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Chapter J

Managing the Corporate Legal Crisis

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Corporate Crisis Checklist J-3

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SAMPLE

Corporate Crisis Checklist

1. Be Prepared – Identify and Train a Crisis Management Team
 - Representatives from management, legal, public affairs, security, IT
2. Preserve all Documents, Data and Evidence
 - Suspend document destruction policies
 - Consider data that may be deleted automatically, or physical evidence that might otherwise be discarded as a result of a repair or remediation
 - Consider photos, videotapes, split samples
3. Gather the Facts
 - Debrief employees
 - Separate representation issues, such as possible conflict, undertaking to repay fees
4. Control the Flow of Information
 - Control the faucet
 - Speak with one voice
5. Identify Stakeholders and Their Concerns
 - Shareholders
 - Employees
 - Citizens Groups
 - Media
 - General Public
 - Regulators
 - Prosecutors
 - Courts
 - Opposing Counsel

6. Determine Whether Any Obligation to Report
7. Remediation/Repair/Protect
 - Consider whether similar corrective action is necessary in other locations or situations
8. Identify and Notify Insurers
9. Consider Disciplinary Issues
10. Privilege Issues
 - Public Relations Consultants
 - Joint Defense
11. Communications
 - a) Identify stakeholders as above;
 - b) Provide timely communications, but resist the urge to draw conclusions or state facts until you are certain of these conclusions or facts;
 - c) Proactive is better than reactive;
 - d) To the extent you can, communicate your message
 - i. develop an effective message
 - ii. deliver it consistently

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A PRIMER ON CORPORATE INDEMNIFICATION AND ADVANCEMENT OF EXPENSES INCURRED BY CORPORATE REPRESENTATIVES IN GOVERNMENT INVESTIGATIONS: HOW AND WHEN

I. Introduction

One problem that occurs frequently in the context of government investigations is the necessity of obtaining separate counsel for employees. Where there is a conflict or potential conflict between the corporation and the employee, the individual employee must be represented by separate counsel.¹ The practical problem then arises of how the employee can afford to pay for a lawyer with the experience and ability to best handle the situation.

Frequently, because of vicarious liability concepts such as respondeat superior, the corporation's criminal liability will depend on the individual's liability; if the individual is not liable, the company will not be liable. Thus, it may be in the company's best interest to ensure that the individual employee has the best attorney the company can afford. Even if the individual (and, therefore, the company) is not 100% innocent, it may still be in the company's best interest to ensure that the employee has skilled counsel in order to mitigate the government action against the individual and, therefore, possibly the company.²

¹ See Pa. Rules of Prof'l Conduct (2012) 1.7 (relating to conflicts of interest) & 1.13(e) (relating to counsel representing an organization and officers, directors, or employees).

² In an apparent attempt to alter these incentives, the Department of Justice in 2003 directed federal prosecutors to consider "a corporation's promise of support to culpable employees and agents, [including] through the advancing of attorneys fees," in evaluating the extent of its cooperation with government officials. U.S. Dep't of Justice, "Principles of Federal Prosecution of Business Organizations," at Section VI (Jan. 20, 2003). These guidelines were roundly criticized by legal scholars, legislators, and federal judges alike, with one federal judge going so far as to conclude that the government had violated the constitutional rights of former KPMG employees charged with tax fraud by holding "the proverbial gun to [KPMG's] head" and forcing the company to abandon its long-standing practice of advancing legal fees to its employees. United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) (dismissing indictment against former employees). Faced with such overwhelming criticism, the DOJ reversed course in late 2006, concluding that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." U.S. Dep't of Justice, "Principles of Federal Prosecution of Business Organizations," at 11 (Dec. 12, 2006). The DOJ went a step further in 2008, flatly prohibiting prosecutors from considering the advancement or reimbursement of attorneys' fees in evaluating corporate cooperation. See Letter from Deputy Attorney Gen. Mark Filip to Senators Patrick J. Leahy and Arlen Specter at 3 (July 9, 2008).

This article will first discuss generally the law of indemnification of corporate representatives under Delaware, New Jersey, and Pennsylvania law. With that background, the article will then address under what circumstances and how the company can advance fees to corporate representatives during a government investigation.

II. Background – The Delaware, New Jersey, and Pennsylvania Statutes

The corporate statutes of Delaware, New Jersey, and Pennsylvania provide for permissive and mandatory indemnification of corporate representatives sued in their official capacity. Because the New Jersey and Pennsylvania indemnification statutes were modeled after the Delaware statute, the statutes of each state contain similar provisions: a corporation may indemnify any officer or director who has “acted in good faith and in a manner [he or she] reasonably believed to be in or not opposed to the best interests of the corporation.”³ With respect to criminal investigations or proceedings, the corporation may indemnify corporate officials provided that they had “no reasonable cause” to believe that their conduct was unlawful.⁴

Indemnification requires the majority vote of a quorum of directors who are not parties to the relevant action or suit. If such a quorum is not obtainable, authorization may be granted by the shareholders or by written opinion of independent legal counsel.⁵

A. Who is Indemnified?

The Delaware statute protects any person who “is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise,” provided that the person in question “was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding[.]”⁶ By contrast, the Pennsylvania statute refers not to directors, officers, employees or agents, but to representatives of the

³ Del. Code Ann. tit. 8, § 145(a); N.J. Stat. Ann. § 14A:3-5(2)(a); 15 Pa. Cons. Stat. Ann. § 1741.

⁴ Del. Code Ann. tit. 8, § 145(a); N.J. Stat. Ann. § 14A:3-5(2)(b); 15 Pa. Cons. Stat. Ann. § 1741. A plea of nolo contendere, upon acceptance by the court and imposition of sentence, is a judgment of conviction for purposes of indemnification statutes and agreements. Merritt-Chapman & Scott Corp. v. Wolfson (“Merritt-Chapman II”), 321 A.2d 138, 143 (Del. Super. Ct. 1974).

⁵ Del. Code Ann. tit. 8, § 145(d); N.J. Stat. Ann. § 14A:3-5(5); 15 Pa. Cons. Stat. Ann. § 1744.

⁶ Del. Code Ann. tit. 8, § 145(a).

corporation.⁷ The indemnification offered by the New Jersey statute is broader; it includes “corporate agents,” as well as agents of “other enterprises.”⁸

The director of a corporation will normally be covered by the indemnification statutes even if the asserted claims are only tangentially linked to his or her services to the corporation.⁹ Except where indemnification is court-ordered, the determination of whether an officer or director has met the applicable standard of conduct for indemnification must be made by the board of directors on a case-by-case basis.

B. Corporations’ Ability to Extend Indemnification

The indemnification statutes also permit corporations to establish – pursuant to certificates of incorporation, shareholder resolutions, or indemnification agreements or contracts – programs for indemnification that extend beyond the permissive indemnification granted by the statutes themselves. A contract to indemnify an officer or director is enforceable so long as the officer or director was involved in the underlying litigation by reason of being or having been an officer or director, even if he or she never entered the action and was never served with process but was merely named in the complaint.¹⁰

Pennsylvania and New Jersey limit the extent to which a corporation may provide additional indemnification. Pennsylvania bars indemnification “where the act or failure to act giving rise to the claim for indemnification is determined by a court to have constituted willful misconduct or recklessness.”¹¹ Similarly, New Jersey bars indemnification for any acts or omissions that constituted breach of the duty of loyalty, were made in bad faith, involved knowing violations of the law, or resulted in improper personal benefit.¹²

⁷ 15 Pa. Cons. Stat. Ann. § 1741.

⁸ N.J. Stat. Ann. §§ 14A:3-5(1)(a), (1)(b), (3).

⁹ Heffernan v. Pac. Dunlop GNB Corp., 965 F.2d 369, 375 (7th Cir. 1992) (interpreting Delaware’s indemnification statute).

¹⁰ Mooney v. Willys-Overland Motors, Inc., 204 F.2d 888, 898 (3rd Cir. 1953) (interpreting Delaware’s indemnification statute). Where the transaction at issue is personal and not related to the director’s position, by contrast, there is no right to indemnification. See Sorensen v. Overland Corp., 142 F. Supp. 354, 358-59 (D. Del. 1956) (finding no right to indemnification where plaintiff sought to enforce rights under an employment contract entered into before he became director), aff’d, 242 F.2d 70 (3d Cir. 1957).

¹¹ 15 Pa. Cons. Stat. Ann. § 1746(b).

¹² N.J. Stat. Ann. § 14A:3-5(8).

Delaware, meanwhile, allows the corporation to indemnify an officer or director without restriction, “both as to action in such person’s official capacity and as to action in another capacity while holding such office.”¹³ Courts, however, have read into the Delaware statute certain limitations on the corporation’s ability to grant additional indemnification rights, although the scope of these limitations is not entirely clear.¹⁴

C. Indemnification Mandatory if Director, Officer, or Employee is Successful in Defense

The Delaware, New Jersey, and Pennsylvania statutes also mandate indemnification for any officer or director who has been successful in the defense of any action, suit, or proceeding.¹⁵ The officer or director is entitled to indemnification if he or she is successful on the merits “or otherwise,” meaning that he or she need not litigate an issue on the merits where a technical defense will suffice.¹⁶ An officer or director may also be entitled to mandatory indemnification where the dispute has been terminated by a negotiated settlement in which there is no assumption of individual liability and the claim is dismissed with prejudice and without payment.¹⁷

¹³ Del. Code Ann. tit. 8, § 145(f).

¹⁴ In Waltuch v. Conticommodity Services, Inc., the Second Circuit, interpreting Delaware law, rejected a plaintiff employee’s claim that the non-exclusivity language of § 145(f) allows corporations to indemnify officers under circumstances which fail to meet the requirements of good faith. 88 F.3d 87, 91 (2d Cir. 1996). The court reasoned that if § 145(f) allowed indemnification without regard to the good faith requirements set forth in § 145(a), “[t]here would be no point to the carefully crafted provisions of Section 145,” and “[t]he exception would swallow the rule.” Id. (citation omitted). The court concluded that § 145(f) allows corporations to grant indemnification rights that go beyond the rights provided in § 145(a), but only so long as the rights granted are consistent with § 145(a)’s substantive provisions. Id. By contrast, in Choate, Hall & Stewart v. SCA Services, Inc., 495 N.E.2d 562, 566 (Mass. App. Ct. 1986), the Massachusetts Court of Appeals, interpreting § 145(f), held that a corporation may agree to grant its officers or directors additional indemnification rights, provided that the agreement can withstand an attack on grounds of policy or basic equity.

¹⁵ Del. Code Ann. tit. 8, § 145(c); N.J. Stat. Ann. § 14A:3-5(4); 15 Pa. Cons. Stat. Ann. § 1743.

¹⁶ However, where claims are dismissed merely because similar claims are pending elsewhere, the dismissal is not a vindication on the merits “or otherwise,” and mandatory indemnification will not apply unless the same charges are dismissed in the parallel litigation. Galdi v. Berg, 359 F. Supp. 698, 702 (D. Del. 1973).

¹⁷ See, e.g., Waltuch v. Conticommodity Servs., Inc., 833 F. Supp. 302, 311 (S.D.N.Y. 1993) (interpreting Delaware law), aff’d, 88 F.3d 87 (3d Cir. 1996); B&B Inv. Club v. Kleinert’s, Inc., 472 F. Supp. 787, 789-91 (E.D. Pa. 1979) (interpreting Pennsylvania law). Further, a corporate official may recover pro se litigation expenses under a mandatory indemnification provision where the actions of the corporation forced the official to conduct a pro se defense. See McLean v. Int’l Harvester Co., 902 F.2d 372 (5th Cir. 1990) (interpreting Delaware law). In McLean, the vice-president of the defendant corporation sought to recover costs and fees incurred in defending

Otherwise, mandatory indemnification does not apply unless a final judgment has been entered in the officer or director's favor. With respect to fees incurred as a result of a grand jury investigation, any result other than indictment by the grand jury qualifies as a success under the mandatory indemnification statute.¹⁸ Where a judgment is appealed, indemnification will not be granted until the appellate court affirms non-liability.¹⁹

To qualify for mandatory indemnification, "[e]scape from an adverse judgment or other detriment, for whatever reason, is determinative. . . . [T]he only question a court may ask is what the result was, not why it was."²⁰ In Waltuch, the indemnitee employee and the corporation settled claims brought against them as joint defendants, and the settlement agreement was structured so that the employee did not contribute toward the settlement. The court found the employee had been successful under the Delaware mandatory indemnification provision by virtue of having paid no money while having all claims against him dismissed with prejudice and without any assumption of liability. The employee's escape from suit without payment, the court reasoned, was sufficient success to entitle him to indemnification. Noting that the employee had not expressly agreed to the arranged settlement, the court was also reluctant to allow the corporation to escape mandatory indemnification by paying a settlement sum on behalf of an "unwilling indemnitee."²¹

An officer or director who is successful on one count of a multi-count indictment may be entitled to partial indemnification. In Merritt-Chapman II,²² the Delaware Superior Court awarded partial indemnification to the defendant director for expenses incurred in defending one independent criminal charge, even though he pled nolo contendere to the other charges against him. The court held that the Delaware statute does not require complete success but instead

criminal charges and expunging his name from the corporation's guilty plea. The official believed that the attorneys provided by the corporation would not represent him loyally and zealously because the corporation stood to gain from having the official's name on its plea. Because the official succeeded in his defense to the criminal charges, the court held that he would be entitled to indemnification for his pro se defense so long as he could show that he was effectively forced to conduct this defense. Id. at 375.

¹⁸ Stewart v. Cont'l Copper & Steel Indus., Inc., 67 A.D.2d 293, 302 (N.Y. App. Div. 1st Dep't 1979) (interpreting Delaware law).

¹⁹ 2 Dennis J. Block, Nancy E. Barton, & Stephen A. Radin, The Business Judgment Rule 1866 (5th ed. 1998).

²⁰ Waltuch, 88 F.3d at 96.

²¹ Id. at 97.

²² 321 A.2d 138 (Del. Super. Ct. 1974).

provides for mandatory indemnification “to the extent” an officer or director succeeds on the merits or otherwise.²³

Prior to judgment, an indemnitee does not have the right to waive mandatory indemnification. In McLean v. International Harvester Co.,²⁴ a former corporate officer sought indemnification for expenses incurred in a successful defense of criminal charges. The official had refused to accept the company’s offer for advanced attorneys’ fees because the company had expressly conditioned this offer on the official’s ultimate acquittal. The official wanted his fees guaranteed and thus rejected the offer. The court concluded that the official had not waived his statutory right to indemnification, especially since he had specifically attempted to obtain guaranteed indemnification.²⁵

D. What Does Indemnification Cover?

In suits brought by third parties, including the federal government, a corporation may indemnify an officer or director for judgments, fines, penalties, amounts paid in settlement, and reasonable expenses, including attorney’s fees.²⁶ “The standards used in determining whether fees have been ‘reasonably incurred’ are similar to standards used by courts in awarding fees.”²⁷ A reasonable hourly rate is “a logical beginning,” and the court should assume that the claimant was mindful of the possibility of not being indemnified and, hence, spent cautiously.²⁸

III. Advancement of Fees and Expenses

A corporation may advance payments of fees and expenses before the final adjudication of litigation. The Pennsylvania and Delaware statutes do not require director or stockholder approval as a condition for advancements, but merely condition advanced payments on “receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that [he or she] is not entitled to be indemnified by the corporation as authorized by this section.”²⁹ A copy of such an undertaking is attached as Exhibit A. The New

²³ Id. at 141. Where a defendant is charged and convicted of conspiracy, however, acquittal on the charged underlying act does not qualify as success on the merits or otherwise for purposes of mandatory indemnification. See Merritt-Chapman & Scott Corp. v. Wolfson (“Merritt-Chapman I”), 264 A.2d 358, 360 (Del. Super. Ct. 1970).

²⁴ 817 F.2d 1214 (5th Cir. 1987).

²⁵ Id. at 1223.

²⁶ Del. Code Ann. tit. 8, § 145(a); N.J. Stat. Ann. § 14A:3-5(2); 15 Pa. Cons. Stat. Ann. § 1741.

²⁷ Merritt-Chapman II, 321 A.2d at 143 (citations omitted).

²⁸ Id.

²⁹ Del. Code Ann. tit. 8, § 145(e); 15 Pa. Cons. Stat. Ann. § 1745.

Jersey statute mirrors the Delaware and Pennsylvania statutes except that it requires director approval for the advancement of expenses.³⁰

Much like the indemnification provisions discussed above, the advancement of funds provisions contained in the Delaware, New Jersey, and Pennsylvania statutes are non-exclusive,³¹ and corporations may agree to advance litigation expenses without restrictions. In practice, advancement of funds provisions frequently appear in corporate charters, bylaws, and indemnification agreements, and courts have interpreted these provisions broadly to protect corporate employees.

In fact, under Delaware law, employees need not demonstrate the ultimate right to indemnification in order to receive advanced payments,³² nor must they prove that they have the financial resources to repay the company in the event of an unfavorable outcome.³³ The right to advanced payments, moreover, “is a vested contract right which cannot be unilaterally terminated.”³⁴ Accordingly, advancement agreements should be carefully worded to make clear under what circumstances the corporation may (and may not) recoup its advancements.³⁵

³⁰ N.J. Stat. Ann. § 14A:3-5(6).

³¹ Del. Code Ann. tit. 8, § 145(f); N.J. Stat. Ann. § 14A:3-5(8); 15 Pa. Cons. Stat. Ann. § 1746(a).

³² See, e.g., Ridder v. CityFed Fin. Corp., 47 F.3d 85, 87 (3d Cir. 1995) (“Under Delaware law, [employees’] right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them, and is separate and distinct from any right of indemnification they may later be able to establish.”) (citation omitted).

³³ In re Central Banking Sys., C.A. No. 12497, slip op. at 6-7 (Del. Ch. May 11, 1993). Under a 1994 amendment to Delaware’s indemnification statute, defendant employees may seek a summary determinations from the Chancery Court as to the corporation’s advancement obligations. See Del Code Ann. tit. 8, § 145(k).

³⁴ Schoon v. Troy Corp., 948 A.2d 1157, 1165 (Del. Ch. 2008) (citation and quotation marks omitted).

³⁵ For example, in Bergonzi v. Rite Aid Corp., C.A. No. 20453, 2003 Del. Ch. LEXIS 117 (Del. Ch. Oct. 20, 2003), Rite Aid’s board of directors brought suit to recoup legal expenses paid to former CFO Frank Bergonzi after Bergonzi pled guilty to participating in a criminal conspiracy to defraud the company. Under “the plain language of Rite Aid’s charter,” however, Bergonzi was only bound to repay the company upon “final judgment that [he was] not entitled to indemnification.” Id. at *9, 12. Because Bergonzi had not yet been sentenced, no such final judgment had been entered against him, and Rite Aid was not entitled to repayment. Accordingly, the court dismissed Rite Aid’s claims, noting that the company “could have easily drafted [its charter] differently, but it did not and must now maintain its bargain with its former officer.” Id. at *11.

EXHIBIT A

September 30, 2012

Employee XYZ

ABC Corporation

Re: Advancement of Legal Fees and Costs

Dear Employee XYZ:

This will confirm that ABC Corporation has agreed to advance your legal fees and expenses in connection with the pending investigation by [] into activities relating to [] by ABC Corporation. You hereby agree to repay the corporation upon conclusion of this matter the fees and expenses which it has advanced on your behalf unless the ABC Corporation ultimately determines that you are entitled to be indemnified as authorized by section 145 of the General Corporation Law of the State of Delaware. Please confirm your agreement to the terms of this letter by signing the enclosed copy of this letter and returning it to [].

Very truly yours,

Employer ABC

ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT ISSUES IN THE USE OF PUBLIC RELATIONS CONSULTANTS

In managing the corporate legal crisis, lawyers and public relations (“PR”) consultants are often called upon to work together closely. It is critical for counsel to understand the privilege issues that may arise in connection with this working relationship. The presence of PR consultants in confidential meetings, for instance, can sometimes result in waiver of the attorney-client privilege. Similarly, draft press materials prepared with input from PR consultants may be subject to future discovery.

This memorandum explores the circumstances under which the attorney-client privilege and/or work product doctrine may protect the confidentiality of communications with PR consultants. The majority of courts to consider the question have *rejected* claims of privilege over these types of communications, although some courts have been more receptive to such claims in recent years. In large part, the success of these claims turns on whether, and to what extent, the consultant was retained to help counsel provide legal advice to the client, although even communications that do not meet this standard may be protected under the work product doctrine if made in anticipation of litigation. Nevertheless, judicial inquiry in this area is highly fact-specific, and there are no fool-proof means for protecting confidentiality in all cases. With this reality in mind, the best strategy may be to assume that confidentiality cannot be maintained, and to act accordingly.

I. The Attorney-Client Privilege in the Public Relations Context

The attorney-client privilege protects confidential communications between clients and their attorneys for the purpose of obtaining legal advice. In re Ford Motor Co., 110 F.3d 954, 965 (3d Cir. 1997). Although the privilege is normally waived by the voluntary disclosure of confidential information to third parties, there exists an exception to this rule for disclosure to third-party agents, including PR consultants, hired specifically to assist counsel in providing legal advice to the client. See H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 15, 1995) (privilege not waived where PR consultant participated in discussions between attorney and defendant to assist attorney in providing legal advice).

The party asserting the privilege bears the burden of proof, and it is “crucial” for any party seeking to protect communications with PR consultants to show that these communications were indeed made “so that the client [could] obtain *legal advice from her attorney.*” Haugh v. Schroder Inv. Mgmt. N. Am., Inc., No. 02-7955, 2003 U.S. Dist. LEXIS 14586, at *7-8 (S.D.N.Y. Aug. 25, 2003) (emphasis in original). In fact, should a court conclude that a consultant was hired to provide commercial advice to the client rather than to assist the lawyer in formulating his or her legal opinions, all communications disclosed to that consultant will likely be discoverable. Traditionally, courts have interpreted this requirement strictly, rejecting claims of privilege over communications with PR consultants whose expertise was not absolutely *essential* to counsel’s ability to advise the client. See, e.g., Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (privilege did not apply to communications between plaintiff and PR firm where the firm’s “work and advice simply serve[d] to assist

[plaintiff's] 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"); Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999) (client's communications with "litigation consultant" were "not made for the purpose of obtaining advice from a lawyer and therefore [were] not protected by the attorney-client privilege").

These authorities notwithstanding, at least one federal court recently extended the privilege to communications with PR consultants hired not to assist counsel in answering specific legal questions, but rather to inform counsel's broader litigation strategy. Before Martha Stewart was indicted on securities fraud charges in 2003, her outside counsel hired a PR firm to help combat negative publicity. During grand jury proceedings, prosecutors subpoenaed documents and testimony regarding communications between Stewart, her attorneys, and the PR firm. Stewart's counsel objected, however, arguing that these communications were protected by the attorney-client privilege, and the court sustained the objection:

This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions – such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication – would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. . . . In consequence, this Court holds that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege.

In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003).

The significance of Grand Jury Subpoenas should not be overstated. In fact, some commentators have suggested that the reach of this case is "limited by its context," Ravenell v. Avis Budget Group, No. 08-CV-2113, 2012 U.S. Dist. LEXIS 48658, at *12 (E.D.N.Y. Apr. 5, 2012), and courts have continued to reject claims of privilege over communications with PR consultants even in its wake. See, e.g., In re New York Renu with Moistureloc Prod. Liab. Litig., MDL No. 1785, 2008 U.S. Dist. LEXIS 88515, at *24-26 (D.S.C. May 6, 2008) (distinguishing Grand Jury Subpoenas); Haugh, 2003 U.S. Dist. LEXIS 14586, at *9 (same). Nevertheless, the holding in this case suggests that at least in the proper circumstances, communications with PR consultants hired "to assist [lawyers] in dealing with the media" may enjoy attorney-client protection, even if these communications concern "tasks that go beyond advising a client as to the law." 265 F. Supp. 2d at 325, 330.¹

¹ By way of example, the court in Grand Jury Subpoenas suggested that "lawyers may need skilled advice as to whether and how possible statements to the press – ranging from 'no comment' to detailed factual presentations – likely would be reported in order to advise a client as to whether

Of course, even under Grand Jury Subpoenas' expansive interpretation, the ultimate question for privilege purposes is whether the consultant was retained to assist counsel in providing "legal services" to the client, however broadly these services are defined. Accordingly, clients and their attorneys should consider taking the following steps in order to maximize their prospects for maintaining confidentiality in this context:

- First, the attorney rather than the client should retain the consultant in the first instance and bill the consultant for its services. See Moistureloc, 2008 U.S. Dist. LEXIS 88515, at *20 (concluding that basic PR advice "from a consultant hired by the corporate client . . . is not within the privilege"); Grand Jury Subpoenas, 265 F. Supp. 2d at 326 ("No one suggests that communications between [Ms. Stewart] and [her PR firm] would have been privileged if she simply had gone out and hired [the firm] as public relations counsel.")²
- Second, the attorney should be the consultant's primary point of contact and should be involved in all meetings between the client and the consultant. Moreover, to the extent possible, the attorney should weave his or her legal advice into any discussions between the client and the consultant that might otherwise be considered purely commercial or strategic. See Calvin Klein, 198 F.R.D. at 54 (privilege does not protect "ordinary public relations advice"). But see In re Papst Licensing, GmbH Patent Litig., MDL No. 1298, 2001 U.S. Dist. LEXIS 15667, at *8 (E.D. La. Sept. 24, 2001) ("[C]ommunications remain within the privilege when business and legal considerations are interwoven.") (citation omitted).

the making of particular statements would be in the client's legal interest." 265 F. Supp. 2d at 330.

² In In re Copper Market Antitrust Litigation, defendant Sumitomo – a Japanese mining company – hired a PR firm to act as its spokesperson in dealing with the Western press. This firm "was the functional equivalent of an in-house public relations department with respect to Western media relations, having authority to make decisions and statements on Sumitomo's behalf, and seeking and receiving legal advice from Sumitomo's counsel with respect to the performance of its duties." 200 F.R.D. 213, 216 (S.D.N.Y. 2001). In these circumstances, the court concluded that the PR firm could "fairly be equated with Sumitomo" for attorney-client purposes, such that communications between the firm, Sumitomo, and Sumitomo's counsel "made for the purpose of facilitating the rendition of legal services to Sumitomo [could] be protected from disclosure by the attorney-client privilege." Id. at 219; see also FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (sustaining claims of privilege over "communications that GSK shared with its public relations and government affairs consultants," since these individuals "acted as part of a team with full-time employees regarding their particular assignments and, as a result, . . . became integral members of the team assigned to deal with issues that were completely intertwined with GSK's litigation and legal strategies") (quotation marks and alternations omitted).

In the proper circumstances, therefore, even communications with *client-retained* PR consultants may be protected by the attorney-client privilege, although cases such as In re Copper Market and GlaxoSmithKline are the exception rather than the rule.

- Third, the attorney should be the conduit for all draft materials exchanged between the client and the consultant. All drafts should be labeled privileged and confidential attorney-client communications and should, where possible, include specific references to legal advice and/or requests for the same.³
- Finally, following Grand Jury Subpoenas, the attorney, the client, and the consultant should, to the extent possible, emphasize in their oral and written communications the importance of the consultant’s PR advice to the client’s broader legal strategy.

While the precise relationship between the client, the consultant, and the attorney will naturally vary with the facts of each particular case, following these guidelines will best position the client to argue that its communications with the consultant were “made for the purpose of obtaining advice from a lawyer,” such that the privilege ought to apply. Blumenthal, 186 F.R.D. at 243. That said, claims of privilege in this context fail more often than they succeed, and parties should exercise caution wherever possible. For example, clients should discourage consultants from taking notes during meetings, and draft press materials – unless already subject to subpoena or other discovery requests – should be discarded once a final version has been prepared. Clients might even consider *excluding* consultants from meetings with counsel in which highly sensitive or potentially damaging issues are likely to be discussed.

II. The Work Product Doctrine in the Public Relations Context

Under the Federal Rules of Civil Procedure, “a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.” Fed. R. Civ. P. 26(b)(3)(A).⁴ Accordingly, press-related materials drafted by counsel may be protected under the work product doctrine, Gucci Am., Inc. v. Guess?, Inc., 271

³ Of course, even if prepared directly by counsel, draft materials will not be protected by the attorney-client privilege unless they include counsel’s legal (as opposed to commercial) advice. See Burton v. R.J. Reynolds Tobacco Co., 200 F.R.D. 661, 669 (D. Kan. 2001) (“A party may not cloak a document with a privilege by simply having business . . . or public relations matters handled by attorneys.”) (citation omitted).

Moreover, while there is a split of authority on this issue, some courts have flatly refused to extend the privilege to draft press releases – even those that include legal advice from counsel – on the theory that the company ultimately intended the information in those drafts to be made public. Compare Burroughs Wellcome Co. v. Barr Labs., Inc., 143 F.R.D. 611, 619 (E.D.N.C. 1992) (concluding that “draft press release submitted to plaintiff’s legal department for review [was] not privileged because it was not intended to be confidential”), with Moistureloc, 2008 U.S. Dist. LEXIS 88515, at *17 (“[I]f the draft is sent to the lawyer for a legal-advice review, then any statements in the draft are privileged to the extent that they are not ultimately revealed to the public. Put the other way, only the portions of the draft that are ultimately disclosed in the final document are subject to disclosure.”).

⁴ Unlike the attorney-client privilege, the work product doctrine is not absolute. Even materials protected by this doctrine may be discovered if the party seeking discovery “has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A)(ii).

F.R.D. 58, 78 (S.D.N.Y. 2010), even if these materials are later “conveyed in confidence to a public relations consultant.” Chevron Corp. v. Salazar, No. 11-3718, 2011 U.S. Dist. LEXIS 92628, at *6 (S.D.N.Y. Aug. 16, 2011) (citation omitted); see also Calvin Klein, 198 F.R.D. at 55 (“[A]n otherwise valid assertion of work-product protection is [not] waived with respect to an attorney’s own work-product simply because the attorney provides the work-product to a public relations consultant whom he has hired and who maintains the attorney’s work-product in confidence.”).⁵

By the plain terms of Rule 26, moreover, the work product doctrine applies “not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.” Rule 26 Advisory Comm. Notes, 1970 Amendment. Whether a communication or document is protected, in other words, depends on the motivation behind its creation rather than the identity of its creator. Accordingly, even litigation-related materials prepared by *PR consultants themselves* may be protected by the work product doctrine. See United States v. Nobles, 422 U.S. 225, 238-39 (1975) (the doctrine applies to materials prepared by a party or his representatives, including attorneys, consultants, agents, or investigators).

Of course, the work product doctrine will *not* apply to PR communications concerning purely commercial matters, “because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client’s customers, the media, or on the public generally.” Calvin Klein, 198 F.R.D. at 55; see also Gucci, 271 F.R.D. at 79 (draft press statement did not qualify for work product protection where plaintiff’s “publicity strategy was treated as a business concern”); Burke v. Lakin Law Firm, P.C., No. 07-0076, 2008 U.S. Dist. LEXIS 833, at *9 (S.D. Ill. Jan. 7, 2008) (work product doctrine did not apply to PR advice concerning “how [defendant law firm] might conduct itself in order to avoid losing clients and employees”). Nonetheless, so long as the party resisting production can show that the materials in question were “created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation,” these materials ought to be protected, even if they were created for some commercial reason(s) as well. United States v. Torf, 357 F.3d 900, 908 (9th Cir. 2003) (citation omitted).⁶

⁵ More generally, “because the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party.” In re Grand Jury Subpoena, 220 F.3d 406, 409 (5th Cir. 2000). Instead, “courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information.” Falise v. Am. Tobacco Co., 193 F.R.D. 73, 80 (E.D.N.Y. 2000) (citation and quotation marks omitted).

⁶ In Torf, the Ninth Circuit joined “a growing number” of other Circuits in applying this “because of” standard, which “does not consider whether litigation was a primary or secondary motive behind the creation of a document.” 357 F.3d at 907-08; see also United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (a document created in anticipation of litigation “does not lose protection . . . merely because it [was] created in order to assist with a business decision” as well). Nevertheless, some Circuits continue to sustain work product claims only where “the *primary motivating purpose* behind the creation of the document was to aid in possible future litigation.”

In this respect, the work product doctrine may afford greater protection to communications with PR consultants than the attorney-client privilege, and indeed, courts have generally been more receptive to work product claims in this context. *See, e.g., Dongguk Univ. v. Yale Univ.*, No. 08-00441, 2011 U.S. Dist. LEXIS 53751, at *1-4 (D. Conn. May 19, 2011) (partially sustaining work product claims over communications between plaintiff’s counsel and employees of PR firm hired by plaintiff); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2007 U.S. Dist. LEXIS 23164, at *11 n.3 (E.D. La. Mar. 5, 2007) (sustaining work product claims over communications with PR consultants acting at the direction of outside counsel).⁷ In fact, various courts have sustained work product claims over materials shared with PR consultants while simultaneously *rejecting* claims of privilege over these same materials. *See, e.g., Haugh*, 2003 U.S. Dist. LEXIS 14586, at *10-16; *Calvin Klein* 198 F.R.D. at 55-56.⁸

Importantly, work product claims are more likely to succeed where “the public relations firm needs to know the attorney’s strategy in order to advise as to public relations, and the public relations impact bears, in turn, on the attorney’s own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form.” *Calvin Klein* 198 F.R.D. at 55. Thus, many of the guidelines outlined in the previous section will apply with just as much force in the work product context. Nonetheless, even communications with PR consultants that are not integral to the provision of legal advice – and thus not protected by the attorney-client privilege – may qualify for work product protection, so long as they were made in anticipation of ongoing or future litigation. *See St. Paul Reins. Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 636 (N.D. Iowa 2000) (explaining that “the critical question” in “all cases in which work product issues arise” is whether the subject materials were prepared in anticipation of litigation).⁹

In sharing communications, documents, and other materials with PR consultants, therefore, clients and their attorneys should make clear, to the extent possible, that these materials were created with litigation (or the threat of litigation) in mind, rather than for purely commercial or strategic reasons. *See Burke*, 2008 U.S. Dist. LEXIS 833, at *8 (“[T]hough the work product

United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) (citation omitted) (emphasis added).

⁷ *See also Nance v. Thompson Med. Co.*, 173 F.R.D. 178, 182-83 (E.D. Tex. 1997) (suggesting, in dicta, that documents authored by and sent to PR consultant likely qualified as work product).

⁸ In addition, some courts have afforded *both* work product and attorney-client protection to communications with PR consultants. *See, e.g., In re Copper Market*, 200 F.R.D. at 221.

⁹ For purposes of Rule 26, litigation “includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner’s inquiry or an investigative legislative hearing.” *United States v. Textron, Inc.*, 553 F.3d 87, 89 (1st Cir. 2009) (citation omitted). Generally speaking, however, documents prepared in anticipation of a government investigation do not qualify for work product protection unless and until the investigation has begun. *Guzzino v. Felterman*, 174 F.R.D. 59, 63 (W.D. La. 1997).

doctrine may protect documents that were prepared for one's defense in a court of law, it does not protect documents that were merely prepared for one's defense in the court of public opinion."').¹⁰ All materials created by or shared with consultants, for example, should be labeled as attorney work product. Moreover, counsel should actively review and comment on the consultants' PR advice, incorporating that advice into their legal analysis where appropriate. For their part, consultants should work closely with counsel in formulating their advice in the first instance, and should make explicit reference in their written materials to litigation or the threat of the same. Although there are certainly no guarantees – and although parties should exercise caution as the caselaw in this area continues to evolve – such measures can provide clients with solid bases on which to argue that their communications with PR consultants deserve work product (if not attorney-client) protection.

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¹⁰ See also Teena-Ann V. Sankoorikal & Kathleen H. McDermott, Attorney-Client Privilege and Work-Product Doctrine: Potential Pitfalls of Disclosure to Public Relations Firms, 786 Practising L. Inst. 271, 286 (2008) (“If a document created by or shared with a public relations firm, while relating to the pending litigation, was not prepared in anticipation of the litigation itself – i.e., it was prepared in anticipation of a potential media battle, instead of a courtroom battle – a court may find that no privilege exists.”).

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Managing the Corporate Legal Crisis

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Christine C. Levin
November 14, 2012

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LLP

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The Arthur Andersen partner was on his cell phone when he said,
"Ship the Enron documents to the feds,"
but his Secretary heard,
"Rip the Enron documents to shreds."



It turns out that it was all just a case of bad cellular.

Sprint PCS The clear alternative to cellularSM

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2 Managing the Corporate Legal Crisis: Lessons for Survival

Introduction



- Rules for managing a corporate legal crisis
- Lawyering and public relations lessons learned from other crises



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3 Managing the Corporate Legal Crisis: Lessons for Survival

What Is a Corporate Legal Crisis?

- **Emergency** "an unforeseen combination of circumstances or the resulting state that calls for immediate action."
- **Crisis** - "an unstable or crucial time or state of affairs whose outcome will make a decisive difference for better or worse"



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4 Managing the Corporate Legal Crisis: Lessons for Survival

Corporate Crisis Survival Rules

- **Speed**
 - Part of today's world
 - Social media
 - Word spreads fast
- **Everyone has a voice**
 - One voice is as loud as any other
- **Look at it in 2 parts**
 - What to do
 - What to say



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Corporate Crisis Survival Rules

1. **Be prepared - identify and train a crisis management team in advance**
 - Representatives from management, legal, public affairs, security, IT
 - Advantage – people know each other and procedures already in place



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Corporate Crisis Survival Rules

2. In a public crisis, legal concerns may take a back seat and counsel may just be along for the ride
 - PECO clip
 - Difference between private and public crisis – control

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Corporate Crisis Survival Rules

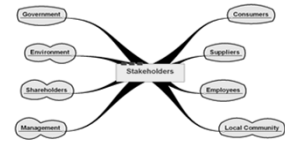
3. In a crisis situation, public perception can impact legal outcome

A. Good PR management may be good legal management

- Martha Stewart

B. Identify stakeholders and their concerns

- Customers
- Employees
- Community
- Suppliers
- Media
- General public
- Regulators



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Corporate Crisis Survival Rules

- C. Don't make factual statements until you know they are accurate
 - Retractions destroy credibility – BP
 - Huge pressure for information
 - Rush to Judgment
- D. To the extent you can, communicate your message
 - Develop an effective message – BP/Hayward
 - Deliver it consistently
 - McDonalds
 - Provide timely information
- E. Proactive is better than reactive (as long as C. above is obeyed)
- F. Timing may make a difference

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Corporate Crisis Survival Rules

4. Preserve all documents, data and evidence

- Good intentions
- Suspend document destruction policies
- Obstruction of justice issues
- Consider data that may be deleted automatically, or physical evidence that might otherwise be discarded as a result of a repair or remediation
- Consider photos, videotapes, split samples

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Corporate Crisis Survival Rules

5. Gather the facts

- Debrief employees/those involved
 - Who does this?
- Separate representation issues



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Corporate Crisis Survival Rules

6. Control the flow of information

- Control the faucet
- Speak with one voice



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Corporate Crisis Survival Rules

7. Determine whether there is an obligation to report
 - Licensing organizations
8. Remediate/repair
 - Consider whether similar corrective action is necessary in other locations or situations

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Corporate Crisis Survival Rules

9. Consider disciplinary action
10. Identify and notify insurers
11. Privilege issues
 - Public relations consultants
 - Joint defense

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Additional Lessons

- There are no secrets
 - Technology
- The approach of Congress
 - Subpoena - no privilege
 - Internet



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More Lessons Learned

- In some cases, it may not make any difference if you win in the end
- Initial reaction is important
 - Customers
 - Employees
 - Regulators
 - Prosecutors

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Conclusion

- “Managing” is key word here
- Be prepared
- Act quickly where you have to
- Speak carefully

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