

SPIN CONTROL AND THE HIGH-PROFILE CLIENT – SHOULD THE ATTORNEY-CLIENT PRIVILEGE EXTEND TO COMMUNICATIONS WITH PUBLIC RELATIONS CONSULTANTS?

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In the year 2004, we have been treated to an unprecedented number of celebrity trials. Martha Stewart, Kobe Bryant, Michael Jackson, Scott Peterson¹, Robert Blake, Courtney Love, and Phil Spector have found themselves this year sitting across from prosecutors in high-profile criminal cases.² The public seemingly has an insatiable appetite for these cases.³ Faced with public scrutiny, these celebrities are concerned about how their cases will play out in the court of public opinion.⁴ Accordingly, many celebrities hire not only attorneys to defend their cases in court, but also public relations experts to defend their cases in the public eye.⁵ The line between defending a celebrity case in court and defending a case to the public is becoming blurred.⁶

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¹ Although Scott Peterson was not a “celebrity” prior to being accused of killing his wife Laci, he soon became one. See Glenn Garvin, *Jury Is In: Celebrity Trials a Hit for TV*, The Miami Herald, Monday, June 14, 2004, available at <http://www.miami.com/mld/miamiherald/8916986.htm?1c>.

² See <http://www.thejusticesystem.net>.

³ Garvin, *supra.*, and Joe Milicia, *Celebrity Trials Proliferate 50 Years After Sheppard Case*, The Associated Press, June 26, 2004, available at <http://www.cleveland.com/newsflash/cleveland/index.ssf?/base/news-11/108822565015770>. See also, Janet Ball, *Martha Stewart Pays Price of Fame*, BBC News, UK Edition, Friday March 5, 2004, available at: <http://news.bbc.co.uk/1/hi/business/3537903.stm>.

⁴ Joseph W. Martini and Charles F. Willson, *Defending your Client in the Court of Public Opinion*, Champion Magazine, The National Association of Criminal Defense Lawyers, April 2004, available at <http://www.nacdl.org/public.nsf/0/93efa7fb3cld6al585256e9a004bfled?OpenDocument>.

⁵ Lynne Duke, *Humble Pie for a Diva of Domesticity, Crash of High-Flying Martha Stewart Made Perfect Public Theater*, (“This was not just a legal case, not just a judgment rendered. It was, alas, some kind of grist for the mill of modern media frenzy,”) Washington Post, Saturday, March 6, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A35220-2004Mar5?language=printer>. See also, Lizzie Grubman ((herself a “celebrity publicist”), who backed into a crowd at a Hamptons nightclub and hired damage-control expert Howard Rubenstein to “spread the word that the incident was an accident and that Grubman was truly sorry.”) John Springer, *A Year After Hamptons Horror, Publicity Princess Could be Poised for a Plea Deal*, available at http://www.courttv.com/trials/grubman/070202_ctv.html. See also, *All Quiet at Martha Stewart’s as She Plans Strategy*, (“The Daily News said Stewart will hold a teleconference with her attorneys and public relations advisers today to map a strategy to fight her felony convictions and rescue her reputation.”) Available at <http://www.westportnow.com/business>.

⁶ *All Quiet at Martha Stewart’s as She Plans Strategy*, Available at <http://www.westportnow.com/business>.

Indeed, “the management team for a celebrity often hires a crisis-public relations consultant to help the lawyer and client control the outflow of information to the media.”⁷ In 1994, the American Bar Association changed one of its ethical rules to allow an attorney to correct what he or she believes to be false publicity.⁸ Against this backdrop, it is not surprising that courts have been presented with the question of whether statements made to public relations consultants are privileged under the Federal Rules of Evidence.⁹ In one high-profile case, the United States District Court for the Southern District of New York held that the attorney-client privilege extended to “oral communications among” the target of a grand jury investigation, her lawyers, and a public relations firm hired by her lawyers.”¹⁰

This article explores the issue of privilege for communications with public relations firms. Part I will discuss the history and underlying purposes of the attorney-client privilege. In Part II of this article, the *In re Grand Jury Subpoenas Dated March 24, 2003* case, as well as other similar cases, will be addressed. Part III will compare the recent opinions with the purposes of the attorney-client privilege. Finally, in Part IV, the article will conclude that expanding the attorney-client privilege to communications with public relations consultants is inadvisable and against the interests of justice.

⁷ Steve Cron, *Busted!*, Entertainment and Sports Lawyer, A publication of the ABA Forum on the Entertainment and Sports Industries, Volume 20, Numbers 1-2, Spring/Summer 2002.

⁸ American Bar Association, Model Rules of Professional Conduct, Rule 3.6(a).

⁹ *See, e.g.*, *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. June 2, 2003); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001); *Burton v. R.J. Reynolds*, 200 F.R.D. 661 (U.S.D.C. D. Kansas 2001); and *Dorf & Stanton Communications v. Molson Breweries*, 100 F.3d 919 (Fed. Cir. 1996), cert. den. 520 U.S. 1275 (1997).

¹⁰ *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. June 2, 2003), at 323.

I. The History and Purposes of the Attorney-Client Privilege

Rule 501 of the Federal Rules of Evidence sets forth the general rules of privilege.¹¹ The rule is simple. The rules of privilege are “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.”¹²

A. Bentham and Wigmore

The attorney-client privilege was well established at common law. Jeremy Bentham,¹³ an “early nineteenth-century British radical theorist,”¹⁴ and Dean John Henry Wigmore,¹⁵ an American scholar whose work has dominated American evidence law,¹⁶ were early legal scholars on theories of evidence.¹⁷ Their work heavily influenced the United States evidence laws. Bentham, who died before Dean Wigmore was born, opposed the very concept of an attorney-client privilege.¹⁸ He “subscribed to the truth theory of adjudication.”¹⁹ Bentham stated

¹¹ Federal Rules of Evidence, Rule 501.

¹² *Id.*

¹³ Jeremy Bentham (1748 – 1832) has been described as a “utilitarian philosopher, political economist, lawyer, and legal reformer.” He wrote *A Treatise on Judicial Evidence* in 1825 and *Rationale of Judicial Evidence* in 1827. See Literary Encyclopedia at <http://www.LitEncyc.com>

¹⁴ Edward J. Imwinkelried and Glen Weissenberger, *An Evidence Anthology*, 7.

¹⁵ Dean John Henry Wigmore (1863 – 1943) was a legal scholar and the Dean of Law at Northwestern University until 1929. He wrote *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, which is commonly referred to as *Wigmore on Evidence*. See <http://www.britannica.com> and <http://www.encyclopedia.com>.

¹⁶ Imwinkelried and Weissenberger, *supra.*,

¹⁷ William Twining, *Theories of Evidence: Bentham & Wigmore*, at 25 and 110.

¹⁸ *Id.*, at 99. “He places little weight on values which constrain the uninhibited pursuit of truth. He is opposed to rules of privilege designed to protect marital harmony or confidential relationships; and he makes it quite clear that such factors should normally be given less weight than rectitude of decision. He is particularly harsh on the lawyer-client privilege and gives no quarter to the claim that this may serve to increase rectitude of decision in the long term; he is dismissive of the privilege against self-incrimination and the right to silence and gives short shrift to many of the specific provisions that would today be subsumed under such notions as due process, natural justice and process values, except in so far as they would promote rectitude of decision.” Some illustrious writers, namely John Stuart Mill, Justice John Appleton, Edward Livingston, and professors Edmund Morgan and Charles McCormick have shared Bentham’s views. See Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure*, vol. 24, §5472, at 87.

¹⁹ Edward J. Imwinkelried, *The New Wigmore, A Treatise on Evidence, Evidentiary Privileges*, § 2.5, at 113. See also, *U.S. v. Gray*, 857 F. Supp. 852 (D. Utah 1994). (“To Bentham rectitude of decision and truth were the highest values of the judicial process”).

the following:

The man by the supposition is guilty; if not, by the supposition there is nothing to betray; let the law adviser say every thing he has heard, every thing he can have heard from his client, the client cannot have any thing to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough; the first thing the advocate or attorney will say to his client, will be, ‘Remember that, whatever you say to me, I shall be obliged to tell, if asked about it.’ What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from this law adviser, in the way of concerting a false defence, as he may do at present.²⁰

In contrast, Dean Wigmore embraced the attorney-client privilege and defended its use.²¹

However, he did believe that the use of privileges should be limited.²² He stated the following:

For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence.

It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. . . The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle.²³

Dean Wigmore traced the concept of the attorney-client privilege back to the “reign of Elizabeth.”²⁴ Because oral testimony as a method of proof did not appear as a common source of proof until the early 1500s, the concept of privileges arose at approximately the same time as

²⁰ Jeremy Bentham, *Rationale of Judicial Evidence, b. IX, pt. IV, c. 5*, as quoted in John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2291, at 3200. This passage also appears in Eric D. Green, Charles R. Nesson, and Peter L. Murray, *Problems, Cases and Materials on Evidence*, Third Ed., at 620.

²¹ 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, 477 (2003).

²² Imwinkelried, *The New Wigmore*, *supra*, at § 3.1, at 121.

²³ John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2192, at 2968.

²⁴ Wigmore, *supra*, at §2290, at 3193. Max Radin, a law professor at the University of California at Berkeley from 1919 through 1948, believed that the attorney-client privilege may have originated in Roman law – “It was one of the commonplaces of the Roman law that a servant – who was, to be sure, a slave – might not give testimony against his master.” Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 487 – 488.

the concept of testimonial evidence.²⁵ The first cases involving the attorney-client privilege arose during the late 1500s after the enactment of the Statute of Perjury.²⁶

B. Early English Common Law

The attorney-client privilege began not as a protection for a client, but as “obligations of honor among gentlemen.”²⁷ The honor was such that a lawyer would never reveal a client’s secrets – to do so would be dishonorable.²⁸ The privilege belonged to the attorney,²⁹ not the client, as is the case today. Gentlemen would not divulge a client’s secrets.

By 1776, the privilege all but disappeared.³⁰ In the interesting *Duchess of Kingston’s Case*,³¹ a bigamy trial, Lord Barrington, an old friend of the accused, was asked, “Did you ever hear from the lady at the bar that she was married to Mr. Hervey?” He responded, “If anything has been confided to my honor, or confidentially told me, I do hold, with humble submission to your lordships, that as a man of honor, as a man regardful of the laws of society, I cannot reveal it.”³² Despite his gentlemanly protest, Lord Barrington was ordered to answer all questions.³³ A year later, in *Hill’s Trial*,³⁴ the court stated the following:

Gentlemen, one has only to say further, that if this point of honor was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day

²⁵ *Id.*, at 3194; and Paul R. Rice, *Attorney-Client Privilege in the United States*, Second Ed., at 7.

²⁶ Rice, *supra.*, at 11.

²⁷ Wigmore, *supra.*, at §2286, at 3187.

²⁸ Paul R. Rice, *Attorney-Client Privilege in the United States*, Second Ed., at 6.

²⁹ Imwinkelried, *The New Wigmore, supra.*, § 2.3, at 108.

³⁰ *Duchess of Kingston’s Case*, 20 How. St. Tr. 586, 1776, as quoted in John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2286, at 3188.

³¹ *Duchess of Kingston’s Case*, 20 How. St. Tr. 586, 1776, as quoted in John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2286, at 3188.

³² *Id.*

³³ *Id.*, at 3189.

³⁴ *Hill’s Trial*, 20 How. St. Tr. 1362, as quoted in John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2286, at 3188.

escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honor.

The “point of honor” approach thus disappeared forever as a motive for recognizing a privilege.³⁵ That purpose was no longer considered valid.³⁶

A case that has received a significant amount of attention³⁷ is *Annesley v. Earl of Anglesea*, decided in 1743.³⁸ Although one commentator indicates that with *Annesley*, the privilege was “nearly wiped out,”³⁹ the case actually set some boundaries with respect to the privilege that are still in effect today.⁴⁰ The *Annesley* case, tried before the Barons of the Irish Exchequer,⁴¹ had interesting facts.

At issue was who succeeded to certain property owned by Arthur, Baron of Altham, after he died.⁴² The plaintiff was a lessee of James Annesley, and the defendant was Richard, Earl of Anglesea.⁴³ Richard was entitled to the land of Arthur if Arthur died childless.⁴⁴ The plaintiff claimed that Richard did not die childless, and that James was in fact the natural son of Arthur.⁴⁵ The issue of the attorney-client privilege arose because Richard retained an attorney, John Giffard, to advise him on numerous matters.⁴⁶ Plaintiff asserted that Richard retained

³⁵ John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2286, at 3189.

³⁶ *In re Grand Jury Subpoena Duces Tecum served upon Shargel v. U.S.*, 742 F.2d 61 (2d Cir. 1984), at 63.

³⁷ Wigmore, *supra.*, at § 2310, at 3231; and Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, at 1073.

³⁸ *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1229 (1743).

³⁹ Hazard, *supra.*

⁴⁰ *See, e.g., Sawyer v. Barczak*, 229 F.2d 805, 808 (7th Cir. 1956); and *Kansas v. Wilcox*, 90 Kan. 80, 91 (1913).

⁴¹ *Whiting v. Barney*, 30 N.Y. 330, 333 (1864).

⁴² Hazard, *supra.*, at 1074.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Giffard in order to have James falsely arrested on murder charges, and then hanged.⁴⁷ Giffard was willing to testify for the plaintiff, but Richard objected.⁴⁸

Lord Chief Baron Bowes, who wrote the majority opinion allowing the testimony,⁴⁹ stated the following:

Now, admitting the policy of the law in protecting secrets disclosed by the client to his attorney, to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that everything said by a client to his attorney falls under the same reason? I own, I think not; because there is not the same necessity upon the client to trust him in one case as in the other . . .⁵⁰

The court distinguished between consulting an attorney for legal advice and consulting an attorney as an acquaintance.⁵¹ In the event the subject matter of the conversation was different from that for which the attorney was employed, the conversation would not be privileged, said the court.⁵²

The more fascinating opinion, and the one more often cited, is the concurring opinion written by Baron Mounteney.⁵³ He set forth a hypothetical fact pattern in which a client approaches numerous attorneys and asks them to carry out a criminal act.⁵⁴ As each declines, the attorneys would then be obliged to “keep this inviolably secret,” if the attorney-client privilege applied.⁵⁵ The client could effectively escape prosecution by consulting every attorney in a jurisdiction until he found an attorney “wicked enough to carry this iniquitous scheme into

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, at 1078.

⁵⁰ Wigmore, *supra.*, at § 2310, at 3231.

⁵¹ *Id.*

⁵² Hazard, *supra.*

⁵³ *Id.*

⁵⁴ Sawyer v. Barczak, at 808.

⁵⁵ *Id.*

execution.”⁵⁶ That, said Baron Mounteney, would be contrary to both law and reason.⁵⁷ The *Annesley* case formed the basis of the crime-fraud exception to the attorney-client privilege that we have today.⁵⁸ Sergeant Tisdall stated the following:

If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of the society, to discover every design which may be formed contrary to the laws of the society to destroy the public welfare.⁵⁹

Far from nearly wiping out the attorney-client privilege, the barons were ahead of their time. The court also recognized in this case that the true purpose of the rule was to foster honest communication between the client and the attorney.⁶⁰

C. United States Common Law

Written evidence laws in the United States can be traced back to the year 1789.⁶¹ This was the period of time when Congress was forming federal courts, and “[t]hrough overshadowed by constitutional policy and practical politics, technical details of practice and procedure such as rules of evidence were involved in both the Judiciary Act of 1789 and the Bill of Rights.”⁶² Some evidentiary rules such as the right of confrontation and the right against self-incrimination, received “constitutional status.”⁶³ These were a departure from English law.⁶⁴ The federal courts looked to English law when making evidentiary rulings, but there was selective incorporation rather than wholesale adoption.⁶⁵

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See, e.g.* U.S. v. Zolin, 491 U.S. 554, 563 (1989). *See also*, Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 4th Ed., American Bar Association, Section of Litigation, at 416 – 418.

⁵⁹ *Annesley, supra.*, Sergeant Tisdall quoted in *Kansas v. Wilcox, supra.*

⁶⁰ *Annesley, supra.*

⁶¹ Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure*, vol. 21, §5001, at 3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, at 5.

⁶⁵ *Id.*

According to Dean Wigmore, the attorney-client privilege arose only a few times during the late 1700s.⁶⁶ Geoffrey C. Hazard, Jr., another evidence expert, has found that “recognition of the privilege was slow and halting until after 1800.”⁶⁷ The concept of an attorney-client privilege as we know it today was reborn, according to Dean Wigmore, under a new theory in the mid 1800s.⁶⁸ He states the following:

That new theory looked to the necessity of providing subjectively for the client’s freedom of apprehension in consulting his legal adviser, and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law.⁶⁹

Two cases decided by Lord Brougham in 1833 form the basis of this new theory and the attorney-client privilege today.⁷⁰ The first was *Bolton v. Corporation of Liverpool*,⁷¹ a civil case brought by the Corporation of Liverpool to recover some dues and tolls from merchants.⁷² Prior to bringing the case, the corporation sought written advice from its counsel.⁷³ The merchants then sought discovery of this advice.⁷⁴ Lord Brougham denied their request, stating the following:

It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights.⁷⁵

⁶⁶ Wigmore, *supra.*, at 3189 – 3195; however, Geoffrey C. Hazard, Jr., in his *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, states that “For 50 years after 1743 there appears to be no reported decision clearly sustaining a claim of privilege, although there are cases permitting an attorney to refuse to supply documents in response to a subpoena.” 66 Cal. L. Rev. 1061, at 1080.

⁶⁷ Hazard, *supra.*, at 1070.

⁶⁸ Wigmore, *supra.*, at 3189 – 3195. However, this theory seems to have emanated from *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1229 (1743), see above. See also: Wright and Graham, *supra.*, at vol. 24, §5472, at 72, “Recent scholarship suggests that Wigmore has exaggerated greatly the degree to which the privilege was accepted prior to 1800” (citing to Hazard).

⁶⁹ *Id.*, at 3194.

⁷⁰ Hazard, *supra.*, at 1083.

⁷¹ *Bolton v. Corporation of Liverpool*, 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch. 1833).

⁷² Hazard, *supra.*, at 1083.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

The second case was *Greenough v. Gaskell*,⁷⁶ a civil case brought to cancel a note.⁷⁷ Interestingly, the items sought by the petitioner in that case were financial papers and records of the client that were being held by the solicitor.⁷⁸ Again, Lord Brougham held the papers immune from disclosure.⁷⁹ He stated the following:

If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case.⁸⁰

The attorney-client privilege appeared for the first time in a reported United States decision in *Dixon v. Parmelee*,⁸¹ a New England case decided in 1829. The American Court relied on the *Annesley*⁸² decision and found that the privilege did not apply to the particular factual situation in *Dixon*.⁸³ However, the court did clearly embrace the attorney-client privilege when it stated the following:

It has long been the established law, that counselors, solicitors and attorneys, ought not to be permitted to discover the secrets of their clients: it is declared repugnant to the policy of the law, to permit the disclosure of secrets by him whom the law has intrusted therewith. It is the privilege of the client, that the mouth of his counsel should be forever sealed against the disclosure of things necessarily communicated to him for the better conducting his cause, *pendente lite*: but this privilege, in all the cases which have fallen under my observation, has been strictly confined to the period in which the suit has been pending, and to the party of record, or in interest; and where the substance of the communication was such that it became necessary for the attorney to know it in order to manage the suit.⁸⁴

⁷⁶ *Greenough v. Gaskell*, 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch. 1833).

⁷⁷ Hazard, *supra.*, at 1083.

⁷⁸ *Id.*, at 1084. The facts of the case are interesting because the papers and financial records would likely not be protected by the attorney-client privilege today. See *Colton v. U.S.*, 306 F.2d 633, 639 (2nd Cir. 1962).

⁷⁹ *Id.*

⁸⁰ Wigmore, *supra.*, at 3197.

⁸¹ *Dixon v. Parmelee*, 2 Vt. 185 (1829), as presented in Hazard, *supra.*, at 1088.

⁸² *Annesley v. Anglesea*, 17 How. St. Tr. 1229 (1743).

⁸³ *Dixon v. Parmelee*, 2 Vt. 185, 190 (1829).

⁸⁴ *Id.*, at 188.

In *Dixon*, the court reasoned that attorneys were necessary “mouthpieces” for their clients.⁸⁵ It appears that this court was looking at the privilege from the point of view of the “master-servant relationship” of Roman law, rather than the point of view of “encouraging clients to make full disclosures” used today.⁸⁶ The court indicated that the “origins of the law” are as follows:

...in early days, suitors brought in person their complaints before the King, and afterwards his court; that as business increased, the administration of justice approximating to a science, and the necessity of forms sensibly felt, it became absolutely necessary that there should be a set of men to stand in the place of suitors, called attorneys, and manage their causes; to encourage which, and bring the same into practice, it also became necessary for courts to adopt a rule, by way of pledge to suitors, that their secret and confidential communications to their attorneys should not be drawn from them, either with or without the consent of such attorney.⁸⁷

The court did make it clear that the privilege belonged to the client, not the attorney, as had been the case in the past.⁸⁸

The first “important” treatise on evidence law was published in 1842 by Simon Greenleaf of Harvard Law School.⁸⁹ During this same year, the Supreme Court was given “broad rule-making power, which included the regulation of “forms and modes of taking and obtaining evidence.”⁹⁰ In 1898, James B. Thayer, another Harvard Professor of Law, wrote *A Preliminary Treatise on Evidence at the Common Law*.⁹¹ Thayer is “considered the first true giant in American evidence law.”⁹² He indicated that the law of evidence is really a study of what is *excluded* from a trial, rather than what is included.⁹³ His “most erudite disciple,”⁹⁴ John

⁸⁵ *Id.*

⁸⁶ *In re Grand Jury Subpoena Duces Tecum Served upon Shargel v. U.S.*, 742 F.2d 61, 62 (2nd Cir. 1984), citing to J. Weinstein & M. Berger, *Evidence*, Sec. 503(02) (1982).

⁸⁷ *Dixon*, *supra*. See also, *Whiting v. Barney*, 30 N.Y. 330, 333 (1864).

⁸⁸ *Id.*

⁸⁹ *Wright and Graham, supra.*, at vol. 21, §5001, at 20.

⁹⁰ *Id.*, at 22.

⁹¹ James B. Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898), partially reprinted in Edward J. Imwinkelried and Glen Weissenberger, *An Evidence Anthology*, at 1.

⁹² Imwinkelried and Weissenberger, *supra*.

⁹³ *Id.*, at 2.

Henry Wigmore, became America's foremost authority on evidence law.⁹⁵ Armed with English and American case law, as well as Professor Thayer's teachings, Wigmore developed "four fundamental conditions" of privilege law.⁹⁶ These conditions, later cited in numerous court cases,⁹⁷ are the following:

1. The communications must originate in a *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*; and
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.⁹⁸

D. Codification of the Rules of Evidence

The process of codifying rules of evidence began with Jeremy Bentham's offer to President Madison to "codify the American common law" in 1811.⁹⁹ President Madison declined to accept the offer.¹⁰⁰ Many attempts were made at codification throughout the years,¹⁰¹ but it was not until the Uniform Rules of Evidence, adopted by the American Law Institute in 1953 and endorsed by the American Bar Association, that strides were made towards codification.¹⁰² The Uniform Rules did not take hold (having been approved by only two states), but they did form the basis of many of our federal rules of evidence today.¹⁰³

⁹⁴ *Id.*, at 7.

⁹⁵ Edmund M. Morgan and John A. Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909 (1937), reprinted in part in Imwinkelried and Weissenberger, *supra*.

⁹⁶ John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Volume IV, published by Little, Brown, and Company, 1905, §2285, at 3185.

⁹⁷ *See, e.g.*, *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976); *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); and *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963).

⁹⁸ Wigmore, *supra*. Emphasis in original.

⁹⁹ Wright and Graham, *supra*, at vol. 21, §5005, at 62.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, at 62 – 92.

¹⁰² *Id.*, at 90.

¹⁰³ *Id.*, at 90 – 91.

The drafting of the Federal Rules of Evidence as we know them today began in 1958, when the “American Bar Association adopted a resolution urging the United States Judicial Conference to consider adopting a uniform set of evidentiary rules for federal courts.”¹⁰⁴ In 1961, the Judicial Conference authorized a committee to investigate this possibility, and United States Supreme Court Justice Earl Warren appointed the committee.¹⁰⁵ The committee released its report less than nine months later, indicating that it was “both feasible and advisable to promulgate a set of uniform rules.”¹⁰⁶ This standing committee recommended to the Judicial Conference that an Advisory Committee be appointed to write the rules.¹⁰⁷ Chief Justice Warren appointed the members of the committee, naming Albert E. Jenner, Jr. Chairman.¹⁰⁸ It has been said that the membership of the committee reflected the influence of both Jeremy Bentham and Dean Wigmore.¹⁰⁹

The members of the Committee were rather conservative,¹¹⁰ and Albert Jenner was quoted as saying that the Committee was not “inclined to give the family jewels away or tip or rock the laws of evidence.”¹¹¹ Most of the work of the Committee was done by Professor

¹⁰⁴ Imwinkelried, *The New Wigmore, supra.* §4.2.1(a), at 150.

¹⁰⁵ *Id.*, at 151. In actuality, the Chief Justice “chose instead to constitute the Chairman of the existing Advisory Committee as a Special Committee on Evidence, with Professor James Wm. Moore of the Yale Law School as Chairman.” Wright and Graham, *supra.*, at vol. 21, §5005, at 92.

¹⁰⁶ *Id.* and Wright and Graham, *supra.*, at vol. 21, §5006, at 92.

¹⁰⁷ Wright and Graham, *supra.*, at vol. 21, §5006, at 97.

¹⁰⁸ *Id.* Jenner formed Jenner and Block, a leading law firm in Chicago.

¹⁰⁹ Imwinkelried, *The New Wigmore, supra.* §4.2.1(b), at 153. The members of the Committee were Albert E. Jenner, Jr. (chair), Professor Edward W. Cleary (recorder), Professor Jack Weinstein, David Berger, Hicks Epton, Judge Simon E. Sobeloff, Chief Judge Joe Ewing Estes, Judge Robert Van Pelt, Professor Thomas F. Green, Associate Dean Charles W. Joiner, Robert S. Erdahl, Egbert L. Haywood, Frank G. Raichle, Herman F. Selvin, Craig Spangenberg, and Edward Bennett Williams. Wright and Graham, *supra.*, at vol. 21, §5006, at 98.

¹¹⁰ Wright and Graham, *supra.*, at vol. 21, §5006, at 99.

¹¹¹ *Id.*

Cleary.¹¹² Professor Cleary later testified at a House subcommittee meeting that privileges “often operated as blockades to the quest for truth.”¹¹³

A draft of the rules was submitted for comment in 1969, with Article V of that draft containing the privilege rules.¹¹⁴ A revised draft, which reflected some comments from the bar, was submitted by the Judicial Conference to the Supreme Court in 1970.¹¹⁵ Instead of promulgating the rules and sending them on to the Congress, as was provided by the Rules Enabling Act, the Court returned the rules to the Judicial Conference with instructions to publish them for comment.¹¹⁶ The Justice Department made many requests for changes, and these changes were reflected in a third version of the rules.¹¹⁷ “[V]irtually all the major changes that would subsequently be made “reflect[ed] the wishes of Senator McClellan and the Department of Justice.”¹¹⁸ Senator McClellan was the Chair of the Subcommittee on Criminal Laws and Procedure of the Senate Judiciary Committee.¹¹⁹ Minor changes continued to be made at the request of the Justice Department.¹²⁰

Article V of the drafts of the rules had thirteen separate provisions. Nine of the provisions addressed specific privileges, one of which was the attorney-client privilege (5-03).¹²¹ In a March 1971 revised draft, Rule 5-03 became 503, and the drafters added a fourth section. The following is a text of the attorney-client privilege rule at this point:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications (1) between himself or his representative

¹¹² *Id.*, at 100.

¹¹³ Imwinkelried, *The New Wigmore, supra.*

¹¹⁴ *Id.*, at 154.

¹¹⁵ Wright and Graham, *supra*, at 101.

¹¹⁶ *Id.*

¹¹⁷ *Id.*, at 103.

¹¹⁸ Imwinkelried, *The New Wigmore, supra.*, at 165.

¹¹⁹ *Id.*

¹²⁰ *Id.*, at 166 – 170; and Wright and Graham, *supra.*, at vol. 21, §5006, at 103.

¹²¹ *Id.*, at 154.

and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client.¹²²

On November 20, 1972, the Supreme Court approved the "green book" of rules, which contained the above language, and on February 5, 1973, the Chief Justice sent the rules to Congress.¹²³ Justice Douglas filed a dissent when the rules were transmitted.¹²⁴ Justice Douglas dissented because he believed the rules needed to be developed on a "case-by-case basis" by the courts.¹²⁵ He thought that if any body was responsible for drafting rules, it was the Congress.¹²⁶ The Rules Enabling Act did not give the Supreme Court the power to issue rules of evidence, he believed, because these rules were actually substantive in nature, rather than procedural.¹²⁷ Finally, he thought that the Supreme Court was merely a "conduit" between the Committee and Congress and had not appropriately considered the rules.¹²⁸

E. The Watergate Effect

The years 1972 and 1973 were significant for their effect on privilege law.¹²⁹ On June 17, 1972, the Watergate burglars were caught and arrested as they attempted to bug Democratic National Committee headquarters at the Watergate hotel in Washington, D.C.¹³⁰ On June 3, 1973, John Dean, the White House Counsel, told the Watergate investigators that he and

¹²² *Id.*, at 161.

¹²³ *Id.*, at 170 -171; and Wright and Graham, *supra.*, at vol. 21, §5006, at 104.

¹²⁴ *Id.*, at 171; and Wright and Graham, *supra.*

¹²⁵ *Id.*, and Wright and Graham, *supra.*

¹²⁶ *Id.*, and Wright and Graham, *supra.*

¹²⁷ Imwinkelried, *The New Wigmore, supra.*

¹²⁸ *Id.*

¹²⁹ Wright and Graham, *supra.*

¹³⁰ *Watergate Timeline: The Details*, at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/chronology.htm>.

President Nixon had discussed the cover-up at least 35 times.¹³¹ President Nixon refused to turn over the presidential tape recordings on July 23, 1973, citing executive privilege,¹³² Special Prosecutor Archibald Cox issued a subpoena to J. Fred Buzhart, presidential counsel, and the Senate Watergate Committee issued a subpoena to Leonard Garment, another Nixon lawyer.¹³³ In the landmark case *United States v. Nixon*, the U.S. Supreme Court found that the executive privilege was not absolute, and it ordered Nixon to turn over the tapes and records.¹³⁴

The Watergate events had a definite effect on the privilege rules. Senator Sam Ervin was both Chairman of the Watergate Committee and the Chair of the Senate Judiciary Committee.¹³⁵ He introduced Senate Bill 583 in order to delay the effective date of the rules that had been promulgated by the Supreme Court.¹³⁶ A similar provision was passed in the House, and a report prepared at that time indicated that the delay was intended “to promote the separation of constitutional powers.”¹³⁷ The Congressional debates on the rules contained numerous references to the Watergate controversy.¹³⁸

F. Federal Rule of Evidence, Rule 501

On June 28, 1973, the Judiciary Committee released a “Committee Print of the Federal Rules.”¹³⁹ The House amended the earlier privilege provisions, and the 13 specific privilege rules were eliminated and replaced with a provision almost identical to Federal Rule of

¹³¹ *Id.*

¹³² Carroll Kilpatrick, *President Refuses to Turn Over Tapes; Ervin Committee, Cox Issue Subpoenas*, Washington Post, July 24, 1973, at A-01, available at www.washingtonpost.com

¹³³ *Id.*

¹³⁴ *United States v. Nixon*, 418 U.S. 683 (July 24, 1974).

¹³⁵ Kilpatrick, *supra*, and Imwinkelried, *The New Wigmore, supra.*, at 165 and 176.

¹³⁶ Wright and Graham, *supra*, at 105.

¹³⁷ Imwinkelried, *The New Wigmore, supra.*, at 174.

¹³⁸ Edward J. Imwinkelried, *Whether the Federal Rules of Evidence Should be Conceived as a Perpetual Index Code: Blindness is Worse than Myopia*, 40 Wm. & Mary L. Rev. 1595, 1601 (1999).

¹³⁹ Imwinkelried, *The New Wigmore, supra.*, at 181.

Evidence 501.¹⁴⁰ Further, the House also adopted an amendment stating that the Supreme Court could not promulgate court rules on privileges without “affirmative approval by Congress.”¹⁴¹ Congress was clearly marking out what it saw as its “turf” when it decreed “[a]ny. . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”¹⁴² The Committee Print was adopted by the House and the Senate and was signed by President Ford on January 2, 1975, to take effect on July 1, 1975.¹⁴³ As of this writing, the courts have decided privilege law under Federal Rule of Evidence 501, according to common law, “in light of reason and experience,” for thirty years.

The purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”¹⁴⁴ The lawyer must be aware of all the facts and circumstances in order to adequately represent his or her client.¹⁴⁵ The need for this privilege was first recognized by the Supreme Court in 1888.¹⁴⁶ Charles Wright and Kenneth Graham, two leading commentators on federal practice and procedure, refer to the above rationales for the privilege as the “instrumental argument.”¹⁴⁷ The instrumental argument has the following five steps:

1. The law is complex. A layperson would find it almost impossible to understand the law and procedure involved in a trial.
2. It is in the public’s interest that a layperson understand the law and the best way to assure his/her understanding is to enlist the help of persons “learned in the law.”

¹⁴⁰ *Id.*, and Advisory Committee Notes to Rule 501.

¹⁴¹ *Id.*, at 183.

¹⁴² Imwinkelried, *Whether the Federal Rules*, *supra*, at 1602.

¹⁴³ Wright and Graham, *supra*, at 108.

¹⁴⁴ *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

¹⁴⁵ *Id.*, citing to *Trammel v. U.S.* 445 U.S. 40, 51 (1980).

¹⁴⁶ *Id.*, citing to *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

¹⁴⁷ Wright and Graham, *supra*, at Vol. 24, at 80.

3. In order to provide the best advice, the lawyer needs to know all the facts, both good and bad.
4. Without the privilege, clients would only reveal those facts that are favorable to their case.
5. The benefits society receives through the attorney-client privilege outweigh the costs to society of suppression of the communication.¹⁴⁸

As mentioned above, the privilege belongs to the client, and the attorney is expected to safeguard it on behalf of the client.¹⁴⁹ Utmost candor between the attorney and the client is absolutely essential if a client is to have effective assistance of counsel.¹⁵⁰

On the other hand, because it “impedes full and free discovery of the truth,” the attorney-client privilege is to be strictly construed.¹⁵¹ The burden of proving that the privilege applies is on the party asserting the privilege.¹⁵² Privileges “are not favored,” even if they have constitutional roots.¹⁵³ Courts are to confine the privilege to its “narrowest possible limits consistent with the logic of its principle.”¹⁵⁴ Without limitations, the privilege would “engulf all manner of services performed for (sic) the lawyer that are not now, and should not be, summarily excluded from the adversary process.”¹⁵⁵

¹⁴⁸ *Id.*, at 80 – 86.

¹⁴⁹ Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 4th Ed., American Bar Association, Section of Litigation, at 3.

¹⁵⁰ *Greater Newburyport Clamshell Alliance v. Public Service Company of New Hampshire*, 838 F.2d 13, 21 (1st Cir. 1988).

¹⁵¹ *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

¹⁵² *Id.* at 25.

¹⁵³ *Herbert v. Lando*, 441 U.S. 153, 175 (1979), citing to Wigmore and Bentham. However, *see also* Epstein, *supra.*, at 14, where she indicates that court opinions do not always follow this dictate.

¹⁵⁴ *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984).

¹⁵⁵ *In re Lindsey*, 158 F.3d 1263, 1281 (D.C. Cir. 1998), cert. den. 525 U.S. 996 (1998), entitled *Office of the President v. Office of Independent Counsel*. Bruce R. Lindsey was an attorney in the Office of President Clinton.

II. The Question of Whether Communications with Public Relations Agents Are Protected Under the Attorney-Client Privilege

A. *The In re Grand Jury Subpoena Dated March 24, 2003 Case*

Judge Kaplan, a United States District Court Judge for the Southern District of New York, presided over a motion for order to show cause filed by the United States Attorney against a public relations firm and its employee.¹⁵⁶ In the *In re Grand Jury Subpoenas Dated March 24, 2003* case (*Grand Jury March 24* case), the U. S. Attorney had served grand jury subpoenas on the public relations firm and its employee in order to discover the substance of conversations the public relations firm had had with both the target of a grand jury investigation and the target's attorney.¹⁵⁷ The grand jury was investigating a "high-profile matter," and the name of the target as well as any other identifiable facts were redacted from the original opinion, which was filed under seal.¹⁵⁸ One need only Shepardize the case to learn that the high-profile client was actually Martha Stewart. The public relations firm declined to testify and to produce documents.¹⁵⁹ It asserted that it was hired by the target's attorneys as part of the defense team, and that conversations and communications it had were protected by the attorney-client privilege.¹⁶⁰ Judge Kaplan initially ordered the public relations firm employee to appear before the grand jury and indicated that the employee could assert any objection at that time.¹⁶¹ Judge Kaplan then held an *in camera* inspection of the documents, and held that some of the documents were protected, not by the attorney-client privilege, but by the attorney work product

¹⁵⁶ *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. June 2, 2003).

¹⁵⁷ *Id.* at 322.

¹⁵⁸ *Id.*, at 322 and 323.

¹⁵⁹ *Id.* at 323.

¹⁶⁰ *Id.* The public relations firm was likely Citigate Sard Verbinnen, a crisis consulting firm. Bruce Horowitz, *Stewart Uploads her Cause to Web Site*, USA Today, Money, June 6, 2003, available at: http://www.usatoday.com/money/industries/retail/2003-06-05-marthareact_x.htm.

¹⁶¹ *Id.*

privilege.¹⁶² He then ordered the parties to indicate whether they still had a disagreement with respect to the remaining documents.¹⁶³ The public relations firm and its employee continued to press their objections to the U.S. Attorney requests.¹⁶⁴

In an interesting twist, the target's attorneys claimed that they had hired the public relations firm not to influence the public in general, but to influence the prosecutors and regulators.¹⁶⁵ According to the target's attorneys, the public relations firm was hired because the news reports concerning the target were biased and inaccurate.¹⁶⁶ They claimed that because of the inaccurate reports, the public was unfairly pressuring the prosecutor to file charges against their client.¹⁶⁷

The public relations firm had at least two conversations directly¹⁶⁸ with the target and sent at least one e-mail directly to the target. Other communications involved conversations with the target's attorneys in the absence of the target.¹⁶⁹ Still other situations involved meetings with the attorneys, the target, and the target's spouse.¹⁷⁰ The public relations firm then disseminated to the media information requested by the attorneys.¹⁷¹ All of this was done in the hope of influencing the prosecutor's decision as to whether to charge the target. The court ultimately found that the attorney-client privilege covered both conversations between the

¹⁶² *Id.* The attorney work product privilege originated in the *Hickman v. Taylor* case, a Supreme Court case in which the Court held that written statements of witnesses to a tugboat sinking and an attorney's written memoranda regarding these oral statements were not discoverable by opposing counsel. This protection is qualified, however, and in the event an adversary shows a sufficient need for the material, the material will no longer be protected. *See, Epstein, supra.*, at 479 – 481.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 324.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* As Martha Stewart did not have a spouse at the time of this motion, presumably the person accompanying Ms. Stewart was her daughter, Alexis.

¹⁷¹ *Id.*

attorneys and the public relations consultant and conversations between the target and the public relations consultant.¹⁷²

Because of these peculiar circumstances as argued by the attorneys, this decision should be limited to its facts, and any influence on other cases would ordinarily be limited. However, public relations firms, thrilled with the result in the case, have highly publicized it.¹⁷³ Accordingly, it appears likely that courts will face this question on a continuing basis. Additionally, the use of public relations firms is a relatively new device used by clients in high-profile cases.¹⁷⁴ There will undoubtedly be a push to protect those communications.

The Judge in *Grand Jury March 24* made two key findings in deciding the case. First, he relied on the *U.S. v. Kovel* case; and second, he found that the public relations activities qualified as “legal advice.”¹⁷⁵

1. The U.S. v. Kovel Case

In the *Grand Jury March 24* case, Judge Kaplan relied heavily on *U.S. v. Kovel*,¹⁷⁶ a case in which the Second Circuit Court of Appeals held that the attorney-client privilege extended to conversations between a client and accountants retained by the attorney.¹⁷⁷ The *Kovel* case has been cited extensively since it was decided in 1961, but it does not represent a

¹⁷² *Id.*

¹⁷³ *See, e.g.*, Tries & Rice, LLC, citing to a Wisconsin Law Journal article about the Grand Jury Subpoenas Dated March 24, 2003 case. Available at <http://www.trpr.biz/focus.html>.

¹⁷⁴ *E.g.*, *All Quiet at Martha Stewart's as She Plans Strategy*, “The Daily News said Stewart will hold a teleconference with her attorneys and public relations advisers today to map a strategy to fight her felony convictions and rescue her reputation.” Available at <http://www.westportnow.com/business>; Tom Melsheimer, *How Prominent Execs Can Avoid Martha Stewart's Fate*, Fish & Richardson P.C. – Articles & News, available at <http://www.fr.com/news/articledetail.cfm?articleid=299>; Jessica Martin, *High-Profile Celebrity Trials Test Lawyers' Skills with “unique set of challenges,”* Washington University in St. Louis, News & Information, available at: <http://www.news-info.wustl.edu/tips/page/normal/640.html>; and Gail Diane Cox, *Blogs Dot the Litigation Landscape*, The National Law Journal, July 29, 2004, available at: <http://www.law.com/jsp/article.jsp?id=1090180185467>.

¹⁷⁵ In re Grand Jury Subpoenas Dated March 24, 2003, *supra*, at 325 and 330.

¹⁷⁶ *Id.*, at 326.

¹⁷⁷ *U.S. v. Kovel*, 296 F.2d 918 (2nd Cir. 1961).

great change to attorney-client privilege law.¹⁷⁸ The holding in *Kovel* is actually quite limited. The Court likened the accountant's role in the case to that of a translator.¹⁷⁹ In fact, Judge Friendly, who wrote the *Kovel* opinion, stated that “[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases.”¹⁸⁰

The *Kovel* Court recognized the balancing that is necessary in attorney-client privilege cases.¹⁸¹ On the one hand, there is the search for truth, but on the other hand, there is the need for attorneys due to of the complexity and difficulty of our laws.¹⁸² Recognizing the need for accountants to explain complex tax issues to the attorney, the court found that an accountant's communications, made in order to enable the attorney to provide legal advice, are protected by the attorney-client privilege.¹⁸³ The privilege in this case has been referred to as a “derivative” privilege.¹⁸⁴ The court was quick to limit the scope of its holding, stating the following:

Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, 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 latter are operating under their own steam.¹⁸⁵

The court also distinguished between a case in which a client consults with an accountant prior to retaining the lawyer (no privilege applies) and one where the client retains the lawyer and the lawyer hires the accountant (privilege applies).¹⁸⁶ Additionally, the court cautioned that “if the advice sought is the accountant's, rather than the lawyer's, no privilege exists.”¹⁸⁷

¹⁷⁸ See Kim J. Gruetzmacher, *Comment: Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 Marq. L. Rev. 977, Summer 2003.

¹⁷⁹ *Kovel*, *supra.*, at 921.

¹⁸⁰ *Id.*, at 922.

¹⁸¹ *Id.*

¹⁸² *Id.*, at 921.

¹⁸³ *Id.*, at 922.

¹⁸⁴ *Black & Decker v. U.S.*, 219 F.R.D. 87, 90 (D. Maryland 2003).

¹⁸⁵ *Id.*, at 921.

¹⁸⁶ *Id.*, at 922.

¹⁸⁷ *Id.*

2. *Kovel's Progeny*

In the years since *Kovel* was decided, it has been cited numerous times by courts, both with respect to accountants and with respect to others.¹⁸⁸ Some commentators believe that courts have strictly limited the scope of *Kovel*.¹⁸⁹ For example, in *U.S. v. Ackert*, decided as was *Kovel* by the Second Circuit Court of Appeals, the court refused to extend the *Kovel* holding to communications with an investment banker.¹⁹⁰ In *Akert*, the I.R.S. was auditing Paramount Communications, Inc. for losses it claimed on its tax returns from 1989 through 1992.¹⁹¹ During the audit, the I.R.S. agent issued a summons to David A. Ackert, an investment banker formerly employed by Goldman, Sachs, and Co.¹⁹² Mr. Ackert refused to comply with the summons, and Paramount claimed that any communication between Mr. Ackert and Eugene I. Meyers, its tax counsel, was protected by the attorney-client privilege.¹⁹³ During 1989, Mr. Ackert, while working for Goldman, Sachs, met with Paramount about an investment proposal that he said would save the company federal income taxes.¹⁹⁴ Paramount eventually entered into a transaction with another investment banking firm, but paid Goldman, Sachs \$1.5 million for its earlier investment advice.¹⁹⁵

Paramount argued that the facts of the case were similar to *Kovel*, and the magistrate judge agreed.¹⁹⁶ The Second Circuit reversed, clarifying its earlier *Kovel* opinion.¹⁹⁷ It held that

¹⁸⁸ See, e.g., *U.S. v. Ackert*, 169 F.3d 136 (2nd Cir. 1999); *Occidental Chemical Corp. v. OHM*, 175 F.R.D. 431 (W.D.N.Y. 1997); and *Cavallaro v. U.S.*, 284 F.3d 236 (1st Cir. 2002).

¹⁸⁹ See, e.g., Kim J. Gruetzmacher, *Comment: Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 Marq. L. Rev. 977, 978, Summer 2003; and Carl Pacini, *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure Via Electronic Communication*, 28 Del. J. Corp. L. 893, 907 (2003).

¹⁹⁰ *U.S. v. Ackert*, 169 F.3d 136 (2nd Cir. 1999).

¹⁹¹ *Id.*, at 138.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

in *Kovel* the accountant was merely clarifying communication between the client and the attorney.¹⁹⁸ The court compared the accountant's role to that of a translator.¹⁹⁹ The court found, as the magistrate had, that Mr. Meyers had interviewed Mr. Ackert so that he could better advise his client, Paramount.²⁰⁰ However, the court stated that this was not enough to fall within *Kovel*, stating the following:

[t]he privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client...a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client.²⁰¹

In *Ackert* the information provided by the investment banker was "not possessed by either the attorney or the client."²⁰² Mr. Ackert did not act as a translator between the client Paramount and the attorney Mr. Meyers.²⁰³ Therefore, the court did not extend the privilege.

In another case, this time involving an independent contractor, the Eighth Circuit Court of Appeals found that the privilege applied, although the court found so because of an agency-type relationship, not because of a translator-type relationship.²⁰⁴ In this case Bieter Company, a partnership, was attempting to develop a parcel of land in Minnesota.²⁰⁵ The company worked closely with Dennis S. Klohs, who was an independent contractor, not an employee of nor a partner in Bieter.²⁰⁶ The company later asserted that the local government blocked the

¹⁹⁷ *Id.*, at 140.

¹⁹⁸ *Id.*, at 139.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Pacini, *supra*.

²⁰³ *Id.*

²⁰⁴ In re: Bieter Company, 16 F.3d 929 (8th Cir. 1994).

²⁰⁵ *Id.*, at 930.

²⁰⁶ *Id.*, at 931.

development, suing the government for RICO²⁰⁷ Act violations.²⁰⁸ Partners in Bieter, and Mr. Klohs, had both met with the attorneys for Bieter Company, Dorsey & Whitney.²⁰⁹

The local government requested documents from Mr. Klohs, and he refused to produce them, asserting the attorney-client privilege.²¹⁰ The Magistrate, followed by the District Court, issued orders compelling discovery.²¹¹ The Eighth Circuit reversed, holding that communications between Klohs and the law firm were privileged.²¹² The court found as a fact that Klohs had worked closely with the partner in Bieter, both before and in the early stages of the litigation, and was therefore a representative of Bieter.²¹³ Applying the United States Supreme Court case *Upjohn v. United States*,²¹⁴ the court found that communications with Klohs fell within the privilege.²¹⁵

A United States District Court in Colorado relied on *In re Bieter Co.* when it ruled on a motion to compel production of documents in a Federal Tort Claims Act case.²¹⁶ In *Horton v. U.S., Coolidge Evergreen Equities, LLC* was one of the plaintiffs that sued the United States for the alleged contamination of its property located adjacent to Lowry Air Force Base.²¹⁷ The United States served a subpoena on Dunmire Property Management Co., and Dunmire objected to the request, citing the attorney-client privilege.²¹⁸ Dunmire was not one of the plaintiffs; it argued that as the managing agent for Coolidge for two apartment buildings, its correspondence

²⁰⁷ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 – 1968.

²⁰⁸ *Bieter, supra.*, at 930.

²⁰⁹ *Id.*, at 934.

²¹⁰ *Id.*, at 930.

²¹¹ *Id.*

²¹² *Id.*, at 939.

²¹³ *Id.*, at 934.

²¹⁴ *Upjohn v. U.S.*, 449 U.S. 383 (1981). The *Upjohn* case rejected the “control group” test in favor of a case by case analysis for corporate attorney-client privilege cases.

²¹⁵ *Bieter, supra.*, at 939.

²¹⁶ *Horton v. U.S.*, 204 F.R.D. 670 (D. Colo. 2002).

²¹⁷ *Id.*, at 671.

²¹⁸ *Id.*

with the Hannon law firm, Coolidge’s attorneys, was privileged.²¹⁹ The District Court cited to the *Bieter* case, finding that Dunmire had the burden to show both that it was the “functional equivalent of an employee” and that the information sought by the U.S. was information subject to the attorney-client privilege.²²⁰ The court ultimately found that Dunmire failed to show that it was the functional equivalent of an employee.²²¹

Dunmire had submitted two documents to the court in its attempt to meet its burden.²²² The first was a Property Management Agreement between Coolidge Evergreen and Dunmire providing that Dunmire was Coolidge Evergreen’s agent to “rent, lease, operate and manage the property.”²²³ The second document was a letter from Coolidge Evergreen to Dunmire stating that Crystal Dunmire and her company were the “owner’s agent for handling the lawsuit with the federal government.”²²⁴ The court labeled this second document “self-serving” because it was dated after the dispute arose.²²⁵ Because the court found that Dunmire failed to prove it was the functional equivalent of an employee, it did not reach the second question of whether the information exchanged was the type of information subject to the attorney-client privilege.²²⁶

A case decided by the D.C. Circuit, *Linde Thomson v. Resolution Trust Corp.*, involved the question of whether communications with an insurer come within the attorney-client privilege.²²⁷ In *Linde Thomson*, a federal savings and loan institution failed, and Resolution Trust Corporation, an entity established by Congress to investigate such failures, looked into the

²¹⁹ *Id.*

²²⁰ *Id.*, at 672.

²²¹ *Id.* at 672 and 673.

²²² *Id.*

²²³ *Id.* at 262.

²²⁴ *Id.* at 263.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Linde Thomson v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993).

failure.²²⁸ Resolution Trust issued an administrative subpoena to Linde Thomson, a law firm with connections to the savings and loan institution.²²⁹ Linde Thomson refused to comply with the subpoena, and Resolution Trust sued to enforce its subpoenas.²³⁰ It first claimed that there was an insured-insurer privilege, and when it appeared likely this argument would fail, it argued that the privilege applied to communications between it and its liability insurer pursuant to the attorney-client privilege.²³¹ Although the court acknowledged that there might be instances in which communication between an attorney and its insurer may be privileged, it found no such circumstances in this case.²³² Referring to its earlier decision in *FTC v. TRW, Inc.*,²³³ the court stated the following:

We stressed that the critical factor for purposes of the attorney-client privilege was that the communication be made “in *confidence* for the purpose of obtaining *legal advice from the lawyer*... We cautioned restraint, however, lest the privilege be construed to engulf “all manner of services” that should not be summarily excluded from the adversary process.²³⁴

The court noted that an insurer may have different interests from those of the attorney.²³⁵ In such a case, the insurer could not possibly be an agent of the attorney.²³⁶ The court accordingly found that Linde Thomson could not meet the “relatively rigorous standards” of the attorney-client privilege.²³⁷

A case similar to *Linde Thomson* is *Heavin v. Owens-Corning Fiberglass*, decided by the Kansas District Court.²³⁸ The court in *Heavin* reached the same conclusion that the D.C.

²²⁸ *Id.* at 1510.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 1514.

²³² *Id.*, at 1515.

²³³ *FTC v. TRW, Inc.*, 628 F.2d 207 (D.C. Cir. 1980).

²³⁴ *Linde Thomson, supra.*, 1514 and 1515.

²³⁵ *Id.*, at 1515.

²³⁶ *Id.*

²³⁷ *Id.*, at 1518.

²³⁸ *Heavin v. Owens-Corning Fiberglass*, 2004 U.S. Dist. LEXIS 2265 (D. Kansas 2004).

Circuit had in *Linde Thomson*.²³⁹ The court considered Duane Heavin’s Motion to Compel Production of Documents against Owens-Corning, finding that Owens-Corning failed to show that the documents it alleged were privileged actually contained legal advice.²⁴⁰ Again, an insurer was involved.²⁴¹ Documents had been sent between Miles Mustain, the attorney for Owens-Corning, and Crawford & Company, Owens-Corning’s insurer.²⁴² The court stated the following:

Defendant states “Crawford & Company was the independent contractor acting as Owen [sic] Corning’s agent for the purpose of handling all worker’s compensation claims.” An unsupported claim of agency relationship such as this, however, is insufficient for the Court to find Crawford & Company stands in the shoes of the client for purposes of confidential communications relating to legal advice.

As an independent contractor handling Defendant’s worker’s compensation claims, it is likely that Crawford & Company reviewed and considered documents relating to Plaintiff’s worker’s compensation claim for a myriad of business reasons other than seeking out legal advice.²⁴³

Owens-Corning failed to show that Crawford & Company was its agent, which would have potentially put the insurance company within the attorney-client privilege, and it also failed to establish that the subject matter of the communication was legal advice, which is also a requirement for privilege protection.

The Third Circuit decided *U.S. v. Alvarez* based on an application of *Kovel*.²⁴⁴ Although the court incorrectly blended the attorney-client privilege with the Sixth Amendment right to effective assistance of counsel, it did rely on *Kovel* when it compared the assistance of an accountant to the assistance of a medical expert, in this case a psychiatrist.²⁴⁵ The court saw “no

²³⁹ *Id.*, at 14 and 15 LEXIS.

²⁴⁰ *Id.*

²⁴¹ *Id.*, at 13 LEXIS.

²⁴² *Id.*

²⁴³ *Id.*, at 14 LEXIS.

²⁴⁴ *U.S. v. Alvarez*, 519 F.2d 1036 (3rd Cir. 1975).

²⁴⁵ *Id.*, at 1045 and 1046.

distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry.”²⁴⁶

As demonstrated in the cases cited above (*Ackert, In re: Bieter, Horton, Linde Thomson, Heavin, and Alvarez*), courts have indeed been reluctant to extend the holding of *Kovel* to grant the attorney-client privilege to nonattorneys. What can be discovered from the cases above is that courts will not extend the privilege to communications with nonattorneys unless the nonattorneys are performing an interpreting function, or unless the nonattorneys are acting as agents (or the functional equivalents of employees) of the client. Further, the attorney involved must be providing legal services, not simply business services.

B. Other Public Relations Cases

The question of whether public relations tasks fall within the attorney-client privilege has been the focus of only a handful of cases. Most courts have found that public relations communications do not give rise to the privilege.²⁴⁷ In *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, the district court held that a memorandum on media disclosures was not protected by the attorney-client privilege because it concerned business advice rather than legal advice.²⁴⁸ Similarly, in *Rattner v. Netburn*, a public announcement (press release) was ruled not privileged.²⁴⁹ The district court in *Rattner* quoted the following from Weinstein’s Evidence:

. . . The privilege governs the performance of duties by the attorney as legal counselor, and if he chooses to undertake additional duties on behalf of his client that cannot be so characterized, those activities and communications in furtherance of them are not privileged.²⁵⁰

²⁴⁶ *Id.*, at 1046.

²⁴⁷ *See Rice, supra.*

²⁴⁸ *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, 143 F.R.D. 611, 619 E.D.N.C. 1992), partial summary judgment denied on other issues, 828 F. Supp. 1200 (E.D.N.C. 1993).

²⁴⁹ *Rattner v. Netburn*, 1989 U.S. Dist. LEXIS 6876 (S.D.N.Y. 1989), dismissed on other grounds, 733 F. Supp. 162 (S.D.N.Y. 1990), *aff’d in part and vacated in part*, 930 F.2d 204 (2nd Cir. 1991).

²⁵⁰ *Ratner, supra.*, at 13, LEXIS.

A case where a district court found that the attorney-client privilege applied to discussions between a civil defendant and its counsel despite the participation of a public relations consultant is *H.W. Carter & Sons, Inc. v. The William Carter Co.*²⁵¹ Unfortunately, the reported case involved a discovery dispute, and the court did not extensively analyze its finding. It is significant, however, that the court specified that “[t]he public relations consultants participated to assist the lawyers in rendering legal advice, which included how defendant should respond to plaintiff’s lawsuit.”²⁵²

In a patent and trademark action filed by Labatt Brewing Company against Molson Breweries, the Circuit Court for the Federal Circuit ruled that a public relations consultant assisting Labatt was required to produce notes taken during its meeting with Labatt’s General Counsel.²⁵³ Judge Patterson granted Molson’s motion to compel.²⁵⁴ In his Order, he stated the following:

The documents are notes of personnel of the independent advertising agencies representing Plaintiffs made [sic] at a meeting scheduled to assist them in marketing and advertising Plaintiffs’ product, “Ice Beer”; Plaintiffs’ attorneys were present at this meeting. There has been no showing that the Third Parties were seeking legal advice at the meeting. Rather, it appears that Plaintiffs were briefing the personnel of the Third Parties so that the content of the advertising placed by the agencies would not undercut the theories expounded in the [related] litigation.²⁵⁵

The circuit court affirmed Judge Patterson’s Order.²⁵⁶

The dissent filed in the case by Judge Newman is interesting. She analyzed the case under a completely different theory, an agency theory.²⁵⁷ She cited to the *Kovel, In re Bieter*

²⁵¹ *H.W. Carter & Sons, Inc. v. The William Carter Co.*, 1995 U.S. Dist. LEXIS 6578 (S.D.N.Y. 1995).

²⁵² *Id.*, at 7 and 8 LEXIS.

²⁵³ *John Labatt Limited v. Molson Breweries*, 1995 U.S. Dist. LEXIS 507 (S.D.N.Y. 1995), *aff’d* *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919 (Fed. Cir. 1997).

²⁵⁴ *Id.*, at 4 LEXIS.

²⁵⁵ *Id.*, at 3 and 4 LEXIS.

²⁵⁶ *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919 (Fed. Cir. 1997).

Co., and *H.W. Carter & Sons, Inc.* cases, concluding that Dorf and Stanton Communications, Inc., Labatt’s public relations consultant, was actually an agent of Labatt, the plaintiff.²⁵⁸ As such, she found the communication covered by the attorney-client privilege, because Dorf and Stanton was operating as an agent of the client.²⁵⁹ She also determined that “[t]he information recorded in the notes is directly concerned with litigation issues, is confidential legal advice and [is] litigation information.”²⁶⁰

Judge Kaplan, in the *Grand Jury March 24* case extensively discussed two cases that involved public relations consultants, the *Calvin Klein Trademark Trust* and the *In re: Copper Market Antitrust* cases.²⁶¹ In *Calvin Klein Trademark Trust*, Judge Rakoff of the U.S. District Court for the Southern District of New York denied Calvin Klein’s assertion of the attorney-client privilege with respect to documents and testimony requested by the defendant.²⁶² The defendant sought documents and testimony from Robinson Lerer & Montgomery (RLM), a public relations firm.²⁶³ The law firm representing Calvin Klein had retained RLM in anticipation of filing the lawsuit before the court.²⁶⁴ Calvin Klein had itself independently retained RLM some nine months earlier.²⁶⁵ Calvin Klein claimed that RLM was retained by the law firm in order to understand public reaction to the lawsuit, to provide legal advice, and to “assure that the media crisis that would ensue – including responses to requests by the media about the law suit [sic] and the overall dispute between the companies – would be handled

²⁵⁷ *Id.*, at 927.

²⁵⁸ *Id.*

²⁵⁹ *Id.*, at 928.

²⁶⁰ *Id.*, at 927.

²⁶¹ *In re Grand Jury Subpoenas Dated March 24, 2003*, *supra*, at 328.

²⁶² *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

responsibly.”²⁶⁶ The district court held that Calvin Klein failed to prove that the privilege applied for three reasons.²⁶⁷ First, the court found that the purpose of the communication was not to obtain legal advice.²⁶⁸ The court quoted from the *Ackert* case when it stated, “the privilege protects communications between a client and an attorney, not communications that prove important to an attorney’s legal advice to a client.”²⁶⁹ The court’s second point was that RLM did not serve a “translator” function as the accountant had in *Kovel*.²⁷⁰ The public relations firm reviewed press coverage, made calls to the media, and found “friendly” reporters.²⁷¹ Judge Rakoff stated the following:

The possibility that such activity may also have been helpful to [the law firm] in formulating legal strategy is neither here nor there if RLM’s work and advice simply serves to assist counsel in assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client’s own communications that could not otherwise be appreciated in the rendering of legal advice.²⁷²

Finally, the court’s third rationale was that the privilege is to be narrowly construed, and if the court allowed a privilege in this circumstance, it would be tantamount to allowing a public relations privilege.²⁷³ The court was unwilling to stretch the attorney-client privilege to such an extent.²⁷⁴

The *Copper Market Antitrust* case was also decided by the U.S. District Court for the Southern District of New York, in this case by Judge Swain.²⁷⁵ In September 1999, Viacom, Inc. and Emerson Electric Co. (Viacom) filed suit against Sumitomo Corporation (Sumitomo),

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*, quoting *U.S. v. Ackert*, 169 F.3d 136, 139 (2nd cir. 1999).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 54 and 55.

²⁷² *Id.*, at 55.

²⁷³ *Id.*

²⁷⁴ *Id.*

alleging that Sumitomo conspired to manipulate the world copper market.²⁷⁶ Sumitomo had earlier hired public relations firm Robinson Lerer & Montgomery (RLM – the same firm that appeared in the *Calvin Klein* litigation above) because it anticipated both litigation and an investigation by the Commodity Futures Trading Commission (CFTC) following the deposition of a Sumitomo executive by the CFTC.²⁷⁷ The court found as a fact that Sumitomo lacked prior experience dealing with publicity, and that it had no experience dealing with the Western media.²⁷⁸ Of the three Sumitomo executives in their Communications Department, only two spoke English, and their language skills “were not sufficiently sophisticated for media relations.”²⁷⁹

Viacom subpoenaed documents from RLM that related to its public relations work for Sumitomo.²⁸⁰ Some 15,000 pages of documents were produced, and a privilege log was submitted for those documents not released.²⁸¹ In the privilege log, RLM asserted the attorney-client privilege.²⁸² Instead of analyzing the case from a *Kovel* standpoint, the court relied on the *In re: Bieter* and *Upjohn* cases.²⁸³ Ultimately, the court found that RLM was the “functional equivalent of a Sumitomo employee.”²⁸⁴ In footnote four of the opinion, the court distinguishes the *Calvin Klein* case by finding that the law firm hired the public relations consultant in *Calvin Klein*, whereas the client hired the public relations consultant in *Copper Market Antitrust*.²⁸⁵ The court found that “for purposes of the attorney-client privilege, RLM can fairly be equated

²⁷⁵ *In re: Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001)

²⁷⁶ *Id.* at 215.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*, at 216.

²⁸² *Id.*

²⁸³ *Id.*, at 218 and 219, citing *In re: Bieter*, 16 F.3d 929 (8th Cir. 1994), and *Upjohn, Co. v. U.S.*, 449 U.S. 683 (1981).

²⁸⁴ *Id.*, at 220.

with the [sic] Sumitomo for purposes of analyzing the availability of the attorney-client privilege to protect communications to which RLM was a party concerning its scandal-related duties.”²⁸⁶ One area rather quickly glossed over by the court is the question of whether the communication was legal advice. The court simply states, “[I]n addition, RLM’s communications concerned matters within the scope of RLM’s duties for Sumitomo, and RLM employees were aware that the communications were for the purpose of obtaining legal advice from” Sumitomo’s attorneys.²⁸⁷ It is difficult to determine how RLM, a public relations firm, discussed legal issues with Sumitomo’s lawyers, in some instances in the absence of Sumitomo.²⁸⁸

The United States Court of Appeals for the D.C. Circuit adopted the *Copper Market Antitrust* reasoning in a case it decided involving public relations consultants.²⁸⁹ GlaxoSmithKline (GSK) resisted a subpoena from the Federal Trade Commission (FTC) on grounds that the communication was protected by the attorney-client privilege.²⁹⁰ The FTC argued that GSK waived the privilege when it shared the documents with their “public relations and government affairs consultants.”²⁹¹ The district court agreed.²⁹² The circuit court reversed because it found that the consultants were “integral members of the team assigned to deal with issues [that]...were completely intertwined with [GSK’s] litigation and legal strategies.”²⁹³ Again, this holding was based upon the finding that the consultants were actually an agent of the client.

²⁸⁵ *Id.*

²⁸⁶ *Id.*, at 219.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *FTC v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002).

²⁹⁰ *Id.*, at 143.

²⁹¹ *Id.*

²⁹² *Id.*

An interesting case also involving the claim of attorney-client privilege for public relations communications is *Amway Corporation v. The Procter & Gamble Co.*²⁹⁴ This case was one of several lawsuits between Amway and Procter and Gamble.²⁹⁵ Procter and Gamble claimed that Amway was the source of a rumor that Procter and Gamble was associated with the Church of Satan.²⁹⁶ The rumor began in the late 1970s, and because of it, Procter and Gamble was ultimately forced to change its crescent-shaped man-in-the-moon logo.²⁹⁷ Amway brought a motion to compel the production of documents during its malicious prosecution action against Procter and Gamble.²⁹⁸ Some of the requested documents were communications made by “a group of Procter & Gamble employees formed to deal with the public relations aspects of the Satanism rumors.”²⁹⁹ The group, according to the Court, was frustrated because the rumors were being repeated by members of the clergy and others who were “unlikely targets for a lawsuit.”³⁰⁰ Instead, “the company was eager to blame a competitor for fostering the rumor, principally (but perhaps not solely) to enhance Procter & Gamble’s competitive and public relations position in the marketplace.”³⁰¹

The Court granted the motion to compel, because it found that Procter & Gamble failed to meet its “heavy burden” to “make a clear showing that counsel is acting in a professional legal capacity and that the document reflects legal, as opposed to business, advice.”³⁰² The case

²⁹³ *Id.*, at 148.

²⁹⁴ *Amway Corporation v. The Procter & Gamble Co.*, 2001 U.S. Dist. LEXIS 4561 (W.D. Mich. 2001).

²⁹⁵ *See, e.g.*, *The Procter and Gamble Company v. Amway Corporation*, 2004 U.S. App. LEXIS 14846 (5th Cir. 2004), at 1 and 2 LEXIS, and *P & G Doesn’t Get Second Shot at Lawsuit Over Satanic Rumor*, KTVU Channel 2, available at: <http://www.ktvu.com/money/3550510/detail.html>.

²⁹⁶ *Id.*

²⁹⁷ *P & G Doesn’t Get Second Shot at Lawsuit Over Satanic Rumor*, KTVU Channel 2, available at: <http://www.ktvu.com/money/3550510/detail.html>.

²⁹⁸ *Amway Corporation*, *supra.*, at 3 LEXIS.

²⁹⁹ *Id.*, at 15 LEXIS.

³⁰⁰ *Id.*, at 16 LEXIS.

³⁰¹ *Id.*

³⁰² *Id.*

is different from the *Calvin Klein* and *In re: Copper Market Antitrust*, because the public relations functions were performed by employees, not outside firms. However, the Court found that Procter & Gamble failed to meet the second requirement of the analysis, that the communication concern legal advice.³⁰³

A United States District Court, in *Burton v. R.J. Reynolds Tobacco Co.*, was asked to review a Magistrate's finding that the attorney-client privilege failed to apply to certain documents prepared by R.J. Reynolds' (RJR) attorneys.³⁰⁴ Interestingly, neither outside nor inside public relations consultants were involved in the case.³⁰⁵ The communications originated from the attorneys and concerned "public relations and public image issues."³⁰⁶ The Court held that attorneys may perform nonlegal functions and, when they do so, the communications are not within the attorney-client privilege.³⁰⁷ The Court stated the following:

Thus, while these documents were all written or prepared by RJR attorneys (either inside or outside counsel), the documents make no reference to legal issues or the rendering of legal advice. Document 58, for example, is a draft of a position paper regarding carbon monoxide and cigarette smoking prepared for the purpose of responding to questions or rebutting criticisms stemming from certain (negative) FTC test results concerning the levels of carbon monoxide in commercial cigarettes. While the position paper was prepared by RJR's outside counsel, it was not prepared in the course of rendering legal advice. It could have been prepared by scientists, tobacco industry non-legal personnel, or others with access to the non-legal literature cited in the paper. In short, on its face the position paper was intended for *public relations purposes* rather than legal purposes.³⁰⁸ (emphasis added)

Other documents were drafted by scientists and given to RJR's lawyers.³⁰⁹ Although RJR argued that these scientific reports were directed to the lawyers because they needed to be "kept

³⁰³ *Id.*, at 26 LEXIS.

³⁰⁴ *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661 (D. Kansas 2001).

³⁰⁵ *Id.*

³⁰⁶ *Id.*, at 669.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*, at 671.

advised and updated on various scientific developments for purposes of monitoring legislative, regulatory, and litigation threats,” the Court countered that the documents “contain[ed] no accompanying request for any legal advice whatsoever.”³¹⁰

The United States District Court for the Southern District of New York had yet another opportunity to analyze public relations and the attorney-client privilege in *Haugh v. Schroder Investment Management*.³¹¹ This case was decided approximately two months after the *Grand Jury March 24* case, and was decided by Judge Cote.³¹² Sharon Haugh, the former Chairperson of Schroder Investment Management Co. (Schroder) sued Schroder for age discrimination.³¹³ When she was fired, articles about her departure appeared in industry publications.³¹⁴ Ms. Haugh’s attorney, Mr. Arkin, retained Laura Murray, a public relations consultant who also happened to be an attorney, to “provide us advice to assist us in providing legal services to Ms. Haugh.”³¹⁵ Schroder filed a motion to compel the production of documents against Haugh because Haugh had claimed the attorney-client privilege and refused to produce the documents she had earlier sent to Murray.³¹⁶ The Court noted that none of the documents at issue originated with Arkin.³¹⁷ All of the requested documents except one were sent from Haugh to Murray.³¹⁸ Many of these were also sent to Arkin.³¹⁹ The other document was sent from Murray directly to Arkin.³²⁰

³¹⁰ *Id.*

³¹¹ *Haugh v. Schroder Investment Management*, 2003 U.S. Dist. LEXIS 14586 (S.D.N.Y. 2003).

³¹² *Id.*

³¹³ *Id.*, at 2 LEXIS.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*, at 5 LEXIS.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

The Court began its analysis by citing *Kovel*, but it also cited another Second Circuit case in which that Court had found that the attorney-client privilege “should be narrowly construed and expansions cautiously extended.”³²¹ The District Court noted that there was limited precedent dealing with the application of the attorney-client privilege to public relations consultants.³²² It found as a fact that the duties performed by Murray were ordinary public relations duties, just like those at issue in the *Calvin Klein* case.³²³ Although the retention letter between Arkin and Murray indicated that Murray was to assist Arkin to provide legal advice to Haugh, the Court found that there was an absence of a nexus between the consultant’s work and the attorney’s work.³²⁴ The Court acknowledged the *Grand Jury March 24* case, but indicated that there was no need to determine whether that case was correctly decided.³²⁵ Judge Cote stated the following:

A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice.³²⁶

Interestingly, the Court later found the documents privileged, not because they were protected under the attorney-client privilege, but because they were privileged under the attorney work product privilege.³²⁷

One can make some general observations about the few cases that have been decided concerning public relations consultants and the attorney-client privilege. Courts have been willing to protect communications when the public relations consultants are agents or the “functional equivalent of employees” of the client, for example in the *Carter, Copper Market*

³²¹ *Id.*, at 7 LEXIS, citing to *U.S. v. Weissman*, 195 F.3d 96, 100 (2nd Cir. 1999).

³²² *Id.*, at 8 LEXIS.

³²³ *Id.*

³²⁴ *Id.*, at 9 LEXIS.

³²⁵ *Id.*

³²⁶ *Id.* at 9 and 10 LEXIS.

Antitrust, and *GlaxoSmithKline* cases. In those three cases, the Courts found that the subject matter of the communications was legal advice, but in each case, the Courts gave the issue only a passing glance. Conversely, in the *Burroughs Wellcome*, *Rattner, Dorf & Stanton Communications*, *Calvin Klein*, *Amway*, *Burton*, and *Haugh* cases, the Courts found that the communications were not protected by the attorney-client privilege because the subject matter was not legal advice.

C.. Legal Advice

In the *Grand Jury March 24* case, Judge Kaplan cites *Kovel* for the proposition that “the privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services.”³²⁸ The court then finds that in the particular case before it, the attorneys retained the public relations firm to assist them in rendering legal advice.³²⁹ The court frames the issue as follows:

The ultimate issue therefore resolves to whether attorney efforts to influence public opinion in order to advance the client’s legal position – in this case by neutralizing what the attorneys perceived as a climate of opinion pressing prosecutors and regulators to act in ways adverse to Target’s interests – are services, the rendition of which also should be facilitated by applying the privilege to relevant communications which have this as their object.³³⁰

In the *In re Lindsay* case, a case involving then President Bill Clinton’s attorney, the court stated that the attorney-client privilege applies only if the person to whom the communication is made is a member of the bar, is acting as a lawyer, and “the communication was made “for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.”³³¹ Some courts have insisted that the

³²⁷ *Id.*, at 15 LEXIS.

³²⁸ *In re Grand Jury Subpoenas Dated March 24, 2003*, *supra*, at 325.

³²⁹ *Id.*, at 326.

³³⁰ *Id.*

³³¹ *In re Lindsey*, *supra.*, at 1270.

communication relate “solely” to the purpose of providing legal advice, but most courts agree that the privilege applies if the “primary or predominant purpose of the attorney-client consultation is to seek legal advice or assistance.”³³² The attorney must be acting as a legal advisor.³³³ If business and legal advice are intertwined, the legal advice must predominate.³³⁴ If legal advice is merely incidental to business advice, the attorney-client privilege will not apply.³³⁵

Although courts agree that legal advice must be the primary purpose of the communication, two views emerge about the focus of the purpose.³³⁶ The first view, which is the majority view, focuses on “the predominant purpose behind a particular form of communication.”³³⁷ The privilege is extended only if the primary purpose underlying the conversation is legal advice.³³⁸ For example, in *U.S. v. Aluminum Company of America (Alcoa)*, the court used this analysis in deciding that the attorney-client privilege did not apply.³³⁹ In *Alcoa*, the President of Alcoa requested a report from an employee.³⁴⁰ After this request, but before the employee delivered the report, the attorney requested the report.³⁴¹ The court found that the report was “nothing more than an inter-office memo passing between two business executives.”³⁴² This is indeed how the report originated.

³³² Rice, *supra.*, at Chp. 7, p. 44

³³³ Neuder v. Battelle Pacific Northwest National Laboratory, 194 F.R.D. 289, 292 (D.D.C. 2000).

³³⁴ *Id.*

³³⁵ Neuder, *supra.*

³³⁶ Rice, *supra.*, at Chp. 7, p. 54.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *U.S. v. Aluminum Company of America*, 193 F. Supp. 251 (N.D.N.Y. 1960).

³⁴⁰ *Id.*, at 252.

³⁴¹ *Id.*

³⁴² *Id.*, at 253.

The second approach is one that “focuses on the segregable portions of each communication in which legal advice or assistance has been sought.”³⁴³ If an attorney is providing both legal and business advice, the court will segregate out the business advice and allow only the legal advice the privilege.³⁴⁴ Therefore, under the first approach, the entire communication is protected as long as the predominant purpose is legal advice. If it is not, the communication is not protected at all. The second approach allows partial protection via the attorney-client privilege as long as the communication is severable.

Under either approach, the court must still determine what exactly constitutes legal advice. The attorney must be acting in a “legal capacity, rather than perform[ing] any of the other functions that law-trained individuals in our society are wont to do.”³⁴⁵ The type of service that he/she performs is of the manner that his/her education and certification enable him/her to do.³⁴⁶ The privilege protects legal advice, and does not extend to business advice.³⁴⁷ The Supreme Court has held that “it protects only those disclosures – necessary to obtain informed legal advice – which might not have been made absent the privilege.”³⁴⁸ The privilege applies when “an attorney is giving advice concerning the legal implications of conduct, whether past or proposed.”³⁴⁹ It applies only when an attorney acts in his/her capacity as an attorney.³⁵⁰ Unfortunately, the case law is less than clear on what exactly constitutes legal advice.

³⁴³ Rice, *supra.*, at Chp. 7, p. 60.

³⁴⁴ *Id.*, at 61.

³⁴⁵ Epstein, *supra.*, at 226.

³⁴⁶ Rice, *supra.*, at Chp. 7, p. 65, citing to In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1038 (2nd Cir. 1984).

³⁴⁷ In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1037 (2nd Cir. 1984).

³⁴⁸ Fisher v. U.S., 425 U.S. 391, 403 (1976).

³⁴⁹ Burton, *supra.*, at 484, citing Hercules Inc., v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977).

³⁵⁰ Borase v. M/A Com, Inc., 171 F.R.D. 10 (D. Mass. 1997).

It is fairly well settled that investment advice, tax return preparation, the transmission of funds, and advice on product marketing do not constitute legal advice.³⁵¹ Many times, however, the line between business or tax advice versus legal advice is blurred. The problem is especially pronounced when the attorney gives both business and legal advice or if the attorney is in-house counsel at a corporation.³⁵² Given the varied tasks that lawyers perform, “legal advice “is often intimately intertwined with and difficult to distinguish from business advice.”³⁵³ Professor Wigmore recognized that the line between legal and nonlegal advice was not easily drawn.³⁵⁴ He suggested a presumption in favor of a finding of legal advice, which could be rebutted by a clear showing that the communication was not in fact legal advice.³⁵⁵ Not all courts have followed his suggestion.³⁵⁶ Indeed, “[s]ome courts...have imposed a heavy burden on corporations seeking to protect communications with persons holding dual legal/nonlegal roles.”³⁵⁷ In two cases, the court suggested that a factor to consider was whether the task performed could have been performed by a nonlawyer.³⁵⁸ Other courts have explicitly rejected this as a factor.³⁵⁹

As indicated above, in most of the cases involving public relations consultants, courts have decided the cases based upon whether or not the communication actually concerned legal advice. In the *Grand Jury March 24* case, Judge Kaplan makes the broad statement, “[b]ut it is

³⁵¹ Rice, *supra.*, at Chp. 7, pp. 65 – 67.

³⁵² Epstein, *supra.*, at 228.

³⁵³ Leonen v. Johns-Manville, 135 F.R.D. 94, 99 (D.N.J. 1990), citing to Sedco International, S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982), *cert. den.* 459 U.S. 1017 (1982).

³⁵⁴ Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1978), citing to Wigmore, 8 Wigmore, Evidence § 2296.

³⁵⁵ *Id.*

³⁵⁶ Neuder, *supra.*, at 295.

³⁵⁷ Epstein, *supra.*, at 229.

³⁵⁸ Oil Chemical and Atomic Workers International Union v. American Home Products, 490 F. Supp. 39, 41 (D.P.R. 1992); and Leonen, *supra.*

common ground that the privilege extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law.”³⁶⁰ Although Judge Kaplan did not cite to any authority for this proposition, he indicated that *Kovel* framed the issue, and he used jury consultants as an example of this “common ground.”³⁶¹ Again, Judge Kaplan did not cite to any authority for his statement that jury consultants are covered by the attorney-client privilege.³⁶² He indicated that the government in the case had stipulated to such a fact.³⁶³ In actuality, if statements made to jury consultants are protected, they are protected under the attorney work product doctrine, not the attorney-client privilege.³⁶⁴

Judge Kaplan opined that times have changed. Traditionally, he said, the lawyer’s role with respect to public opinion was very limited, because even the appearance of attempting to influence jury pools was prohibited by the bar.³⁶⁵ Judge Kaplan cites two authorities for his finding that times have changed, and that the public relations consultants in issue were assisting the lawyers in providing legal advice.³⁶⁶ First, he cites to Justice Kennedy’s plurality opinion in *Gentile v. State Bar of Nevada*.³⁶⁷ Specifically, Judge Kaplan cited to the following passage:

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...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 motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or

³⁵⁹ See, e.g., *Chore-Time Equipment, Inc. v. Big Dutchman, Inc.*, 255 F. Supp. 1020, 1023 (W.D. Mich. 1966); and *Attorney General of the U.S. v. Covington & Burling*, 430 F. Supp. 1117, 1121 (D.D.C. 1977). See also: *Rice, supra.*, at Chp. 7, p. 67.

³⁶⁰ *In re Grand Jury Subpoenas Dated March 24, 2003, supra.*, at 326.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ See, *In re: Cendant Corporation Securities Litigation*, 343 F. 3d 658 (3rd Cir. 2003). (“Litigation consultants retained to aid in witness preparation may qualify as non-attorneys who are protected by the work product doctrine.”).

³⁶⁵ *Id.*, at 326 and 327.

³⁶⁶ *Id.*, at 327.

³⁶⁷ *Id.*, at 327, citing to *Gentile v. State Bar of Nevada*, 501 U.S. 1030.

reduction of charges, **including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.**³⁶⁸ (emphasis added)

Justice Kennedy was joined in this part (Part II) of the *Gentile* opinion by Justices Marshall, Blackmun, and Stevens.³⁶⁹ The second point that Judge Kaplan relied upon is that courts have compensated lawyers for public relations efforts when awarding attorney fees.³⁷⁰ Judge Kaplan ultimately determined that these public relations duties qualified as legal advice.³⁷¹ Judge Kaplan failed to recognize that attorneys are often compensated for performing duties that do not include legal advice.

The majority of the U.S. Supreme Court did not join Justice Kennedy in Part II of the *Gentile* opinion.³⁷² Chief Justice Rehnquist delivered the majority opinion for Part II of the opinion, and he cited to *Sheppard v. Maxwell*, a case that captivated the citizenry of Ohio and the rest of the nation in the late 1950s and early 1960s.³⁷³ In the *Sheppard* case, Dr. Sam Sheppard was accused of bludgeoning his pregnant wife to death.³⁷⁴ The Supreme Court emphasized the “insatiable interest of the American public” in the case,³⁷⁵ and finding that the trial judge did not protect Mr. Sheppard from the prejudicial publicity, it ordered him released.³⁷⁶ In *Gentile*, Justice Rehnquist quoted from the *Sheppard* case, stating that collaboration between lawyers and the press not only could be regulated, but could also be censured.³⁷⁷

³⁶⁸ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991).

³⁶⁹ *Id.*, at 1031. Chief Justice Rehnquist wrote the majority opinion for Part II of *Gentile*, and was joined by Justices White, O’Connor, Scalia, and Souter.

³⁷⁰ In re Grand Jury Subpoenas Dated March 24, 2003, *supra*, at 327.

³⁷¹ *Id.*, at 331.

³⁷² *Gentile, supra.*, at 1031.

³⁷³ *Id.*, at 1065, citing to *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

³⁷⁴ *Sheppard v. Maxwell*, 384 U.S. 333, 341. The *Sheppard* case served as the inspiration for the movie and television series “The Fugitive.” See <http://www.cnn.com/US/9803/05/sheppard.case/>.

³⁷⁵ *Id.*, at 356.

³⁷⁶ *Id.*, at 363.

³⁷⁷ *Gentile, supra.*, at 1072.

D. Ethical Issues

The American Bar Association relied upon the *Sheppard* opinion in tightening the restrictions on a lawyer's ability to make public statements about his or her case.³⁷⁸ The ABA Disciplinary Rule 7-107, passed just two years after the Court's opinion in *Sheppard*, materially restricted statements lawyers could publicly make.³⁷⁹ Lawyers were prohibited from making an extrajudicial statement³⁸⁰ that the lawyer knew or reasonably should have known would have a "substantial likelihood of materially prejudicing an adjudicative proceeding."³⁸¹ Material prejudice was defined very broadly. According to the Rule, a statement was ordinarily likely to prejudice if it referred to a criminal matter and the statement related to the character, credibility and/or reputation of a party in a criminal matter.³⁸² Additionally, under the Ethical Considerations contained in the rules, lawyers were required to completely refrain from making extrajudicial statements.³⁸³

In 1978, the ABA produced the Model Rules of Professional Conduct.³⁸⁴ Model Rule 3.6 referred to trial publicity, prohibiting lawyers from "giving information to the media when they know or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."³⁸⁵ Although the Supreme Court in *Gentile* approved a Nevada ethical rule that was substantially similar to that Model Rule, the Rule was amended in

³⁷⁸ John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of their Clients*, 7 *Comm. L. & Pol'y* 77, 93, Winter 2002.

³⁷⁹ American Bar Association, Model Code of Professional Responsibility, D.R. 7-107 (1968).

³⁸⁰ Extrajudicial statements refers to statements which are given or effected outside of the course of a regular judicial proceeding. *Blacks Law Dictionary*, Fourth Ed., at 698.

³⁸¹ American Bar Association, Model Code, *supra*.

³⁸² *Id.*

³⁸³ American Bar Association, Model Code of Professional Responsibility, Ethical Consideration 7-29.

³⁸⁴ Watson, *supra.*, at 94.

³⁸⁵ *Id.*

1994 in response to the Court's *Gentile* opinion.³⁸⁶ Model Rule of Professional Conduct 3.6 now provides that a lawyer "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."³⁸⁷ A lawyer, however, is allowed to make a statement that is required in order to protect a client from the prejudicial effect of publicity, but only as necessary to mitigate the adverse publicity.³⁸⁸ This has been referred to as the "fair reply" provision.³⁸⁹ This amendment was a written recognition by the American Bar Association that lawyers have a need to correct the public record about any adverse publicity their client may be receiving.

The Supreme Court first realized that trial publicity could affect the result in a trial in the *Sheppard* case. In fact, they let a man out of prison because of the adverse publicity.³⁹⁰ In *Gentile*, the Court recognized an attorney's right to free speech, but also indicated that the bar could regulate this speech.³⁹¹ The amendment was really a response to Justice Kennedy's minority opinion, in which he stated, "petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community."³⁹² We now have a fair reply provision. Attempting to influence prosecutors and regulators goes far beyond a fair reply. Attempting to influence the public also appears to go beyond a fair reply, unless a lawyer is correcting past adverse publicity. Today celebrities are

³⁸⁶ Mawiyah Hooker and 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, 660, Summer 2003.

³⁸⁷ American Bar Association, Model Rules of Professional Conduct, Rule 3.6(a).

³⁸⁸ *Id.*, Model Rule 3.6(c).

³⁸⁹ Watson, *supra.*, at 97.

³⁹⁰ Sheppard, *supra.*, at 363.

³⁹¹ *Gentile*, *supra.*

³⁹² *Id.*, at 1043.

hiring public relations consultants at the first sign of trouble in an attempt to protect their reputations, not simply to clarify what may be unfair publicity.

E. Type of Public Relations Advice

In the *Grand Jury March 24* case, the court distinguished the *Calvin Klein* case by stating that in *Calvin Klein*, ordinary public relations advice was at issue, whereas in the *Grand Jury March 24* case, the public relations firm's task was "defensive."³⁹³ The Court found that the defense attorneys used the public relations consultants in order to "neutralize the environment" so that prosecutors and regulators would make their decisions without "undue influence" from the negative press the target had received.³⁹⁴ The audience the public relations consultants hoped to reach was not the "public at large," but rather regulators and prosecutors.³⁹⁵ This appears to go beyond the bounds of the ethical rules, as this particular action goes further than simply a "fair reply." More importantly, although this activity may be within an attorney's responsibilities, it is difficult to stretch the nature of this activity to be "legal advice." This is particularly true in the situation when the communications take place between the public relations consultants and the target, when the attorneys are not even in attendance. Judge Kaplan protected this communication as well.³⁹⁶ In what way could the communication contain legal advice? If legal advice was disseminated, then the public relations consultants would be guilty of practicing law without a license.

³⁹³ In re Grand Jury Subpoenas Dated March 24, 2003, *supra*, at 329 and 323.

³⁹⁴ *Id.*, at 323.

³⁹⁵ *Id.*, at 323 and 324.

³⁹⁶ *Id.*, at 331.

III. Comparison of Public Relations Cases with the History and Purposes of the Attorney-Client Privilege

Dean Wigmore recognized that the public has a right to “every man’s evidence.”³⁹⁷ The restrictions on this maxim were to be exceptional.³⁹⁸ Because of the belief that no client would dare consult a lawyer unless their communications were guarded, the attorney-client privilege has become such an exception. As Lord Brougham observed in *Greenough v. Gaskell*, if the privilege did not exist, each client would be forced to rely on his or her own knowledge of the law, which of course is limited.³⁹⁹ The privilege is a protection for the client, so that he or she receives the benefit of one schooled in the law, with the assurance that the attorney has been provided with all of the pertinent facts.

The Advisory Committee on drafting the Federal Rules of Evidence reflected the conservative beliefs of Wigmore.⁴⁰⁰ As Professor Cleary said, privileges often operate to block the search for truth.⁴⁰¹ The Supreme Court also has indicated that privileges are not favored.⁴⁰² On the other hand, candor between an attorney and his or her client is absolutely essential in order to have an effective assistance of counsel.⁴⁰³

How do communications with public relations consultants compare with communications with lawyers when viewed in the light of the history and purpose of the attorney-client privilege? If the assistance of a public relations consultant was necessary in order to interpret complex material for the attorney, surely the purpose of the attorney-client privilege would be served, as it was in the *Kovel* case, and even perhaps in the *Copper Market Antitrust* case. However,

³⁹⁷ Wigmore, *supra.*, §2192, at 2968.

³⁹⁸ *Id.*

³⁹⁹ Wigmore, *supra.*, at 3197.

⁴⁰⁰ Imwinkelried, *The New Wigmore, supra.* §4.2.1(b), at 153.

⁴⁰¹ *Id.*

⁴⁰² *Herbert v. Lando, supra.*

⁴⁰³ Greater Newburyport Clamshell Alliance, *supra.*

understanding public relations issues is not comparable to understanding the complex Internal Revenue Code, as was the case in *Kovel*. The *Copper Market Antitrust* case involved non-native speaking Japanese clients.⁴⁰⁴ The public relations consultants served a translator function because the executives at Sumitomo were unfamiliar with the American media.⁴⁰⁵ There are very limited situations in which a public relations consultant would serve a translator function.

Unless the translator function is at issue, it is difficult to see how the purpose of the attorney-client privilege could be met for public relations communications. The privilege protects the free exchange of information that otherwise would not take place in its absence. In order for the attorneys to provide the best legal advice, all of the facts, both favorable and unfavorable, must be made known to him or her. This is not true of a public relations consultant. A client need not divulge incriminating information in order to receive effective media advice.

Many courts have analyzed public relations cases under an agency theory. If the client brings in either an inside or outside public relations consultant, courts have been willing to treat the consultant as “the functional equivalent of an employee.” This analysis was used in the *Copper Market Antitrust* and the *GlaxoSmithKline* cases. However, having an attorney-client relationship is not the only requirement of the privilege. There are other requirements, as set forth by Wigmore. The element of confidentiality is essential.⁴⁰⁶ Because the purpose of hiring public relations consultants is to transmit information to the public, it is indeed difficult to see how these communications could be termed confidential. Even in the *In re Grand Jury March 24* case, in which the court found the audience was not the public at large but the prosecutors and regulators, the absence of a communication made in confidence is obvious. The Wigmorean

⁴⁰⁴ In re: Copper Market Antitrust Litigation, *supra*.

⁴⁰⁵ *Id.*

⁴⁰⁶ Wigmore, *supra*, §2285, at 3185.

conditions also require a relationship that ought to be “sedulously fostered.”⁴⁰⁷ Although the attorney–client relationship must be fostered, the public relations consultant-client relationship need not be. Wigmore also believed that the cost of a privilege must be compared to the benefit of that privilege. When the cost of the attorney-client privilege is compared to the benefit, judges and scholars have agreed that the cost, loss of truth, is worth the benefit, the free exchange of pertinent information. It is difficult to imagine a case in which the benefit of public relations advice exceeds the cost of the loss of pertinent information.

Judge Wyzanski, who wrote the *U.S. v. United Shoe Machinery Corp.* case, listed several requirements of the attorney-client privilege.⁴⁰⁸ These requirements, adopted by numerous courts⁴⁰⁹, are as follows:

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 on 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.⁴¹⁰

When courts have analyzed public relations cases under the agency theory, they have determined that the public relations consultants are agents either of the client or the attorney. Some courts

⁴⁰⁷ *Id.*

⁴⁰⁸ *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

⁴⁰⁹ *U.S. v. ALCOA*, 193 F. Supp. 251 (N.D.N.Y. 1960).

⁴¹⁰ *U.S. v. United Shoe Machinery Corp.*, *supra.*, at 358 – 359.

have missed the essential second step. The communication must contain legal advice. The courts in *Copper Market Antitrust* and *GlaxoSmithKline* failed to perform the second necessary step of the analysis. Even if the public relations consultants are an agent or a “functional equivalent of an employee,” the communications are not privileged if the communications do not contain legal advice. As set forth by Judge Wyzanski, that legal advice could be an opinion on law, legal services, or assistance in a legal proceeding. There was no such finding in *Copper Market Antitrust* or *GlaxoSmithKline*.

The *In re Grand Jury March 24* case, Judge Kaplan did specifically find that legal advice was disseminated. Judge Kaplan believed that times have changed, and that part of an attorney’s function for his or her client is to attempt to influence prosecutors and regulators. Although Judge Kaplan cites to the words of Justice Kennedy for his finding, he fails to make the distinction between the role an attorney may and should play and that attorney’s task of providing legal advice. Not all communications between an attorney and a client are privileged. Only those communications concerning legal advice are protected. Communications concerning such things as tax preparation, marketing advice, and investment advice are specifically not protected. Nor should they be. It is the unique advice that only a lawyer is able to give a client is what is and should be protected. Attorneys perform many services for their clients; some services are nonlegal in nature. The protection afforded a privilege is to be as narrowly applied as possible in order to meet the purpose of the privilege.

IV. Expanding the Attorney-Client Privilege to Public Relations Consultants is Inadvisable and Against the Interests of Justice

High-profile cases have been in the news for some time now. Lizzie Bordon was tried in 1893,⁴¹¹ the Rosenberg trial took place in 1951,⁴¹² the Sheppard murder occurred in 1954,⁴¹³ and Charles Manson was before a court in 1970.⁴¹⁴ The use of public relations consultants is of more recent vintage. In the mid-1990's, John and Patsy Ramsey hired both attorneys and public relations consultants when they were suspected of murdering their daughter JonBenet.⁴¹⁵ In fact, the Governor of Colorado challenged the Ramseys to stop hiding behind their public relations firm.⁴¹⁶ Both Michael Milken, the junk bond king, and Clark Clifford, a former Presidential Cabinet Secretary, hired public relations firms in order to fend off indictments.⁴¹⁷

Certainly a lawyer may and should consider using public relations consultants in high-profile cases. One could even argue that it is an attorney's ethical obligation to attempt to influence public opinion. It is another question entirely whether communications with public relations agents ought to be privileged. Privileges limit the information that the judge and jury receive. Privileges impede the search for truth. They are to be restricted to the narrowest possible limits.⁴¹⁸ The privileges that exist are there to foster certain relationships; for example, between spouses or between attorney and client. Clients must feel free to discuss their case, or they will be left to their own devices. Federal Rule of Evidence 501 provides that privileges should be

⁴¹¹ Doug Linder, *Famous Trials*, available at <http://www.law.umkc.edu/faculty/projects/ftrials/ftrials.htm>.

⁴¹² *Id.*

⁴¹³ Sheppard, *supra.*, at 336.

⁴¹⁴ Linder, *supra.*

⁴¹⁵ Watson, *supra.*, at 80.

⁴¹⁶ Karen Auge and Marilyn Robinson, *Interviews Produce No Action*, Denver Post, August 30, 2000, available at: <http://63.147.65.175/news/jon083000.htm>.

⁴¹⁷ Jonathan Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 Colum. L. Rev. 1811, 1829, November 1995.

governed by common law, in light of reason and experience. This rule does allow for the growth of privileges. However, this growth must be tempered by reason and experience. The extension of the attorney-client privilege to communications with public relations consultants is not logical. The purposes behind the privilege do not extend to such communications. To allow the privilege to this extent would essentially allow a public relations consultant-client privilege. Comparing the cost of such a privilege to the benefit of the privilege, one finds that the cost is simply too great. The fact that communications with public relations agents are not protected will not deter clients from consulting with them.

High-profile clients now engage public relations consultants as well as attorneys when they are facing indictment and criminal and civil trials. These clients hope to influence both those inside the judicial system and those outside of it, the public. Given the media circus that often accompanies these clients, such a strategy makes good sense. However, the protection of this communication is against the whole history and purpose of privilege law. Because they impede truth, privileges are to be strictly construed.⁴¹⁹ The Fifth Circuit Court of Appeals has stated “[p]rivileges are based upon the idea that certain societal values are more important than the search for truth.”⁴²⁰ Communications between attorneys and clients rise to the level of important social values. The attorney needs to be aware of all of the facts of the case in order to adequately represent the client, and the client needs to be assured that by disclosing these facts, he or she is not sealing their own fate. On the other hand, there is little societal benefit in a client seeking the services of a public relations consultant in order to put the right spin on certain facts.

⁴¹⁸ *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984).

⁴¹⁹ *Dinnan v. Board of Regents of the University System of Georgia*, 661 F. 2d 426, 429, citing to *Trammel v. U.S.*, 455 U.S. at 49 (1980).

⁴²⁰ *Id.*

The service the public relations experts perform simply does not rise to the same level in terms of societal importance.

V. Conclusion

The use of public relations consultants in connection with high-profile cases will undoubtedly continue. Public relations firms are advertising that their advice is necessary when celebrities face criminal charges. It is beyond speculation that such advice may be helpful, but should such advice be protected from disclosure under the attorney-client privilege? Privileges are to be recognized “only within the narrowest limits required by principle.”⁴²¹ Clients surely will continue to consult public relations consultants even if their communications are subject to discovery. Public relations experts will continue to receive accurate information from clients even if communications are not protected by privilege. The Third Circuit Court of Appeals has stated “privileges obstruct the truth-finding process and provide benefits that are at best indirect and speculative.”⁴²² Public relations consultants do not provide legal advice. They are retained for the very purpose of transmitting information to the public. The communications are not meant to be confidential. The lack of a privilege will not deter clients from consulting the public relations experts. Retaining a public relations consultant may be, as Martha Stewart would say, “a good thing.” Protection of those communications, however, is not a good thing.

⁴²¹ *Id.*

⁴²² In re: Grand Jury Matter, Grand Jury No. 91-832, 147 F.D.R. 82, 84, 1992 U.S. Dist. LEXIS 21289.