
EXTENDING THE PRIVILEGE TO LITIGATION COMMUNICATIONS SPECIALISTS IN THE AGE OF TRIAL BY MEDIA

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I. INTRODUCTION

High-profile civil litigation is not just decided in the courts; it also is decided in the court of public opinion. Courts and legal commentators are increasingly recognizing that the media, through the way it covers litigation,

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has a very real impact on the resolution of individual lawsuits. Common sense dictates that it is within a lawyer's role, therefore, to work with reporters on their stories to ensure accurate reporting. Many defense attorneys in high-profile cases, though, flinch at the idea of saying anything to reporters out of concern that such conversations could be misconstrued as an attempt to affect the jury pool or persuade a judge or jury. For this reason, rules and beliefs have developed as to how lawyers may appropriately engage the media to mitigate its impact on their clients.

Regardless of one's stand on an attorney's extrajudicial speech, there is a general consensus that media coverage can affect a lawsuit in two broad ways. First, the media can unduly influence the defenses, motions, and settlement options that a defendant might consider.¹ This is particularly true if the coverage has a negative crossover effect on a defendant's business, livelihood or other important outside interest. Second, media coverage can change the dynamics in the courtroom, so that when "trial lawyers make their arguments before juries, heads nod in recognition of what was said during the media campaign."²

Good plaintiffs' lawyers understand this nexus and have adopted litigation techniques to maximize their leverage. In the game of high-profile corporate litigation, plaintiffs' lawyers will use the media as a vehicle through which they run their triple pressure point litigation play: (1) driving up the costs of the litigation, (2) driving down stock prices, and (3) vilifying the company among consumers and potential juries. To avoid this unfair disadvantage, many corporate and high profile individual defendants settle cases under the theory that a "bad settlement is better than a good lawsuit"³ – a flawed resolution of a case that, when viewed collectively, tarnishes the American civil justice system.

In these situations, working with the media to create more balanced, accurate, and less sensational coverage of a lawsuit is a necessary element in

¹ For example, at the early stages of the Baycol litigation, the lead plaintiffs' lawyer, Mikal Watts, said that he purposefully worked the court of public opinion: "I was feeding a lot of information to European and U.S. papers . . . It was part of my strategy to affect the stock price, which I was very successful at." The article notes that "nervous investors bailing out of its stock kept driving up the cost" of the litigation. Monica Langley, *Courtroom Triage: Bayer, Pressed to Settle a Flood of Suits Over Drug, Fights Back*, WALL ST. J., May 3, 2004, at A1.

² Steven B. Hantler, *Trial By Newswire*, LITIG. MGMT., Summer 2003, at 17 ("In short, the trial lawyers have blurred, to the point of elimination, the lines that traditionally separated the courtroom; product and service marketing; and customer, public, and shareholder relations.")

³ Interview by Daryn Kagan, CNN Anchor, with Kendall Coffey, CNN Commentator (CNN television broadcast, Nov. 12, 2003), at <http://www.cnn.com/transcripts/031-1/12/bn.03.html> (last visited Oct. 26, 2004) (quoting Mr. Coffey).

defending high profile defendants. But most attorneys are not trained in public relations. Further, their attention generally is and should be focused on the more traditional aspects of lawyering, such as discovery, motion practice, and trying the case. To fill this void, there are people who have become skilled in litigation communications. These experts, and not the trial counsel themselves, often are the more appropriate personnel to analyze coverage, anticipate how legal defenses will come across in the media, and offer strategic advice as to how to protect the litigant's legal interests in the media coverage.

Attorneys should have the freedom to hire those who practice litigation communications so they can represent their clients productively inside and outside the courtroom. In order for an attorney to do this in a way that provides the greatest value for the client, courts would have to extend the rubric of privileged communications to those outside communications experts. The problem, however, is that the law has only begun to develop as to whether the attorney-client privilege and work product doctrine apply, and if so, when they apply, to those who provide litigation communications services. Currently, this uncertainty is discouraging lawyers from employing these experts effectively. As this article will show, hiring litigation communications experts can be an essential tool in the proper representation of a client in litigation.

This article first examines the current nature of high-stakes civil litigation, in particular, how the media inherently favors plaintiffs and, consequently, how plaintiffs' attorneys use the media to their advantage.⁴ It next addresses the common misconception that defense attorneys should not publicly respond to negative publicity or outright attacks on their clients in the media for fear of violating state ethics rules. Not only is such an attitude akin to an ostrich burying its head in the sand, it can harm a client's litigation position, and as some suggest, be a breach of one's responsibility to that client.⁵

This article then examines several recent court decisions in this quickly developing area of law. Of particular importance is a June 2003 ruling by the United States District Court for the Southern District of New York, which became the first court to extend the attorney-client and work product privileges to include outside litigation communications specialists who assist attorneys in providing legal services.⁶ In so doing, the learned Southern District Judge

⁴ Although this Article focuses on corporate civil defendants, much of the analysis presented is equally applicable to defendants in criminal trials.

⁵ Debra S. Katz et al., *Extrajudicial Statements: Lawyers' Ethical Obligations in Communicating with the Press*, SH039 ALI-ABA 1015, 1023-1024 (Dec. 1999).

⁶ See *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp.2d 321, 323, 329-31 (S.D.N.Y. 2003).

Kaplan joined a growing number of courts that acknowledge public relations can be a necessary element in litigating a case and in achieving more accurate results from the legal system.⁷ The Article concludes that courts should follow the lead of the Southern District of New York and extend the attorney-client privilege and work product doctrine to litigation communications specialists as non-testifying experts.⁸ This will better permit high-profile defendants and their lawyers to counter negative coverage in the media and provide all the parties that could affect the result of the lawsuit with a balanced understanding of the case.

II. THE SPECIAL CHALLENGE OF PRETRIAL PUBLICITY FOR DEFENDANTS

A. Pro-Plaintiff Media Bias

Litigation involving well-known companies or individuals always has grabbed the attention of the news media, especially when it involves sensational charges. The magnitude of the coverage and the filter through which the media reports on litigation can create a “clear plaintiff bias in civil cases.”⁹ While small companies can find themselves under the media spotlight in a particularly novel or “bet the company” suit, the media tends to focus on allegations against established and respected corporate defendants.¹⁰ These larger companies tend to have household names, and allegations against them can make good “copy” – even if the allegations are seemingly spurious, commonplace or unproven.¹¹ The same is true for litigation involving celebrity defendants.¹²

In covering litigation, particularly corporate litigation, the media has an inherent bias that favors plaintiffs. When charges are made public, the media

⁷ *Id.* at 330-31; *see infra* Part IV, C.

⁸ In the historic analysis of legal ethics, the appropriateness of extrajudicial speech and determinations in whether to extend privileges to non-testifying experts, courts have not distinguished between criminal and civil litigation. *See In re Grand Jury Subpoenas*, 265 F. Supp.2d at 327-328.

⁹ Dirk C. Gibson & Mariposa E. Padilla, *Litigation Public Relations Problems and Limits*, PUB. REL. REV., 215, 216 (Jun. 22 1999) (citing Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, J. OF APPLIED SOC. PSYCHOL. 21 (1991)).

¹⁰ John K. Villa, *Privilege and PR Firms*, 19 NO. 7 ACCA DOCKET 88, 91-92 (July/August 2001).

¹¹ *Id.* at 88.

¹² *See, e.g.*, Paul Pringle, *Hush-Hush High-Profile Cases: Dome of Silence Caps Celebrity Cases; Authorities: It's in Defendants' Best Interests*, L.A. TIMES, Mar. 22, 2004, at A1 (citing a lawyer as saying, “There seems to be an insatiable appetite for these trials.”).

automatically reverts to the basic elements of story telling and casts the lawsuit in traditional protagonist-antagonist terms.¹³ The defendant, simply by being on the wrong side of the “v,” becomes the “villain” to the plaintiff’s “victim,” whether or not the actual charges have any factual basis or legal merit. Reports frequently lead with the plaintiff’s injury or allegations and only include the corporate position as a response.¹⁴ These stories rarely are counterbalanced by positive stories about the defending company. Because companies would rather not draw attention to any litigation, they usually do not seek publicity for their victories. Even if they did, reporters often do not see corporate litigation victories as particularly newsworthy. Goliath is supposed to beat David; that is not news.¹⁵

Furthermore, the corporate defendant’s position often is given scant attention in news coverage, and, when included, usually comes across as defensive.¹⁶ Corporate defendants are placed in the position of having to prove the “nonnegative” in an effort to exculpate themselves – something that is very difficult to do when an unpopular defendant, particularly with science-based defenses, is juxtaposed with a grieving plaintiff who is legitimately and gravely injured. So, “how, without appearing callous, can a company argue in the court of public opinion that a plaintiff’s child died because he misused the product, not because the product was defective?”¹⁷

Not surprisingly, this inherent media bias has a direct impact on the public’s perception of corporate lawsuits – a difficult situation that is exacerbated by

¹³ Phil Goldberg, *Facing Antitrust Action? Who’s Handling Your Media?*, METRO. CORP. COUNS., Dec. 2000, at 42.

¹⁴ See, e.g., William Sherman, *Two Class-action Lawsuits are Filed Against Major New York Modeling Agencies*, N.Y. DAILY NEWS, Feb. 29, 2004 (mentioning defendant’s position for first time in ninth paragraph in a forty-two paragraph article); Bruce V. Bigelow, *New LawsUIT Focus on Stock Trading by Top Executives at Peregrine Systems*, SAN DIEGO UNION-TRIB., Feb. 28, 2004 (providing defendant’s position in just three of the first twenty-two paragraphs); Chris Stirewalt, *Asbestos Trial Focuses on Carbide; Lawyers Exchange Opening Statements*, CHARLESTON GAZETTE, Sept. 26, 2002, at 1A (stating that on the day of opening arguments, the nineteen-paragraph article focused nearly entirely on plaintiff’s argument, mentioning defendant’s position only in paragraphs nine through fourteen); Peter B. Lord, *White House Battles Paint Companies in Lead Case*, PROVIDENCE J., Dec. 15, 2001, at A3 (leading with attorney general’s arguments and using companies’ position as a rebuttal).

¹⁵ As just one example, a Westlaw search shows that when a jury returned a verdict for \$58.5 million dollars against Chrysler in *Debbs v. Chrysler Corp.* in 1999, many of the nation’s daily newspapers covered the verdict and the allegations. When a Pennsylvania appellate court overturned that verdict in October 2002, the decision received scant coverage, which was mostly contained to legal trade publications. 810 A.2d 137 (Pa. Super. Ct. 2002).

¹⁶ Carole Gorney, *Litigation Disguised as Journalism*, S.F. CHRON., Feb. 28, 1993, at 6Z1.

¹⁷ *Id.*

the reluctance of corporate defendants, in particular, to speak with the media. According to a 2002 public opinion survey, 62% of Americans believe a corporation's "no comment" about a lawsuit means that company is covering up wrongdoing.¹⁸ It is more likely, however, that defense lawyers simply are adhering to the antiquated notion that "lawyers do not try their cases in the media."¹⁹ These lawyers may fear that a judge could misconstrue setting the record straight as an attempt to improperly influence the lawsuit, or worse, a risk that could lose their client's attorney-client privilege for documents shared with litigation communications experts.²⁰

B. Plaintiff Use of Pro-Plaintiff Media Bias

Plaintiffs' attorneys have long understood this media bias and have become experts at using their media advantage to their legal gain.²¹ Certain personal injury lawyers, for example, have admitted that they purposefully and systematically set out to discredit businesses and their products before, during, and after trials in order to raise the stakes for the litigation.²² In some

¹⁸ Julia Hood, *'No Comment' Won't Cut it, Finds Survey*, PR WEEK, Aug. 5, 2002, at 3 (quoting Harlan Loeb, director of Hill & Knowlton's litigation support operation as saying, "This survey points out the glaring void between saying little and exposing yourself to the perception of liability, and articulating a clear and linear story . . .").

¹⁹ Richard M. Kerger, *Dealing with the Media*, 26 LIT. 4, 41 (Summer 2000) ("A lawyer from the old school might ignore the message or tell the producer 'no comment.' From his traditional point of view, there is nothing to be gained from an interview. The journalist is a shark, and the lawyer and his client are nothing more than tasty tidbits."); see, e.g., Gregory J. Wilcox, *Ralph's Hit With Lawsuit: Hiring Practices Broke Law, Union Says*, L.A. DAILY NEWS, Jan. 3, 2004, at B1 (citing Ralph's spokesman as saying that it is company policy "not to comment on lawsuits"); Carrie Melago & Robert Gearty *Go Ahead for Lawsuits*, N.Y. DAILY NEWS, Sept. 10, 2003, at 24 (citing a Port Authority spokesperson as saying "it was agency policy not to comment on litigation"); Charles S. Johnson, *McGrath Sues 15 Energy Companies*, BILLINGS GAZETTE, July 2, 2003, at B1 (citing an Avista spokesperson as saying that the "company's standing policy is not to comment about lawsuits"); Dan Strempel, *Executive Search Firm Sues UBS Warburg for \$2.1 million*, FAIRFIELD CO. BUS. J., Mar. 24, 2003, at 6 (citing UBS Warburg spokesperson as saying that "the company's policy is not to comment on any litigation"); *Court Briefs*, CHARLESTON GAZETTE, Oct. 19, 2001, at A3 (citing defendant as saying, "It's our policy not to specifically address issues that are part of lawsuits.").

²⁰ See Michael Dore & Rosemary Ramsay, *Dealing with Public Relations Concerns in Products Liability and Toxic Tort Litigation*, 213 N.J. LAW. 52, 52 (2002) (noting that "courts have often been overtly hostile to litigants' public relations concerns.").

²¹ See Villa, *supra* note 10, at 88.

²² John Coale, *The Public Policy Implications of Lawsuits Against Unpopular Defendants: Guns, Tobacco, Alcohol and What Else*, Address Before The Federalist Society on Law and Public Policy Studies (Nov. 11, 1999), at <http://www.fed-soc.org/Publications/practicergroupnewsletters/civilrights/firearms-civv3i3.htm> ("We take these cases, such as tobacco - back in 1994, and then put together a three-pronged attack, legal, media, and political. We attacked on these three fronts for five years until they folded and settled.")

instances, the plaintiffs' lawyers will only file a lawsuit after the target defendant is made unpopular – through massive public relations efforts and, sometimes, political hearings.²³ The plaintiffs' lawyers know that many companies have low thresholds for negative publicity and its effect on consumers, employees and investors, and, therefore, will settle claims if the pressure gets too high.²⁴ For the cases that do not settle, the media can have an impact on the way judges and juries perceive the litigants as well as the underlying issues, such as science, class certifications, protective orders, and the right of companies to assert their privileges in discovery proceedings. Some plaintiffs' firms have been known to hire in-house public relations staff, while others use plaintiff-oriented litigation communications consultants. Observers of this kind of high-stakes, high-profile litigation have noted that, as a result of the widespread use of public relations by plaintiffs' firms, "[l]itigation blackmail is being committed in the United States every day . . . in an obvious attempt to generate public sympathy and apply pressure on [civil] defendants."²⁵

C. The Media's Impact on Litigation

Studies of pretrial publicity show that "even modest pretrial publicity can prejudice potential jurors against a defendant."²⁶ In fact, one study showed that "pretrial knowledge was the best predictor of prejudgment": 80% of jurors exposed to prejudicial articles found against the defendant, compared with only 39% of those who were not exposed to pretrial publicity.²⁷ As common sense

(transcript on file with authors); see also Hantler, *supra* note 2, at 16 (quoting a trial lawyer from a report in *The New Yorker* as saying, "A lot of what we discussed was how to talk about the [issue] to the general public. This is a war that has lots of fronts. One of the fronts is the battle for the hearts and minds of the American people.").

²³ Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, in BRIEFLY 19 (Nat'l Legal Center for the Pub. Interest, Nov. 1999) ("[P]ersonal injury lawyers launch their efforts by first vilifying a potential defendant through massive public relations efforts. Then they may use political allies to conduct hearings and provide further ammunition to make the potential defendant unpopular. Only then do they file a lawsuit.").

²⁴ Hantler, *supra* note 2, at 16; see also Phil Goldberg, *Courts Should Keep Media Abuse Out of Litigation*, 167 N.J.L.J. 259, 23 (2002).

²⁵ John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 89 (2002).

²⁶ Gibson & Padilla, *supra* note 9, at 216 (quoting Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, J. OF APPLIED SOC. PSYCHOL. 21, 345 (1991)); see also Pringle, *supra* note 12, at A9 ("Judges overseeing celebrity trials often issue gag orders and seal court documents to help keep media coverage from influencing jury decisions.").

²⁷ Gibson & Padilla, *supra* note 9, at 216 (citing A. Padawer-Singer & A.H. Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in Rita J. Simon (ed.), *THE JURY SYSTEM: A CRITICAL ANALYSIS* 125 (Beverly Hills, CA: Sage Publishers, 1975)).

would suggest, judicial instructions to disregard media coverage “did not reduce the impact of pretrial publicity.”²⁸ Perhaps this is why the media often is seen as a “substantial factor” in the escalation of corporate litigation, such as the breast implant suits, which were largely successful despite the fact that the science behind the accusations was later discredited.²⁹ It sometimes can take the facts and the law several years to catch up to sensational headlines.

Judges also are not immune from outside influences. As is evidenced by polling data and other studies, the judges can be, and sometimes are, influenced by public opinion and the media.³⁰ The U.S. Supreme Court identified this problem when it observed that judges are “subject to the same psychological reactions as laymen . . . [I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion.”³¹ The ABA’s Reardon Committee reached a similar conclusion when it reviewed the potential effect of media bias on the judges in the 1960s: “It is essential that the public official . . . maintain his objectivity and impartiality. Under sustained pressure from the news media . . . this may prove impossible.”³²

Given the impact of pretrial publicity on those who decide lawsuits, it is in the best interest for the courts, in their pursuit of a fair and balanced litigation result, to allow defendants the ability to use litigation communications. It is important that defense lawyers have the ability to respond effectively to publicity that adversely affects their client’s interests. Should defense attorneys remain silent, the plaintiffs’ attorneys and pro-plaintiff groups that regularly engage the media could have an undue and disproportionate

²⁸ Gibson & Padilla, *supra* note 9, at 216.

²⁹ Dore & Ramsay, *supra* note 20, at 52; *See also*, Kenneth R. Foster & Peter W. Huber, JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS, 257-59 (1997) (noting flood of Bendectin and breast implant lawsuits based on “specious scientific evidence”); Richard Hazelton, *Rule of Law: The Tort Monster That Ate Dow Corning*, WALL ST. J., May 17, 1995, A21 (noting that Dow Corning, the leading breast implant manufacturer, filed for Chapter 11 protection in 1995 as a result of lawsuits spurred by faulty expert studies).

³⁰ Robert A. Hillman, *The ‘New Conservatism’ in Contract Law And The Process of Legal Change*, 40 B.C. L. REV. 879, 884 (1999) (arguing that “judges allow public opinion to influence decisions . . .”). As the U.S. Supreme Court has observed, the media and the public opinion it helps shape are “effective restraint[s] on “possible abuse of judicial power . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (citing *In re Oliver*, 333 U.S. 257, 270-71 (1948)).

³¹ *Estes v. Texas*, 381 U.S. 532, 548-49 (1965).

³² Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1821 (1995) (quoting ABA, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 77 (1966) and observing that “[e]ven judges . . . might be influenced by publicity”).

influence on the litigation.³³

III. THE ETHICAL ROLE OF DEFENSE ATTORNEYS TO COUNTER NEGATIVE PUBLICITY

While most Americans, and most lawyers, probably would agree that it is best to have a judicial system insulated from outside influence, it is impossible to remove the court system from our larger society. The question for the legal community, then becomes, what is the best way to reduce the effects of media bias on individual suits? A core tenet of the American legal system always has been that the parties have the greatest stake in ensuring that justice is achieved in the courts. It follows, then, that countering pro-plaintiff bias in the media is the obligation of the defendants. Defendants and their lawyers, therefore, should be permitted to use the appropriate tools to help the media develop more complete stories about legal matters of public interest. In fact, legal ethics rules have been migrating in that direction.

Over the past forty years, there has been a change in the perception of whether legal ethics rules permit defense attorneys to talk with the media if media reports show a bias against their clients. Those who favor defending clients in the media are engaged in a fierce tug-of-war with those who adhere to the notion that lawyers do not “try their cases in the media.”³⁴ The latter group is most influenced by the traditional notion of the “gentlemanly” practice of law.³⁵ They may argue that extrajudicial speech can prejudice a judicial proceeding and, therefore, trumps a lawyer’s or corporation’s First Amendment right to free speech.³⁶

This hesitation, though, is misplaced, and the rationale is inverted. A

³³ “The [I]nternet’s unprecedented speed and reach created a powerful platform for plaintiff law firms, activist groups, and others to recruit plaintiffs and influence opinion at the grassroots level.” Karen Doyne, *Litigation PR Vital to Winning in Court of Public Opinion*, PR WEEK, Mar. 22, 2004, at 8. It is common for sensitive documents to turn up on websites, such as thesmokinggun.com long before they are considered in court. *Id.*

³⁴ See *supra* note 19 and accompanying text.

³⁵ Catherine Cupp Theisen, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 840 (1996) (noting that the first ethical guidelines were written in 1908 by the American Bar Association against public statements in the media as a means of letting non-ABA lawyers understand “how to practice law like gentlemen”).

³⁶ *Id.* at 838-39. In *First National Bank of Boston v. Bellotti*, the Supreme Court firmly established the applicability of First Amendment rights to corporate speech. 435 U.S. 765 (1978). In striking down a Massachusetts statute prohibiting corporations from attempting to influence ballot referenda that did not relate directly to their business, Justice Powell, delivering the opinion of the Court, stated, “If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” *Id.* at 777.

criminal client's right to a fair trial and effective counsel under the Sixth Amendment is the policy basis for the "public right of reply" that bar associations have recognized, particularly as applied to defense lawyers, in their ethics rules.³⁷ In fact, the Supreme Court has accepted that making sure potential jury pools have access to accurate, balanced coverage during pre-trial publicity is a legitimate endeavor for litigation communications.³⁸ In high-profile cases, the only way some lawyers can offer clients their Sixth Amendment right to a fair trial, therefore, is to set the record straight in the media in hopes that accurate reporting will create a neutral litigation environment.³⁹ The precise public policy reasons that protect a criminal defendant's right to seek fair coverage in the media apply to defendants in high-profile civil trials, especially when punitive damages or individual reputations and livelihoods are at stake in a case.⁴⁰

A. Origins of Attorney Ethics Rules on Extrajudicial Speech

In the 1960s, the courts initially provided significant ammunition against allowing lawyers their right to extrajudicial speech. These rulings responded to the media circuses surrounding President Kennedy's death and the murder charges against Dr. Sam Sheppard in Ohio. The Warren Report strongly denounced the wide availability in the media of significant details of President Kennedy's assassination, stating that had Lee Harvey Oswald survived, it would have been unlikely that he could have received a fair trial.⁴¹ At around the same time, the Supreme Court overturned the murder conviction of Dr. Sheppard (who later became the subject of the movie "The Fugitive") because the media created significant public prejudice against the defendant.⁴²

³⁷ Watson, *supra* note 25, at 96 ("The right-of-reply concept was grounded in the Sixth Amendment's guarantee of a fair trial and the recognition that defense attorneys should not be expected to stand silently while reports in the media damaged their clients' prospects of winning . . .").

³⁸ See *Genitle v. State Bar of Nevada*, 501 U.S. 1030, 1039-40, 1058 (1991).

³⁹ See *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 323-34, 326 (S.D.N.Y. 2003).

⁴⁰ See Interview by Kagan with Coffey, *supra* note 3 ("If you win \$20 million in court and lose a lifetime of earnings and success and impact throughout the community and throughout the nation, then the litigation pales in comparison, obviously, to [Rosie O'Donnell's] public impact and public presence.").

⁴¹ See REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 238-40, at http://www.archives.gov/research_room/jfk/warren_commission/warren_commission_report_chapter5.html (noting that extensive media coverage, which divulged evidence and included statements that might not have been admissible at trial, endangered Oswald's constitutional right to a trial by an impartial jury).

⁴² See *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

In issuing its decision, the Court recognized that “[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.”⁴³

In response to these opinions, the American Bar Association formed the Advisory Committee on Fair Trial and Free Press to promulgate new ABA rules on trial publicity.⁴⁴ The Committee’s report led to the adoption of ABA’s Model Code of Professional Responsibility, Disciplinary Rule 7-107, in 1969.⁴⁵ The rule, which was adopted in most states, said that in civil actions an attorney could not make extrajudicial statements, other than a quotation from public records, if it reflected on the character or credibility of a witness or party, expressed an opinion on the merits of the claims or defenses of a party, or “[a]ny other matter reasonably likely to interfere with a fair trial of the action.”⁴⁶ Lawyers were fairly tightly gagged in their interactions with the media.

B. Court Decisions Gradually Required Relaxation of the Prohibition

Starting in the 1970s, the judiciary began invalidating these rules as too restrictive and violative of the First Amendment.⁴⁷ In *Chicago Council of Lawyers v. Bauer*, for example, the United States Court of Appeals for the Seventh Circuit found that a district court’s “no-comment” rules, which barred lawyers from making public comments about ongoing civil and criminal cases, deprived litigants of their free speech rights under the First Amendment.⁴⁸ The district court rule at issue, like Disciplinary Rule 7-107, prohibited extrajudicial statements “if there is a *reasonable likelihood* that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.”⁴⁹ The court held that “[o]nly those comments that pose a ‘serious and imminent threat’ of interference with the fair administration of justice can be constitutionally proscribed.”⁵⁰ The court specifically recognized the

⁴³ *Id.*

⁴⁴ See generally STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tentative Draft 1966).

⁴⁵ See Gabriel G. Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1133-34 (1996).

⁴⁶ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-107(G) (2003).

⁴⁷ See, e.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1030-31 (1991) (citing *In re Oliver*, 333 U.S. 257, 270-71 (1948)); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

⁴⁸ *Bauer*, 522 F. 2d at 248-49.

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.* at 249.

importance and significance of attorney speech: "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion."⁵¹

The ABA tried to accommodate *Bauer* by adopting Model Rule of Professional Conduct 3.6 in 1983, which authorized sanctions for attorney speech that produced a "substantial likelihood of materially prejudicing an adjudicative proceeding" and prohibited attorneys from discussing information likely to be inadmissible at trial.⁵² There remained, however, an overriding principle disfavoring extrajudicial speech, and it was still considered unlawful to advocate in the media.

The view that extrajudicial attorney statements could be proper, particularly when made by defense counsel, received a boost in the 1991 Supreme Court case *Gentile v. State Bar of Nevada*.⁵³ The case involved Dominic Gentile, an attorney in Nevada, who held a press conference "[h]ours after his client was indicted on criminal charges."⁵⁴ Gentile, who reviewed the applicable Nevada ethics code,⁵⁵ determined that unless some of the weaknesses in the State's case were made public, "a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors."⁵⁶ While Gentile "sought only to counter publicity already deemed prejudicial,"⁵⁷ the Nevada Bar found him in violation of a disciplinary rule prohibiting the dissemination of information that has a "substantial likelihood of materially prejudicing an adjudicative proceeding," and issued a private reprimand.⁵⁸

The U.S. Supreme Court, in its 1991 decision, struck down the Nevada ethics rule for vagueness.⁵⁹ In delivering a portion of the Court's opinion, Justice Kennedy laid a marker for the right of lawyers to use extrajudicial

⁵¹ *Id.* at 250. This observation was later quoted by the Supreme Court. *Gentile*, 501 U.S. at 1056. The court in *Bauer* was particularly concerned with the right of a plaintiffs' lawyer to make public statements on behalf of his or her client to balance the ability of nonlawyer representatives of public or private defendants to comment on the case in the media. *Bauer*, 522 F.2d at 258.

⁵² See *Gregg*, *supra* note 45, at 1337 (emphasis added).

⁵³ 501 U.S. 1030 (1991).

⁵⁴ *Id.* at 1033.

⁵⁵ NEV. SUPREME COURT RULE 177 was substantively identical to the ABA's MODEL RULES OF PROF'L CONDUCT R. 3.6, and prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding," with certain specified exceptions. *Id.*

⁵⁶ *Id.* at 1042.

⁵⁷ *Id.*

⁵⁸ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033-34 (1991).

⁵⁹ *Id.* at 1034.

statements to seek a just legal result. Justice Kennedy stated,

An attorney's duties do not begin inside the courtroom door . . . Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.⁶⁰

In 1994, the ABA formalized this opinion by drafting ethics rules supporting the right of lawyers to defend their clients in public.⁶¹ It modified Rule 3.6 to add a "right of reply" so that lawyers would feel free to respond to "particularly egregious publicity without fear of sanction."⁶² Now, ABA rules clearly recognize that a lawyer acts within his or her professional responsibility when making "a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."⁶³ In recognition that individual lawsuits often involve larger legal and public policy issues, the ABA also acknowledged that representing a client may extend beyond legal issues "to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁶⁴

As these cases and the development of ethics rules indicate, hesitation by some defense lawyers to engage the media to mitigate plaintiff bias is misplaced.⁶⁵ Working to ensure accurate coverage to minimize the media's impact on litigation is distinguished from waging a "smear campaign" against a litigation opponent, something the authors of this article certainly would not endorse. Rather, the type of litigation communications activities that would benefit from the attorney-client privilege and are discussed in this article generally deal with the defendant's conduct and the defendant's internal documents and strategies. In those areas, the capacity of lawyers to be

⁶⁰ *Id.* at 1043.

⁶¹ *See* Gregg, *supra* note 45, at 1346.

⁶² *See id.* at 1382.

⁶³ MODEL RULES OF PROF'L. CONDUCT R. 3.6(c) (2003) provides that, notwithstanding the general prohibition on lawyers making extrajudicial statements that might have a substantial likelihood of materially prejudicing an adjudicative proceeding, "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Statements made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity." *Id.*

⁶⁴ *Id.* at R. 2.1.

⁶⁵ Defense attorneys often seek protective orders to govern the litigation. These attorneys may be reticent to engage the media and try to secure a protective order in order to stop the other parties from using the media to their advantage. In recent years, judges in high profile cases "appear to be increasingly willing to impose gag orders." Frederick P. Hafetz et al., *Gag Orders: Legal and Practical Issues Confronting the Media*, 605 PRACTICING L. INST. 239, 245 (2000) (including a detailed discussion on the history of protective orders and the types of protective orders courts issue).

advocates for their clients among the public has solidified.⁶⁶

IV. THE LITIGATION COMMUNICATIONS SPECIALIST

Communicating with the media in high profile, pressurized situations is a specialized skill, just like accounting, science and other areas in which lawyers are permitted to consult – confidentially – with outside experts. As with any other area of law requiring specialized skill, lawyers should be able to consult with those skilled in litigation communications to help them perform the media-related aspects of their jobs.⁶⁷ As Judge Kaplan from the United States District Court for the Southern District of New York recognized, lawyers are not necessarily capable or experienced at public relations.⁶⁸ Skills for handling the media are not regularly taught in law school, are not generally considered in hiring corporate counsel, and are not relevant to many of the issues and cases that corporate law departments face. During the 1990s, after *Gentile v. Nevada*,⁶⁹ and several high-profile civil and criminal cases, a number of public relations professionals recognized the need for such skills and began specializing in litigation communications.⁷⁰

In the last decade or so, an “entire industry of legal public relations

⁶⁶ While these rules may evolve further, it is unlikely that they would return to a more restrictive role for attorneys, as “every major trial publicity rule introduced before 1994 has been invalidated by some court as overly restrictive of lawyers’ First Amendment rights.” Gregg, *supra* note 45, at 1323. Some commentators have called for different rules regarding plaintiffs and prosecutors as opposed to defendants. See, e.g., Max Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53, 120-21 (1983). Others have viewed litigation public relations as so central to a defense that they have advocated that legal aid societies offer communications counsel. See, e.g., Gibson & Padilla, *supra* note 9, at 220 (citing statements by Richard Stack, an attorney and professor of public communication at The American University in Washington, D.C.). Either way, it is well settled that lawyers have a right, and potentially an obligation, to consider these extrajudicial factors. See Ryan Brett Bell & Paula Odysseos, Comment, *Sex, Drugs, and Court TV? How America’s Increasing Interest in Trial Publicity Impacts Our Lawyers and the Legal System*, 15 GEO. J. LEGAL ETHICS 653, 669 (2002) (“The ultimate duty of an attorney is to serve the needs of her client, which often necessitates taking extrajudicial factors into account when planning a litigation strategy.”); John C. Watson, *Litigation Public Relations: The Lawyers’ Duty to Balance New Coverage of Their Clients*, 7 COMM. L. & POL’Y 77, 82 (2002) (suggesting that attorneys could face malpractice suits for not advocating in the media if not doing so puts the client at a negative litigation position).

⁶⁷ Molly McDonough, *Lawyers’ Talks With PR Agents Privileged, Judge Says*, 2 NO. 23 A.B.A. J. E-REP. 1, 1 (Jun. 13, 2003) (quoting Martha Stewart’s attorney, Robert G. Morvillo, as stating, “We are moving into a modern world [where] it is simply imperative that lawyers have access to this kind of assistance.”).

⁶⁸ *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003).

⁶⁹ 501 U.S. 1030 (1991).

⁷⁰ Moses, *supra* note 32, at 1829.

consultants” has developed specifically for the purpose of counseling and helping lawyers – both defense and plaintiffs’ attorneys – handle the media.⁷¹ Indeed, several books have been written on this topic and most large public relations and public affairs firms include litigation communications as a specialty area.⁷² Part of what makes litigation public communication different from “regular public relations” is that the practitioners generally are not charged with disseminating or “pitching” stories.⁷³ Rather, they help manage the news, work with reporters to understand the litigation process and the significance of legal rulings and motions, and provide clients with strategic counsel as to how to respond to certain attacks.⁷⁴ As one practitioner in corporate defense litigation communications noted, “Litigation PR is not for the kids. The hazards are too great. It can re-do a company or end a company.”⁷⁵

What makes litigation communications specialists “experts” is that, in addition to being fluent in media relations, they have an understanding of the legal world.⁷⁶ This skill requires the ability to understand and translate legalese into simple terms and concepts that the public can comprehend. Speaking with the press in the midst of litigation demands a comprehension of legal procedures and doctrines; with corporate litigation, it also necessitates familiarity with restrictions on corporate communications. For example, unlike plaintiffs’ attorneys, corporate lawyers are restricted by securities law in how and when they discuss issues material to a company’s financial standing.⁷⁷

⁷¹ *Id.*; see also Anita Chabria, *Litigation PR Gets a Boost in Time of Corporate Scandal*, PR WEEK, Nov. 25, 2002, at 3 (“The string of recent corporate scandals has elevated litigation PR to a new level of acceptance and use among lawyers and their clients . . .”).

⁷² See e.g., JAMES F. HAGGERTY, Esq. IN THE COURT OF PUBLIC OPINION: WINNING YOUR CASE WITH PUBLIC RELATIONS (John Wiley & Sons, Inc. 2003); RICHARD STACK, COURTS, COUNSELORS & CORRESPONDENTS: A MEDIA ANALYSIS OF THE LEGAL SYSTEM (Fred B. Rothman & Co. 1998); LITIGATION PUBLIC RELATIONS: COURTING PUBLIC OPINION (Susanne A. Roschwalb & Richard A. Stack, eds., 1995); JAMES LUKASZEWSKI, THE NEWEST DISCIPLINE: MANAGING LEGALLY DRIVEN ISSUES (Lukaszewski Group 1995).

⁷³ Dore & Ramsay, *supra* note 20, at 53-54.

⁷⁴ *Id.*

⁷⁵ Rebecca Flass, *Could What You Spin Be Used Against You?*, PR WEEK, Oct. 4, 1999, at 9.

⁷⁶ “Relatively few [public relations practitioners] under[stand] the basics of the legal system or the dynamics of communications during litigation. PR people who failed to know and respect the lawyer’s mindset found themselves talking to brick walls. In the worst cases, public statements or other actions did real damage to the party’s legal position.” Karen Doyne, *Litigation PR Vital to Winning in Court of Public Opinion*, PR WEEK, Mar. 22, 2004, at 8.

⁷⁷ See, e.g., Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release No. 34,47276, 17 CFR pt. 205 (2003) (summarizing the Securities & Exchange Commission’s adoption of conduct rules for attorneys appearing before the Commission who represent issuers).

The new Sarbanes-Oxley rules subject those statements to even further scrutiny.⁷⁸ The Securities and Exchange Commission already has charged at least one company with violating securities law for issuing potentially misleading public statements about pending legal matters.⁷⁹

In addition, corporate lawyers, at least for the time being, are bound by the rules of advertising, even in their statements made during crisis or litigation.⁸⁰ Therefore, statements need to be clear and accurate when discussing corporate policies or products. Especially at the outset of a litigation issue, this can be difficult, as companies often have to gather information about the issue while simultaneously trying to give consumers and investors guidance.⁸¹ When plaintiffs' lawyers are not held to this same standard for accuracy, responding to their charges can be particularly challenging for companies because, as the authors have experienced, the first few news cycles can determine the way the public, and eventually the jurors and judges, view a company's culpability. Finally, many cases involving corporate defendants are governed by case-specific protective orders that prohibit certain types of communications.⁸²

Litigation communications specialists need to understand the nuances of how protective orders work. In sum, lawyers need litigation communications experts who understand these rules and have experience operating within them so that, given today's shortened news cycles,⁸³ they can respond quickly, accurately and effectively when litigation developments occur.

⁷⁸ *Impact of Sarbanes-Oxley*, PR NEWS, Dec. 15, 2003, available at 2003 WL 7816298.

⁷⁹ Patrick A. Tuite, *Court Recognizes 'Patient-Spin Doctor' Privilege*, CHI. DAILY L. BULL., Jul. 9, 2003, at 5..

⁸⁰ This proposition was challenged in *Nike Inc. v. Kasky*, but the case settled after the U.S. Supreme Court did not decide the case on the merits, finding that *certiorari* was improperly granted. 539 U.S. 534 (2003). As a result of the Court's inaction, the previous ruling of the California Supreme Court stands and, therefore, all public statements about a company's products and procedures, even if made in the midst of litigation or a crisis, can be held to strict advertising standards. *Id.* While the ruling only applies to California, as a practical matter, national companies will have to account for this ruling in their communications. *Id.*

⁸¹ See Jay G. Martin, *Developing an Effective Crisis Management Plan for a Corporation*, 65 TEX. B.J. 233, 237 (2002); Mark Herrmann & Kim Kumiega, *On Trial in the Courts of Law and Public Opinion: The Tension Between Legal and Public Relations Advice*, 28 NO. 4 LITIG. 29, 31-32 (Summer 2002).

⁸² Beth A. Wilkinson & Steven H. Schulman, *When Talk is Not Cheap: Communications With the Media, The Government, and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 206-07 (2002).

⁸³ It is the experience of the authors that in high-profile cases, the first news stories of rulings and verdicts often are put on the newswires within an hour of the court's decision; these articles generally set the basic framework for viewing the litigation development.

V. EXTENDING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE TO LITIGATION COMMUNICATIONS SPECIALISTS

At a very basic level, lawyers need to provide their public relations experts with confidential information so that the public relations personnel can provide advice in anticipation of potential media pitfalls, likely defenses and settlement strategies. At the same time, public relations professionals need legal input so they do not unwittingly curtail legal options specific to the case or issue at hand. For example, the legal team must assess whether explanations included in press statements could be misconstrued as admissions or whether certain defenses could be precluded through poorly conceived press statements and explanations.⁸⁴ Full disclosure and coordination between lawyers and their public relations counsel is necessary so that both may do their jobs well and have a chance to enhance the administration of justice.⁸⁵

Given these realities of practicing law in corporate America, extending the attorney-client privilege and the work product doctrine to those who provide litigation communications services is both appropriate and necessary. At the conceptual level, this would institutionalize the right of companies to respond to litigation issues, which could reduce the influence of extrajudicial statements on the courts and allow courts to be honest brokers in the pursuit of justice. That is because, at the technical level, extending the privilege would remove one of the greatest obstacles corporate defendants face in deciding whether to use litigation communications experts: the fear of inadvertently waiving legal privileges over key client documents and allowing the public relations and legal teams' thought processes and work product to be read and used by opposing counsel.

A. The Basics of Privileged Communications

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."⁸⁶ The broad outlines of the attorney-client privilege are well-settled: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently

⁸⁴ Peter Gardner, *Media at the Gates: Panic! Stress! Ethics?*, 27 Vt. B. J. 39 (2001).

⁸⁵ *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003).

⁸⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

protected (7) from disclosure by himself or by the legal advisor (8) except if the protection is waived.⁸⁷

It has been established that corporate clients have the same right to invoke the attorney-client privilege as individual clients.⁸⁸ Under the generally accepted “subject matter” test for determining when attorney-client privilege should apply in a corporate environment, the court asks “whether the communication was for the purpose of seeking and rendering legal advice to the corporation, whether the communication was made at the instance of the employee’s superior, and whether the subject matter was within the scope of the employee’s duties.”⁸⁹ The “control group” test, on the other hand, focuses “on whether the communication was made by” employees who have a position to take a substantial role in the legal affairs of the company.⁹⁰ Communications with outside counsel under these two theories, therefore, are protected under attorney-client privilege.⁹¹ That privilege is not lost when outside counsel shares those communications with agents and subordinates, such as clerks and stenographers, who work “under the direct supervision and control of the lawyer.”⁹²

The attorney work product doctrine is different from the attorney-client privilege.⁹³ The work product doctrine “is an intensely practical one, grounded in the realities of litigation in our adversary system.”⁹⁴ Originally defined by the Supreme Court in *Hickman v. Taylor*,⁹⁵ it protects materials prepared by or at the behest of counsel in anticipation of litigation or for trial so that a lawyer can have a “zone of privacy” in preparing and developing theories and strategy “with an eye towards litigation.”⁹⁶

B. Application of the Privilege to Non-testifying Experts

Individuals who assist lawyers in providing legal assistance can be included under the practitioner’s attorney-client and work product privileges if certain

⁸⁷ See Proposed Supreme Court Standard 503(a)(4), as cited in *U.S. v. Spector*, 793 F.2d 932, 938 (1986), *cert. denied by* 479 U.S. 1031, *post-conviction relief denied by* 888 F.2d 583; *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 324; *In re Cooper Market Antitrust Litigation*, 200 F.R.D.213, 217 (S.D.N.Y. 2001).

⁸⁸ EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 73-74 (3D ED. 1997) [hereinafter EPSTEIN].

⁸⁹ *Id.* at 74.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 106 (citing WIGMORE, *EVIDENCE*, § 2301, at 538 (McNaughton rev. ed. 1961)).

⁹³ EPSTEIN, *supra* note 88, at 297.

⁹⁴ *United States v. Nobles*, 422 U.S. 225, 238 (1975).

⁹⁵ 329 U.S. 495 (1947).

⁹⁶ *Id.* at 510-11.

criteria are met.⁹⁷ In *United States v. Kovel*,⁹⁸ the United States Court of Appeals for the Second Circuit extended the attorney-client privilege to an accountant hired by the lawyer to help him understand documents the client provided so that he could render competent services to his client.⁹⁹ The court found that the presence of the nonlawyers was “necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.”¹⁰⁰ In order to qualify as a non-testifying expert, therefore, the communication between the expert and the lawyer must “be made in confidence for the purpose of [the client] obtaining legal advice from the lawyer. If what is sought is not legal advice . . . or if the advice sought is the accountant’s [or other professional] rather than the lawyer’s, no privilege exists.”¹⁰¹

Courts have interpreted *Kovel* to protect the work¹⁰² of those employed “to assist[] the lawyer in the rendition of legal services.”¹⁰³ Under this philosophy, the work of the non-testifying expert becomes entangled with the attorney’s own privileged work product, “thereby shielding the consulting expert’s efforts from discovery.”¹⁰⁴ As a result, the materials of non-testifying, consulting experts are protected and prevented from introduction at trial.¹⁰⁵ These rulings

⁹⁷ See *United States v. Kovel*, 296 F.2d 918, 922-923 (2nd Cir. 1961). The *Kovel* doctrine applies only to *non-testifying* expert consultants. Expert witnesses, on the other hand, may have to surrender their work product in anticipation of cross-examination.

⁹⁸ 296 F.2d 918 (2nd Cir. 1961).

⁹⁹ *Id.* at 922.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Michael J. O’Hara & Graham Mitenko, *Scope of Discovery of an Expert’s Work Product*, 10 J. LEGAL ECON. 37, 38-39 (2000). There is no separate privilege for experts. In order for their work to be considered confidential, their privilege must be derived from the attorney client privilege or work product doctrine. *Id.*

¹⁰³ *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, 265 F. Supp. 2d 321, 325 (S.D.N.Y. 2003) (citing Sup. Ct. Std. 503(a)(3), (b), *reprinted in* 3 Joseph M. McLaughlin, WEINSTEIN’S EVIDENCE § 503.01 (2d ed. 2003); *People v. Spiezer*, 316 Ill. App. 3d 75, 80 (2000) (stating that “many jurisdictions have held that the reports prepared by the non-testifying, consulting experts are protected from disclosure.”); *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); EPSTEIN, *supra* note 88, at 109. A few courts, however, have narrowly interpreted *Kovel* to only apply to those experts who help lawyers understand materials provided by the client, such as interpreters. See, e.g., *United States v. Ackert*, 169 F.3d 136, 140 (2nd Cir. 1999); see also *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1071-72 (N.D. Cal. 2002) (following *Ackert*); *In re G-I Holdings Inc.*, 218 F.R.D. 428, 435-36 (D.N.J. 2003).

¹⁰⁴ O’Hara & Mitenko, *supra* note 102, at 38-39.

¹⁰⁵ The basis for the protection to non-testifying experts varies among the states. New Jersey relied on the Sixth Amendment right to effective counsel. See *State v. Mingo*, 392 A.2d 590, 592-596 (N.J. 1978). Other courts have relied solely on work product doctrine. See, e.g., *State v. Dunn*, 571 S.E.2d 650, 660 (N.C. Ct. App. 2002); *United States v. Walker*, 910 F. Supp. 861, 864 (N.D.N.Y. 1995). Some courts have merged the two doctrines. See,

are consistent with Justice Powell's recognition in *United States v. Nobles*¹⁰⁶ that the reality of modern litigation means that "attorneys often must rely on the assistance of investigators and other agents" in doing their jobs.¹⁰⁷ As Justice Powell further states, "the interests of society and the accused in obtaining a fair and accurate resolution of the question . . . demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."¹⁰⁸

C. Gradual Extension of Privilege to Litigation Communications Specialists

Only a handful of cases address the application of privilege to litigation communications specialists. In a trademark case in 2000, *Calvin Klein Trademark Trust v. Wachner*,¹⁰⁹ the United States District Court for the Southern District of New York denied the extension of the privilege when a corporation sought the advice of communication professionals.¹¹⁰ In that case, the plaintiffs' outside counsel hired the company's existing public relations firm to act as a consultant for "certain communications services in connection with [the] representation" of the company.¹¹¹ The court found that the public relations personnel were simply "strategizing about the effects of the litigation on the client's customers, the media, or on the public generally."¹¹² The significance of this case is that it demonstrates that courts may find that ordinary public relations, as distinguished from litigation communications, do not meet the criteria necessary to satisfy the work product doctrine. The doctrine serves to "provide a zone of privacy for strategizing about the conduct of litigation itself."¹¹³

One year later, the Southern District of New York again heard a case affecting the application of privilege to litigation communications specialists. In *In re Copper Market Antitrust Litigation*,¹¹⁴ the court extended privilege to a public relations firm, but not under the basis of the non-testifying expert doctrine used in *Kovel*.¹¹⁵ This case involved Sumitomo Corporation, a

e.g., *United States v. Alvarez*, 519 F.2d 1036, 1046-47 (3rd Cir. 1975).

¹⁰⁶ 422 US 225 (1975).

¹⁰⁷ *Id.* at 238.

¹⁰⁸ *Id.*

¹⁰⁹ 198 F.R.D. 53 (S.D.N.Y. 2000).

¹¹⁰ *Id.* at 54.

¹¹¹ *Id.*

¹¹² *Id.* at 55.

¹¹³ *Id.*

¹¹⁴ 200 F.R.D. 213 (S.D.N.Y. 2001).

¹¹⁵ *Id.* at 219-220.

Japanese company not skilled in dealing with the American media.¹¹⁶ The company hired a crisis management public relations firm to handle media allegations that it “conspired to manipulate global copper prices.”¹¹⁷ The consultant was privy to advice from the company’s counsel, and “the legal ramifications” of that advice “were material factors in the development of the communications materials.”¹¹⁸ Because the foreign corporation hired the litigation public relations firm directly, the court found that it was the functional equivalent of an in-house department.¹¹⁹ It then applied the principles of *Upjohn Co. v. United States*,¹²⁰ which extend privilege to a company’s agents who possess “the relevant information the attorney needs to render sound *legal advice*.”¹²¹ The key in *Copper Market Antitrust Litigation* was the legal nexus between the public relations advice and the litigation itself.

Finally, in 2002, the United States Court of Appeals for the District of Columbia addressed a related issue in *FTC v. GlaxoSmithKline*.¹²² Unlike in the previous two cases, the court was not presented with the question of whether to cover the work product of the public relations firm. Rather, it considered the narrower question of whether privilege would be lost simply because otherwise privileged documents were shared with the litigation public relations firm.¹²³ In this case, GlaxoSmithKline had distributed otherwise privileged information to specifically named public relations employees and contractors on a “need to know basis.”¹²⁴ The court did not distinguish between the company’s public relations officials and those hired as outside contractors.¹²⁵ It held that privilege was not surrendered because these professionals were under the company’s confidentiality agreements and “needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel.”¹²⁶

¹¹⁶ *Id.* at 215.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 219.

¹¹⁹ *In re Copper Market*, 200 F.R.D at 218 (stating that “there was no reason to distinguish between persons on the corporation’s payroll and the consultant”).

¹²⁰ 449 U.S. 383 (1981).

¹²¹ *Id.* at 392 (emphasis added).

¹²² 294 F.3d 141 (D.C. Cir. 2002).

¹²³ *See id.* at 147.

¹²⁴ *Id.* (internal quotations omitted).

¹²⁵ *See id.* at 148 (“Our conclusion that the documents are protected by the attorney-client privilege extends also to those communications that GSK shared with its public relations and government affairs consultants.”).

¹²⁶ *Id.* at 147.

D. The Breakthrough Case: *In re Grand Jury Subpoenas*

In *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*,¹²⁷ Judge Kaplan of the Southern District of New York extended privilege to litigation communication specialists.¹²⁸ In that high-profile litigation, the plaintiff was the target of a grand jury investigation initiated by the United States Attorney's office.¹²⁹ "The investigation of Target ha[d] been a matter of intense press interest and extensive coverage for months."¹³⁰ The attorney for the investigation's Target hired litigation communications counsel "out of a concern that unbalanced and often inaccurate press reports about [her] created a clear risk that the prosecutors and regulators conducting the various investigations would feel public pressure to bring some kind of charge against her."¹³¹ As the court noted, the "firm's primary responsibility was defensive – to communicate with the media in a way that would help restore balance and accuracy to the press coverage."¹³²

After addressing many of the developments in the ethics laws governing extrajudicial speech, the court concluded that "attorney efforts to influence public opinion in order to advance the client's legal position[s]" are legal services¹³³ because it can be important to a defendant's "ability to achieve a fair and just result" of the legal matter.¹³⁴ The district court noted that courts have long recognized public relations efforts as a legitimate legal function and have reimbursed court-appointed counsel in a number of instances for time spent "hosting press conferences and performing other public relations" tasks in connection with their representation.¹³⁵ It also noted that the common law recognizes that the attorney-client and work product privileges in appropriate circumstances extend to persons assisting the lawyer in the rendition of legal services.¹³⁶

Under the *Kovel* doctrine, as applied by the Southern District of New York, classifying litigation communication professionals as non-testifying experts extends both the attorney-client privilege and the work product doctrine to the

¹²⁷ 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

¹²⁸ *Id.* at 332.

¹²⁹ *Id.* at 322.

¹³⁰ *Id.* at 323.

¹³¹ *Id.* (internal quotations omitted).

¹³² *In re Grand Jury*, 265 F. Supp. 2d at 323 (internal quotations omitted).

¹³³ *Id.* at 326.

¹³⁴ *Id.* at 330.

¹³⁵ *Id.* at 327-28 (citing *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *reh'g denied, vacated in part on other grounds, and remanded*, 984 F.2d 345 (9th Cir. 1993)).

¹³⁶ *In re Grand Jury*, 265 F. Supp. 2d. at 325, 333.

work performed by the litigation communications specialists.¹³⁷ According to the *In re Grand Jury* holding, the privilege covers:

- (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 clients legal problems are protected by the attorney-client privilege.¹³⁸

The privilege also covers documents provided to the experts as well as those materials the experts provide to the lawyers and clients.¹³⁹

The court recognized that if dealing with the media is part of lawyering in high-profile cases, two truths become evident. First, lawyers should be able to consult with litigation communications specialists to help them provide their clients media-savvy legal advice.¹⁴⁰ Second, full and frank communication among clients, lawyers and litigation communications specialists enhances the administration of justice.¹⁴¹ Litigation communications is a specialized discipline within public relations. It, therefore, makes sense to classify these practitioners as expert consultants, worthy of privileged communications. Other courts should follow the lead set forth by the Southern District of New York.

VI. RECOGNIZING, DEFINING, AND PROTECTING THE PRIVILEGE WHEN APPLIED TO LITIGATION COMMUNICATIONS SPECIALISTS

As the cases previously discussed indicate, litigation communication professionals who offer advice that enable attorneys to provide stronger legal representation meet the *Kovel* standard. These specialists, therefore, should be able to operate within the attorney-client and work product privileges enjoyed by non-testifying experts in most jurisdictions. The underlying rationale of these decisions dictates that in high-profile litigation:

- (1) Legal representation includes media work;
- (2) Lawyers are permitted to consult with outside experts in performing these legal functions; and
- (3) Unfettered coordination between lawyers and their litigation communication experts is in the public interest.

¹³⁷ *Id.* at 331-32.

¹³⁸ *Id.* at 331.

¹³⁹ *See id.* at 332-33.

¹⁴⁰ *Id.* at 330.

¹⁴¹ *In re Grand Jury*, 265 F. Supp. 2d at 329-30 (citing *Upjohn v. United States*, 449 US 383, 389 (1981)).

A. Linking to the Litigation

The scope of litigation communications services covered by privilege, as defined by *In re Grand Jury, Gentile*, and the ABA Model Rules of Professional Conduct, are those activities meant to influence the judicial system in a way to increase the likelihood of an accurate result. So, had the potential defendant in the Southern District of New York case “simply . . . gone out and hired Firm as public relations counsel,” the court may not have extended privilege to that relationship.¹⁴² Therefore, communications between the litigation public relations experts and the lawyers must be to help the lawyers provide legal services.¹⁴³ As discussed earlier in this article, the parameters of what is considered legal services encompass all communications with the potential to influence judges and juries, as well as the litigants themselves.¹⁴⁴

In the privilege context, courts have broadened the definition of what is considered a link to litigation so that privilege “is not limited to communications made in the context of litigation or even a specific dispute, but extends to all situations in which an attorney’s counsel is sought on a legal matter.”¹⁴⁵ This is particularly important for companies with a wide-ranging portfolio of legal issues. The litigations communications privilege discussed in this article, therefore, should extend far beyond individual cases and individual trials and include larger litigation issues important to a defendant’s docket of cases.¹⁴⁶

The purpose of media activity for these broader issues, as with case-specific litigation, is to respond to the media bias and tactics oft employed by the plaintiffs’ bar.¹⁴⁷ For example, companies frequently face a series of lawsuits on the same issue, such as exposure to a potential toxic substance or failure of a widely disseminated product.¹⁴⁸ Coverage of the larger issue or public crisis can define the way the public views the company and its culpability. In addition, trial lawyers often sensationalize their accusations and exaggerate the likelihood of recovery when speaking with the media in an attempt to recruit plaintiffs for copycat lawsuits.¹⁴⁹ It is incumbent on a company, therefore, to

¹⁴² *Id.* at 326.

¹⁴³ *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

¹⁴⁴ *See infra* Part V.

¹⁴⁵ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

¹⁴⁶ In *In re Grand Jury*, the court was silent on this issue, as that case dealt with a criminal investigation and not the challenges of expansive corporate litigation.

¹⁴⁷ Courts are less likely to extend privilege when a public relations firm is used as an offensive tactic in litigation. *See Villa, supra* note 10, at 91.

¹⁴⁸ *See, e.g.*, Dick Thornburgh, *Just Say No to Tort Blackmail*, Wall St. J., Jan. 21, 2002, at A12 (referring to serial litigation involving DuPont’s fungicide Benlate).

¹⁴⁹ *See Moses, supra* note 32, at 1840.

provide the public with accurate information to assist potential plaintiffs in making informed decisions about whether to join a lawsuit.¹⁵⁰ Corporations should be able to respond to these common litigation issues, regardless of whether or not they are tied to a specific lawsuit at the time the issues arise.

In addition, the privilege should cover communications efforts related to the interplay between business interests and litigation results. This position is not inconsistent with *Calvin Klein*, where the court determined that media efforts directed *solely* at the effects of the litigation on business and other audiences and pressures would not be covered.¹⁵¹ As discussed earlier, this analysis fails to fully consider the reciprocal relationship between these other interests and the litigant. Business concerns often have a direct impact on whether and how companies decide to assert their judicial rights, such as taking a case to trial or settling out of court, regardless of whether they were legally or morally responsible for the alleged injuries.¹⁵² After all, companies are structured to make the right business decisions for its shareholders, even if those courses of action are at odds with accurate litigation results. Therefore, the course of the litigation can be determined by how audiences important to a company's business interests – from consumers to employees to investors – react to media coverage of the litigation.¹⁵³

The plaintiffs' bar understands this nexus and has adopted business pressure tactics to drive companies to settle suits.¹⁵⁴ It is part of the trial lawyers' triple pressure point litigation strategy: 1) drive up the cost of lawsuits through extensive discovery requests, 2) drive down the stock price through exaggerated claims with Wall Street analysts regarding the financial impact of the litigation, and 3) vilify the target company or industry to shift public opinion against the defendant. When the trial bar brought a series of suits against the HMO industry, well-known Mississippi trial lawyer Dickie Scruggs explained his use of the pressure point strategy by saying, "In the past, nobody has communicated directly with investors about the vulnerability of their money . . . If HMO investors are smart, they'll lean on their companies to see if we can work something out."¹⁵⁵ During the time Scruggs was meeting with

¹⁵⁰ *See id.*

¹⁵¹ *See Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

¹⁵² *See supra* notes 1 and 2 and accompanying texts.

¹⁵³ *See Harlan Loeb, In Long Run CEOs' Drive to Win Suits Can Hurt Firms*, CRAIN'S CHI. BUS., Oct. 16, 2000, at 11, available at www.craingschicagobusiness.com (last visited Nov. 17, 2004) (on file with author) ("It is critical, for example, to understand the dimensions of a regulatory proceeding or pending case that might be troubling to investors and consumers.").

¹⁵⁴ *See Hantler, supra* note 2, at 16.

¹⁵⁵ David Segal, *HMOs Latest to Grapple with Threat of Investor-Scaring Mega-Verdicts*, WASH. POST, Nov. 12, 1999, at A1.

Wall Street analysts in the autumn of 1999, the stock of Aetna, a health care company that runs HMOs, for example, fell by more than 30%.¹⁵⁶ As a result, as Aetna Chief Executive Officer Richard L. Huber observed, “In one day, more than \$10 billion in American savings was vaporized just by the bark of the wolf.”¹⁵⁷

Only through engaging the media to protect their business interests with respect to the litigation can companies free up their lawyers to focus on making the right legal decisions, such as which motions to file, which defenses to assert, and whether to take the case to trial.

B. Structuring the Relationship

A court’s decision on whether to extend privilege to litigation communications efforts also may hinge on the process that defendants and their lawyers use for governing the relationship with their communications experts. Aspects of these relationships were widely discussed in *Calvin Klein*, *In re Copper* and *In re Grand Jury*.

In determining whether the public relations personnel were experts in litigation communications, Judge Kaplan in *In re Grand Jury* noted that the firm was hired specifically for that litigation, and therefore, presumed to be providing specialized legal related services.¹⁵⁸ This situation was different from that in *Calvin Klein*, where Calvin Klein used its regular public relations firm for the litigation, which signaled to the court that the company was likely receiving general public relations advice.¹⁵⁹ This division of labor theory could cause problems for defendants who work with multi-disciplinary public relations firms that have litigation communications specialists on staff. If defendants choose to use those litigation specialists, it may be advisable to create firewalls between litigation communications staff and the other public relations personnel, sign a separate contract with the litigation communications specialists, and hire them through outside counsel.

Also, there may be a higher likelihood that a litigation communications

¹⁵⁶ See Stock Chart for Aetna Inc. (“AET”) at Fidelity.Com, http://activequote.fidelity.com/rtrnews/research_frameset.phtml?page=stocks_main.phtml%3Fin_page%3Dcharts.phtml%26in_ticker%3DAET (last visited November 9, 2004).

¹⁵⁷ Segal, *supra* note 155. Such stock manipulation, particularly when plaintiffs’ lawyers and others team with short sellers, has been called “outsider trading.” George Gilder, editorial, *The Outsider Trading Scandal*, WALL ST. J., Apr. 19, 2000, at A30.

¹⁵⁸ *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003); see also *United States Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160-62 (E.D.N.Y. 1994) (holding that nonlegal work is not covered by the expert privileges).

¹⁵⁹ *In re Grand Jury*, 265 F. Supp. 2d at 329.

expert will be granted attorney-client and work product privileges when retained by an outside counsel and not by the corporate client itself.¹⁶⁰ The court in *In re Grand Jury* made this point clear, saying it would not have granted the privilege if the company hired the public relations consultants directly, even for the same purpose.¹⁶¹ It is important to note that in *In re Copper Market Antitrust Litigation*, the court extended privilege to a public relations firm the company hired directly.¹⁶² In that case, the court reasoned that the firm was the functional equivalent of an in-house department and did not undergo the analysis required for non-testifying experts.¹⁶³ From a public policy view, this approach is sound. A corporate lawyer should not have to hire outside counsel to obtain the privilege.

When deciding whether to apply the privilege to specific work product, a court may consider whether the work went through outside counsel or was done in the presence of outside counsel. While the court in *In re Grand Jury* said that the outside counsel does not need to be present for every discussion¹⁶⁴ in order to maintain privilege, as a general rule, “[w]hen agents are not . . . supervised by the lawyer, the privilege is hard to maintain.”¹⁶⁵ Therefore, it would be prudent for a company to have a clearly defined policy regarding the types of work that are considered privileged,¹⁶⁶ bind their litigation communications experts to their corporate confidentiality agreement, and urge them to stamp their documents “Privileged-Attorney Work Product.”¹⁶⁷

VII. CONCLUSION

Litigation journalism is a fact of the American judicial system. Ideally, justice would be served solely based on what is admitted and said in the

¹⁶⁰ See generally, *United States v. Brown*, 349 F. Supp. 420, 425 (N.D. Ill. 1972) (noting that where the expert, which in this case was an accountant, “is employed directly by the attorney the cases appear to extend the protection of the privilege”); EPSTEIN, *supra* note 88, at 110.

¹⁶¹ *In re Grand Jury*, 265 F. Supp. 2d at 329, 331. *In re Grand Jury* should not be read to change the precedent set by the District Judge Swain in *In re Copper Market Antitrust Litig.*, as Judge Kaplan noted that the legal issues presented to him in the instant case were different from the ones presented in *In re Copper Market Antitrust Litig.* *Id.*

¹⁶² *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

¹⁶³ *Id.*

¹⁶⁴ *In re Grand Jury*, 265 F. Supp. 2d at 331.

¹⁶⁵ EPSTEIN, *supra* note 88, at 115.

¹⁶⁶ One of the factors the court in *FTC v. GlaxoSmithKline* considered in upholding privilege for the documents shared with the public relations personnel was that they were made aware of the confidentiality of the documents and understood the importance of keeping the documents confidential. 294 F.3d 141, 147-148 (D.C. Cir. 2002).

¹⁶⁷ Mark D. Coldiron & Connie M. Bryan, *Use of Experts in Environmental Litigation and Enforcement Matters*, NAT. RESOURCES & ENV'T 13, 15 (1996).

courtroom. Unfortunately, “[a] commitment to fairness cannot be ensured by insulating the legal process from the broader currents of opinion in a society that is deluged by torrents of information.”¹⁶⁸ While some may argue that litigation journalism “seriously undermin[es] the integrity of our legal process,”¹⁶⁹ it would be futile to suggest that the United States should regulate the media coverage of lawsuits, as is done in Great Britain, where the media cannot report on a trial until after its conclusion.¹⁷⁰ It is understandable that courts and bar associations would struggle with the issue of extrajudicial speech and try to keep it out of lawyering. But as long as the courts cannot control trial publicity, the litigants and their lawyers have a right, and even an obligation, to engage the media. Litigation communication specialists provide the expertise to do so effectively. Courts should adopt the holding in *In re Grand Jury* and expand on it to include communications made by either inside or outside counsel so that high-profile defendants can fairly defend themselves in the court of public opinion and achieve an accurate result in the courtroom.

¹⁶⁸ Geri Denterlein, Editorial, *The Thin Line Between Law and Public Opinion*, B. GLOBE, July 26, 2003, at A101.

¹⁶⁹ Gibson & Padilla, *supra* note 9 (quoting Carole E. Gorney, *The New Rules of Litigation Public Relations*, Public Relations Strategist 1, 24 (1995)).

¹⁷⁰ Gregg, *supra* note 45, at 1326.