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When communications with public relations firms are privileged

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Whether a product recall, a cyberattack or some other scenario, crisis management often becomes an all-hands-on-deck situation where professionals from different disciplines, such as lawyers and public relations personnel, work together to handle a specific situation. This will often require these professionals to communicate with one another regarding anticipated or pending litigation.

We all know that the attorney-client privilege and the work product doctrine keep attorney-client communication and the work done in the anticipation of or for litigation privileged.

It is less clear whether communications and work product of an attorney and third-party consultant working together is also protected by attorney-client privilege and the work product doctrine.

In *Stardock Systems Inc. v. Reiche,*[1] the U.S. District Court for the Northern District of California tackled this question, and held that, as is the answer to many legal questions, it depends.

THE *STARDOCK* CASE

Stardock is a trademark action regarding two video games, Star Control and Star Control II, which the defendants created and developed 25 to 30 years ago.

The defendants initially licensed Accolade Inc. to publish Star Control I and II. After the license expired, the plaintiff bought the Star Control trademark registration from Accolade's successor out of bankruptcy.

The plaintiff asked the defendants to license their copyrighted material from Star Control I and II, but the defendants rejected this request. As a result, the plaintiff filed suit alleging that the defendants had infringed on the plaintiff's Star Control trademark.

The defendants responded by alleging that the plaintiff was attempting to steal their intellectual property and prevent them from developing a sequel to the games.

The defendants further alleged that beginning about two months before the plaintiff filed suit, the plaintiff engaged in a "PR war" against the defendants consisting of hundreds of posts on online forums and social media platforms. They said the posts "blatantly misrepresented the facts and [sought] to sway public opinion in favor of [plaintiff]" and its video game to force defendants to settle the case and abandon their IP rights.[2]

As a result of the alleged PR war, the defendants' counsel retained a third-party public relations firm to provide communications and public relations counseling.

The plaintiff served the defendants' PR firm with a subpoena asking for, among other things, documents relating to the communications the PR firm had with the defendants and their attorney.

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While the PR firm did produce responsive, non-privileged documents,[3] the PR firm and the defendants maintained that some of the requested documents were privileged. The parties filed a joint discovery letter brief, which was resolved by the District Court's November 2018 opinion.

According to the defendants, the requested documents were privileged because the PR firm was hired to "provide input on legal strategy, including regarding initial pleadings and communications about the case to counteract [the plaintiff's] false and negative statements."[4]

The plaintiff countered that the documents were not protected because the defendants engaged the PR firm to "orchestrate a social and other media assault on [the plaintiff] and in particular its CEO" to turn public opinion against the plaintiff "by engaging in 'inflammatory' postings and representations that appear to be related to the current litigation."

RELEVANT AUTHORITY AND THE COURT'S RULING

The District Court recognized the existing relevant authority on this topic.

First, in the 9th U.S. Circuit Court of Appeals, the following eight-factor test is applied to determine whether certain communications are covered by attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.[5]

The District Court also recognized that the 2nd U.S. Circuit Court of Appeals grappled with an analogous set of facts when it determined that attorney-client privilege extends to communications with an accountant employed by an attorney to help the attorney understand the client's situation so that he may provide legal advice.[6]

The 2nd Circuit stated that the privilege extends from a client to an accountant "where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present."[7]

The District Court also acknowledged and relied on another federal district court case with similar facts.

In *In re Grand Jury Subpoenas,* the U.S. District Court for the Southern District of New York held that attorney-client privilege, in some circumstances, "extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services."[8]

The New York court explained that an appropriate circumstance would be one where there are:

> (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 [or litigation] (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by attorney-client privilege.[9]

The plaintiff did bring the court's attention to another case in the Northern District of California that held communications between an attorney and a public relations firm were not privileged.

In *Schaeffer v. Gregory Village Partners,*[10] the District Court held that where the client hired a public relations firm to perform a variety of mostly non-legal tasks as a "functional employee," the privilege did not attach.

However, the situation described in *Schaeffer* is distinguishable from the facts in *Stardock Systems* because the public relations firm in *Stardock* was hired by the defendants' counsel, not the defendants, and because the public relations firm assisted defendants' counsel with legal strategy.

Therefore, in *Stardock,* the court found that because defendants' counsel hired the PR firm to provide PR counseling, specifically for the purposes of litigation strategy in the current action, just like the services the PR firm in *In re Grand Jury Subpoenas* rendered, attorney-client privilege extended to the withheld communications between the PR firm and defendants' counsel pertaining to "giving and receiving legal advice about the appropriate response to the lawsuit and making related public statements."

In *Stardock*, the court found that attorney-client privilege extended to the withheld communications between the PR firm and defendants' counsel pertaining to "giving and receiving legal advice about the appropriate response to the lawsuit and making related public statements."

Examples of the documents that were properly withheld because they dealt with litigation strategy and the suit include e-mail communications between the PR firm and defendants' counsel regarding the "draft answer and counterclaim," as well as "potential exhibits" attached to, and the "filing" of, said draft answer and counterclaim.

Other examples include "response to initial press inquiry" and the strategy related to said response; "potential reporters and publications requested by counsel"; "claims"; "draft press release"; "settlement negotiations"; "public posts"; and "services" as well as "potential future strategy."

WHEN ARE COMMUNICATIONS AND WORK PRODUCT PRIVILEGED?

The *Stardock* case clarified that when communications are confidential, made between lawyers and third-party consultants who are hired by counsel to assist in dealing with litigation, made for the purpose of giving or receiving legal advice, and directed at handling a client's legal problems, these communications are "undeniably" protected by attorney-client privilege.[11]

When public relations consultants are hired to advise whether a change of venue is desirable due to the state of public opinion in a community, whether jurors from particular backgrounds are likely to be favorably disposed to a client, how a client should behave while testifying to impress jurors, and on other similar matters that "have a close nexus to the attorney's role in advocating the client's cause before the court," their communications with counsel are protected by attorney-client privilege.[12]

The *Stardock* case also made clear that as long as the sharing of an otherwise protected work product is intended to remain confidential, an attorney does not waive the work-product protection by sharing it with a consultant for public relations assistance.

The court held that when a document that was made both for public relations advice and litigation is not produced because it is a work product, "a party must show that the document 'would not have been created in substantially similar form but for the prospect of litigation,' and that 'the litigation purpose so permeates any [PR] purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.'"[13]

WHEN ARE COMMUNICATIONS NOT PRIVILEGED?

In *Stardock,* the District Court focused more heavily on when communications are in fact privileged.

However, it also acknowledged that there are circumstances where communications with public relations firms and consultants are not privileged.

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These situations may arise when the client hires a PR firm directly for general public relations services.

Further, if a consultant is retained, by counsel or the client, for a non-legal purpose, then communications are not privileged.

HOW TO PROTECT YOURSELF OR YOUR BUSINESS

The District Court's discussion in *Stardock* has provided key insights and some general considerations that can help ensure that communications with third-party consultants are privileged.

First, raise the issue of attorney-client privilege with your attorney. Make sure he or she is aware that communications with third-party consultants are not always protected.

Second, if you and your attorney do wish to hire a third-party consultant, have your attorney retain the consultant or firm.

Third, make sure the communications you expect to be privileged are for the purpose of giving or receiving legal advice or are directed at handling legal problems. If they are not, they will not be protected, even if your attorney retained the consultant.

Finally, make sure the communications are intended to remain confidential. Encourage your attorney and third-party consultant to include labels marking any communication or document that is to remain privileged as confidential or attorney work product.

Notes

1 No. 17-cv-7025, 2018 WL 6259536 (N.D. Cal. Nov. 30, 2018).

2 2018 WL 6259536 at *2.

3 This included communications with reporters, a final press release related to the case and related internet posts.

4 *Id.*

5 *United States v. Graf,* 610 F.3d 1148, 1156 (9th Cir. 2010).

6 *United States v. Kovel,* 296 F.2d 918, 922 (2d Cir. 1961).

7 *Id.*

8 265 F. Supp. 2d 321, 325 (S.D.N.Y. 2003).

9 *Id.* at 331.

10 78 F. Supp. 3d 1198, 1200 (N.D. Cal. 2015).

11 2018 WL 6259536, at *6.

12 *Id.* (quoting *Grand Jury Subpoenas,* 265 F. Supp. 2d at 326).

13 *Stardock,* 2018 WL 6259536, at *6 (quoting citing In re *Grand Jury Subpoena (Torf),* 357 F.3d 900, 908, 910 (9th Cir. 2004)).

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