beaten in the media).

232. *See* Semel & Sevilla, *supra* note 2, at 64.

233. John Siegal & Jeremy R. Feinberg, *Keeping a Client's Privilege Intact: Ruling Sets Forth When Media Consultants' Presence Can be Risky*, NAT'L L.J., Sept. 15, 2003, at S3.

234. *In re Grand Jury Subpoena*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003).

whether to do it personally or through representatives.[235] Public relations experts also advise the attorney as to how best to aim her message at prosecutors and law enforcement agencies, whether to respond to specific allegations, and advise the attorney on when is the most appropriate time to communicate with the media.

The advice of a public relations expert is significant when an attorney is attempting to avoid charges or avoid excessive charges being brought against her client. If the lawyer is not sufficiently skilled and knowledgeable in the field of media relations, then it is her duty to seek the assistance of an expert that can help her get acquainted with the subject area and be able to navigate through it for her client's legal benefit. After all, while communicating with the media may seem simple, in reality the field is far more complex. Most attorneys do not deal with the media on a daily basis, and when a case calls for public engagement, they need the assistance of public relations experts to advise them on how to interact so that words are not taken out of context. The *Kovel* decision envisions that a lawyer may seek outside help when she needs assistance in a subject area in which she is not an expert in order to advance her client's case. Lawyers should be able to retain public relations experts to help deal with important aspects of the litigation, knowing that communications with the expert are protected. There is simply no practical way for meaningful discussions to occur if the lawyer is unable to inform the public relations expert of nonpublic facts, as well as the lawyer's defense strategies and tactics.[236]

ii) *Public Relations Experts Talking to the Client*

While the *Kovel* court found protectable situations where the client spoke directly to the translator without the attorney's presence, whether the translator was provided by the attorney or by the client, there may be a difference as to a public relations expert. As previously noted, public relations experts, unlike engineers and forensic experts, always run the risk of appearing to have provided business services for the client because their job could be useful to the client outside the legal representation. Also, intuitively, communicating with the media is not nearly as complicated or arcane as organic chemistry or fingerprint analysis. Indeed, the *Calvin Klein* court indicated that public relations experts do not provide

235. *Id.*
236. *Id.*

the "translator" function served by the accountant in *Kovel*.[237] Likewise, the court in *Schroder* concluded that the public relations expert provided standard public relations services, via Schroder's attorney.[238] Therefore, unless steps are taken to lessen the appearance that a public relations expert is being hired for the client's business purposes, it is difficult for judges to determine whether there was a legitimate legal purpose in the relationship. It is not hard to see how an attorney can serve as a conduit for a client's business purposes—the client asks the lawyer to hire a public relations expert and, just as in the tobacco cases, the presence of the lawyer is supposed to immunize the communications from an adversary's attack.

The cases discussed in Part III demonstrate that courts are not in agreement as to whether the attorney-client privilege would extend if a client interacted directly with the public relations expert. The court in Martha Stewart's grand jury trial, for example, did not see it as problematic if the client talked directly to the public relations consultants, without the presence of attorneys, as long as the communications were aimed at giving or obtaining legal advice.[239] Yet, given the tone of the *Calvin Klein* and the *Schroder* decisions, and the explicitly narrow view of the privilege adopted by both courts, it is reasonable to infer that they are likely to see client-public relations expert communication as evidence of business service.

iii) *Public Relations Expert as the Lawyer's Mouthpiece*

A second possible role of a public relations expert is to be the attorney's agent and in this capacity talk to the media on the lawyer's behalf. The *Kovel* decision envisions the possibility that lawyers may need agents to perform various tasks.[240] One of the reasons why a lawyer may decide to have the public relations expert speak on her behalf is if, for example, she decides to hold a press conference and take questions from reporters, she may feel that a public relations expert may be better able to handle the questions. On the other hand, the decision may simply be one of delegation of duties, with the paralegals and law school associates doing the research, while the public relations expert handles the

237. Calving Klein Trademark Trust v. Wachner, 198 F.R.D. 53, at 54-55 (S.D.N.Y. 2000).

238. Haugh v. Schroder Inv. Mgmt. N. Am., 02 Civ. 7955, 2003 U.S. Dist. LEXIS 14586, at *8 (S.D.N.Y. Aug. 25, 2003).

239. *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 331.

240. United States v. Kovel, 296 F.2d at 921 (2nd Cir. 1961).

media. But, having the public relations expert talk to the media creates ambiguities that are difficult to defend to a scrutinizing court.

The concern is the same—whether the public relations consultant is the lawyer's or the client's "mouthpiece," and how to tell the difference. The suspicion that the public relations expert is providing business services for the client is heightened in circumstances where the public relations expert speaks on a lawyer's behalf. Furthermore, a naïve court may be unconvinced that a lawyer needs a public relations expert to communicate with the media because public speaking appears to be so facile. As the court in *Calvin Klein* pointed out, when a public relations expert interacts with the media they are "simply providing ordinary public relations advice,"[241] which does not qualify for the protection under the privilege doctrine.

C. Lawyers and Public Relations Experts—Maintaining the Privilege

In representing high profile clients whose chances of obtaining a fair trial could be adversely influenced by heavy negative media coverage, an attorney requiring the aid of a public relations expert should not be dissuaded from relying on their knowledge and skills simply because there is disagreement among courts as to whether and under what circumstances the privilege attaches. After all, none of the courts discussed have categorically stated that the privilege may never attach—they just have not been convinced given the facts in particular cases. When communications between a public relations expert and an attorney are challenged, the defending party will have to demonstrate to the judge the steps taken to ensure that the communications were privileged and that the attorney required the assistance and advice of a public relations expert for the purposes of the representation. The judge will probably conduct an *in camera* review and likely evaluate and determine whether the privilege attaches based on the "totality of the circumstances," i.e., whether on the whole there was sufficient legal reason to justify extending the attorney-client privilege to include a public relations expert. In determining the issue, the judge will have to evaluate whether talking to the media was a legitimate legal service in the given circumstances. She will also have to judge whether the public relations expert was a necessary agent in ad-

241. *Calvin Klein*, 198 F.R.D. at 54-55.

vancing the litigation forward or was instead providing business services to the client.

The following factors are conclusions inferred from the cases previously discussed that may help attorneys ensure that their communications are privileged. The factors are not meant to be applied mechanically but demonstrating most, if not all of the facts, make the decision to rely on a public relations expert easier to defend and may lessen the likelihood that the public relations expert will be viewed as an outside third-party who destroys the privilege.

First, in order to demonstrate that the media engagement was a necessary legal service the lawyer must make a showing that heavy negative publicity had the possibility of undermining her client's chances of obtaining a fair trial by influencing the prosecutor to indict or bring heavier charges. This can be done with pre-indictment evidence from various media outlets which the attorney reasonably believes tends to incite public outrage and therefore is likely to effect the prosecutor's indictment decision. Demonstrating this is the necessary first step because it removes the specter of doubt that the party claiming the protection of the privilege initiated the engagement with the media prior to any negative publicity about the client, which could create doubt as to whether such engagement was indeed a legal service necessary for the representation. As the *Calvin Klein* court concluded, such preemptive engagement will not be protected by the privilege.[242]

Second, the attorney must hire the public relations expert.[243] Hiring by itself, however, as the *Calvin Klein* and the *Schroder* cases indicated, will not privilege the information since it does not entirely remove the possibility that the public relations expert is performing a business service for the client via the attorney.[244] It is also not the conclusion entirely based on *Kovel* because that decision envisioned that a client could bring his own translator.[245] Fur-

242. *Id.* at 55.

243. *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 331 ("[The] Target would not have enjoyed any privilege for her own communications with Firm if she had hired the firm directly.").

244. *See* Haugh v. Schroder Inv. Mgmt. N. Am., 02 Civ. 7955, 2003 U.S. Dist. LEXIS 14586, at *8 (S.D.N.Y. Aug. 25, 2003) (finding that the public relations firm merely provided standard public relations services for the plaintiff); *Calvin Klein*, 198 F.R.D. at 54 ("None of these vague and largely rhetorical contentions . . . is particularly helpful to assessing the purpose of the documents here in issue, many of which appear on their face to be routine suggestions from a public relations firm as to how to put the 'spin' most favorable to CKI on successive developments in the ongoing litigation.").

245. *Kovel*, 296 F.2d at 921.

thermore, realistically the client is still paying for the expert, whether the lawyer hires him or not because the cost will inevitably be incorporated into the client's bill. Nevertheless, the difficulty of drawing a line between legitimate legal service and business service where public relations experts are concerned drives towards the conclusion that the lawyer should do the hiring. The necessity for such seemingly arbitrary line drawing, as Judge Kaplan noted, is necessary.[246] Judge Kaplan applied *Kovel's* rationale to public relations firms: drawing of seemingly arbitrary lines is "the inevitable consequence of having to reconcile the absence of privilege for accountants and the effective operation of the privilege of a client and a lawyer under conditions where the lawyer needs outside help."[247]

Third, although the *Kovel* decision suggests that a client should be able to communicate directly with an attorney's agent, with or without the attorney's presence and whether or not the attorney hired the agent, for the purposes of ensuring the attachment of the privilege, it is best that the public relations expert only interact with the attorney.[248] When only the lawyer communicates with the public relations expert, the situation is more consistent with the entire purpose for hiring the public relations expert—to assist the lawyer in advancing the representation of her client. Also, as mentioned earlier, it is difficult for judges to determine whether there was a legitimate legal purpose in the relationship or whether it was a business service for a client, discussing ways to bolster the client's reputation. If and when a client interacts directly with the public relations expert, it adds to the possibility that it was a business service because, presumably, any information that a public relations expert needs in order to conduct her job can be obtained from the attorney.

The fourth consideration that lawyers wishing to engage the expertise of a public relations expert should consider is interacting directly with the media. As with the previous point, having the public relations expert contact members of the media directly could be seen as "ordinary public relations advice," i.e., business service to the client. The *Calvin Klein* court was clear that such services as "reviewing press coverage, making calls to various media to comment on developments in the litigation," and "finding

246. *In re Grand Jury Subpoena*, 265 F. Supp. 2d at 331.

247. *Kovel*, 296 F.2d at 921.

248. *See id.* at 921-22.

friendly reporters" does not constitute legal services.[249] Legal services, as suggested by the court in Martha Stewart's grand jury case, is having the public relations expert advise the lawyer on which media outlets to use, when and how best to conduct the communications, and whether the client should speak directly to the media.[250] The latter elements are more directly related to a lawyer's duty to avoid charges being brought or to ensure that unnecessary excessive charges are not brought.

In addition to the fundamental aspect of the attorney-client privilege—that communications be confidential—the factors mentioned above return full circle to what the *Kovel* court expressed was the crucial aspect of the privilege. "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."[251]

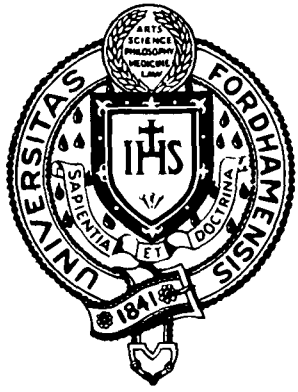
CONCLUSION

Advocating in the court of public opinion is the defining characteristic of some attorneys in recent times. The traditional role of an attorney focusing only on the courtroom is outdated. In this era of the Internet and twenty-four-hour cable news channels, advocating in the public forum to avoid charges brought or reduce their severity, is more and more recognized as a necessity rather than a choice. Failing to recognize this impinges upon clients' rights, hampers the advancement of the legal profession, and acts in contradiction to the explicit goals of the profession. If we embrace media and protect it with broad First Amendment protections, we must accept that lawyers need to protect their clients' right to a fair judicial process. Public relations firms are often part of the modern age response to this modern age problem. For our system of adjudication to be fair and just, if we protect the media's right to inflame the public opinion, to which prosecutors are highly attentive, then we must permit attorneys to engage the media through the assistance of public relations experts.

249. *Calvin Klein*, 198 F.R.D. at 54-55.

250. *See In re Grand Jury Supboena*, 265 F. Supp. at 330-31.

251. *Kovel*, 296 F.2d at 922.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