Wednesday, October 27
9:00am-10:30am

907 - When "No Comment" Isn't the Right Answer — How to Get Your Side of the Story Out

Stephen Calkins
VP, Deputy General Counsel
Office Depot, Inc.

Janine Greenwood
General Counsel
National Student Clearinghouse

Adam Sand
General Counsel
ZL Technologies

Session 907

Faculty Biographies

Stephen Calkins

Stephen R. Calkins is vice president & deputy general counsel for Office Depot. He is responsible for the North American legal department for Office Depot, which includes attorneys responsible for litigation, labor and employment issues, benefits, contracts, intellectual property, licensing, advertising, records management and real estate. In addition, Mr. Calkins is involved in numerous corporate projects and is responsible for the government relations department, which was formed in early 2010. As part of his duties, Mr. Calkins is also actively involved in the company's media communications efforts.

Prior to joining Office Depot, Mr. Calkins was an attorney with Kilpatrick Stockton LLP in Charlotte, North Carolina, where his practice concentrated in complex commercial litigation.

He received his undergraduate degree (BA) from Michigan State University and his JD from the University of South Carolina.

Janine Greenwood

As the National Student Clearinghouse's vice president and general counsel, Ms. Greenwood is responsible for managing all legal and regulatory matters and providing legal, strategic and business counsel to the Clearinghouse's executive team and board of directors. Ms. Greenwood is also responsible for government relations and for ensuring that the Clearinghouse's business practices and policies meet regulatory requirements and interpreting the potential impact of proposed regulatory changes on the Clearinghouse and its participants.

Before joining the Clearinghouse, Ms. Greenwood was the vice president and general counsel for American Student Assistance. For over twenty years, she served as a legal counsel for several major media organizations, including the Hearst Corporation; Metromedia, Inc.; and Westinghouse Broadcasting Company where her principal area of practice was advising reporters and editors on issues of libel, privacy and media access. She also worked as a reporter, television producer and editor.

Ms. Greenwood has held leadership roles in several industry and professional associations including National Council of Higher Education Loan Programs, ACC and ACC's Washington Metropolitan Area chapter. She is a trustee of the Massachusetts School of Professional Psychology. She also speaks frequently on nonprofit governance and higher education law at industry events and has taught law, media management and regulation at Emerson College, Columbia University and Queens College, NY.

She has a bachelor's from the University of Pittsburgh as well as a master's and a law degree from Columbia University.

Adam Sand

Adam R. Sand is general counsel for ZL Technologies, Inc. - a maker of world-class file and email archiving software that enable large enterprises to instantly access all types of electronic data in order to comply with regulations and litigation requests. Mr. Sand's responsibilities include the negotiation and drafting of technology licensing and partnership agreements, managing the company's growing IP portfolio and providing general legal advice to the business. He also manages the development of ZL's eDiscovery software products.

Prior to joining ZL, Mr. Sand was litigation counsel for eBay, handling many of the company's largest lawsuits and regulatory issues. He was also responsible for advising several of eBay's business units (including PayPal and BillMeLater) on risk avoidance, litigation and eDiscovery issues. Prior to joining eBay, Mr. Sand was an associate with the law firm Jones Day where he represented clients such as Chevron, Apple and at&t on anti-trust issues and business related litigation.

Mr. Sand is a member of several organizations such as The Sedona Conference, ACEDS and OLP, is a frequently speaker on eDiscovery issues throughout the country, has written multiple articles and conducts continuing legal education seminars and other programs for attorneys and litigation support professionals.

After graduating from UC Irvine, Mr. Sand owned and operated a franchise of The Princeton Review in Hawaii before returning to the mainland to attend UC Hastings School of Law.

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When "No Comment" is not the Best Comment: Crisis Communications

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Overview:

Planning for a Crisis

Litigation Communications

Communications During Ongoing Crises

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ACT 1

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Be Prepared!

Media relations needs to be a key part of strategic and business interruption planning

Have a media crisis plan

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A ~~SWOT~~ TWOS Analysis Framework

External **Threats**
Corporate **Weaknesses**
Opportunities to Build Trust
Build a **Strong** Team

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External **Threats**

What are the business events that threaten your industry?

- Regulatory Inquiry
- Catastrophic Event
- Data Breach
- Product Failure

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What are your Corporate **Weaknesses** that make a threat more likely?

- Weak Internal Controls
- Outspoken Management
- Known Compliance Issues
- Past Experience

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Opportunities to Build Trust

- Who are the key media opinion makers in your space?
- Do they have accurate basic information about your company?
- Have you built a relationship?
- What biases have they shown to date in their coverage?

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Building a **Strong** team

- Media relations experts on tap
- Outside counsel identified
- Media training for executives
- Counsel in the media relations loop
- Good basic fact sheets and materials
- Determine spokespersons on issues

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Understanding Reporters

The increasing speed of the media coverage cycle has made the profession of journalism more stressful and competitive than ever before.

Tweets and posts do not encourage thoughtful analysis.

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Respect Reporters Needs

- Deadlines are fixed and unforgiving
- Reporters often "win" by being first not necessarily by being accurate
- Reporters need to digest very complex information in very limited time
- Human stories make issues real

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Caveat on New Media

Media relations today must go beyond traditional "mainstream" media

In a disaster, you have to be prepared for Tweets, blogs and citizen journalists

And even satire…

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ACT 2

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Basic Tenets of Communication During Litigation

- Communicate complex issues so that they are understandable and compelling to audience
- Communicate to further your cause
- Communicate to match the situation/ questions

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Formulate a Plan

- Can this attract public opinion?
- Can public opinion be helpful?
- How can public opinion be shaped?
- Come up with three message points

Remember: All PR is a risk

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Does Public Interest Already Exist?

- If media coverage of the case already exists it's always better to be proactive and tell your own story rather than letting others tell it for you
- Focus on the three most important things you want your audience to know and then deliver those messages consistently
- Answer specific questions reporters may have but use every response to bridge back to at least one of your three key messages

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Want to Attract Public Interest?

- If you are thinking about going on the offensive - it boils down to calculated risk.
  - Are you working on a case that will likely serve as a landmark or inform broader policy?
  - Will the outcome impact a public issue or stir public debate?
- Look to mobilize the groups who could potentially be impacted so that should the case be decided against you there are allies who can then support appeal and future efforts and preventing bad legislation

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How to Help the Reporters

- Meet the reporter's needs
- Always look to up the level the conversation. Don't get bogged down in the tit for tat of your case – focus on the issues.
- There is no such thing as off the record.
- 3 message points MAX. Sound bites are the way to go (people listen more to TV then watch).
- Response should be
  - Positive Statement
  - Bridge
  - Message Point

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Privilege and PR

- Assume communications with a PR consultant are NOT privileged
- Work product of a jury consultant is likely privileged
- Have the outside law firm hire the consultant may be safer

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Case Study: "Evil Meg"

I have this video but didn't include to save space

[Available at http://www.youtube.com/watch?v=4s2GvwtWzNA]

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eBay's Responsive Message Points

- This testimony is false and malicious
- Desperate attempt to direct the Court and the public away from the facts of the case
- The facts clearly show that craigslist illegally diluted eBay's share in the company

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Sample Q & A re: Evil Meg

- Q: What did Meg say when she heard the testimony?
- A: She said the same thing Garrett Price said – this testimony is false and malicious.

- Q: But didn't eBay misuse craigslist's confidential information and gain an unfair advantage?
- A: craigslist may want you to believe this but the facts presented in court show that craigslist diluted eBay's share in the company in direct violation of Delaware law.

- Q: Will eBay appeal if they lose this case?
- A: You should ask craigslist this question since eBay is confident that it will prevail.

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ACT 3

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Famous Historic Quotes – The origins of "No Comment"

- Napoleon Bonaparte:

  "I fear the newspapers more than a hundred thousand bayonets."

- Winston Churchill:

  "No comment" is a splendid expression. I am using it again and again.

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Famous "No Comments" - Next Question, Thank You, and Denial

– Sports Agent Drew Rosenhaus' "Next Question"

Source: http://www.youtube.com/watch?v=41rdU-36MA&NR=1

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Famous "No Comments" - Next Question, Thank You, and Denial

– Drew Rosenhaus' recovery with humor to the "Next Question"

Source: http://www.youtube.com/watch?v=nHoq7xjCWro&feature=related

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Famous "No Comments" - Next Question, Thank You, and Denial

– The polite "Thank you" answer akin to "No Comment" by Tiger Woods

Source: http://www.youtube.com/watch?v=2mrLzzNSbfg&NR=1&feature=fvwp

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Famous "No Comments" - Next Question, Thank You, and Denial

– The Denial by President Bill Clinton

Source: http://www.youtube.com/watch?v=KIlP_KDQmXs

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The Legal Right of the Media and the Subject of its story

- As you can see, there is a tension between the media and its subjects. The media has its rights.
  - 1st Amendment – Freedom of the Press
    - Freedom of the Press is a constitutional right that provides individuals, including media, the freedom of communication and expression. Media outlets include television, radio, internet, blogs, twitter, e-mail, newspapers and magazines.
  - Defamation or "Defamation of Character"
    - The subject of the media story also has its rights, particularly if the media oversteps.
    - Defamation or "Defamation of Character" is the act, through either spoken or written words, of harming the reputation of another by making a false statement to a third person.
      (Black's Law Dictionary)
      - If the media says or writes something about your company that harms its reputation, or that prevents existing or future customers from doing business with or associating with your company, defamation may have occurred.
        - » Slander - is spoken or oral defamation.
        - » Libel - is written defamation.

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How companies have historically handled crisis

1. **Tylenol Crisis**
   - The Tylenol Crisis in 1982 resulted in 7 deaths due to Extra-Strength Tylenol capsules laced with Cyanide
     - Initial media exposure was so devastating Tylenol's market share dropped over 12%.
     - It became such a crisis that the New York Times declared that Johnson & Johnson could never "sell another product under that name. There may be an advertising person who thinks he can solve this, and if they find him, I want to hire him, because then I want him to turn our water cooler into a wine cooler.
       Source: http://www.crp.ugam.ca/pages/docs/rapports/Revue_litterature_Merck.pdf
     - Tylenol's Response & Comeback to the Crisis*
       1. Customer safety first, recalled all bottles, no advertising and took responsibility.
       2. Worked with authorities to capture individual and issue reward.
       3. Offered to exchange all Tylenol capsules purchased.
       4. Marketed reissue of new product (tamper resistant) and provided coupons.
       5. Prepared talking points for sales force (2200 members) to medical community.
       6. Received positive media coverage due to taken action and social responsibility.
       7. Media played a big role, as disapproving coverage would have likely destroyed Tylenol's reputation.

*Source: How an effective PR Campaign saved Johnson & Johnson *by Tamara Kaplan, The Penn. State Univ.*
http://www.aerobiologicalengineering.com/wxk116/TylenolMurders/crisis.html

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Working with the Media

- Office Depot's public relations department works with the media routinely and extensively.
- The PR Department works with the media proactively and reactively, including:
  - Press releases – announcements that Office Depot proactively provides to media outlets to announce new initiatives, products, earnings, etc.
  - Media statements – responsive statements to address a specific media need or inquiry.
  - Media alerts – to announce an event to which we are inviting members of the media.
  - "B-Roll" – broadcast video packages that we provide to television or visual media outlets for use during a broadcast.
  - Arranging interviews – with executives on topics such as earnings, product initiatives, etc.
  - Speeches, presentations, and video scripts – for executive leadership to use during conferences, news appearances, and interactions with investors, media, etc.
  - Developing relationships – host select media outlets at headquarters during launches/promotions.

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Example of Press Release and Media Statement

Office DEPOT

CONTACT:

THE COOPERATIVE PURCHASING NETWORK AWARDS
OFFICE SUPPLIES CONTRACT TO OFFICE DEPOT

Agreement Enables Office Depot To Provide Office Supplies and Services To Thousands Of Government Agencies Throughout The Country

About Office Depot

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Office DEPOT

MEDIA STATEMENT

- Press Release
- Media Statement

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Office Depot's plan for crisis communication

- Until February 2008, Office Depot - 100% of the time - responded that "We do not comment on pending litigation."
- For the past 2½ years we have been under a media assault due to a confluence of factors
  - Former disgruntled employee/self-proclaimed "whistleblower"
  - Public sector government contract audits
- Between February 2008 through July 2010 there have been **1,370** media placements regarding Office Depot's government contracts business.
- Since February 2008 Office Depot has responded to several hundred media inquires.
- Office Depot's issues are different than Tylenol, Exxon and BP, as those companies were dealing with a single incident.
- Office Depot has become adept at managing the media
  - Our Public Relations staff works not just with our business units, but also works very closely with the legal department.
  - The legal department drives the media and customer responses.

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Traditional Media - newspaper and television headlines

- **"Office Depot billing disputed"**
  By Janet Zink, St. Pete Times Staff Writer
- **"Hillsborough commissioners fire embattled auditor"**
  By Bill Varian, St. Pete Times Staff Writer
- **"Office Depot's battle with former employee gets national attention"**
  By MATT CLARK, Naples Daily News
- **"City Says Office Depot Overcharged on Supply Contract"**
  By J. Douglas Allen-Taylor, The Berkeley Daily Planet
- **"CBS Atlanta Investigates: School Waste - CBS Atlanta Uncovers Millions In Wasteful Spending"**
  By Wendy Saltzman, CBS Atlanta


Office Depot billing disputed - St. Petersburg Times
and YOU.
50%-90% OFF Gift Cards Click here and
Times
Office Depot billing disputed
By Janet Zink, Times Staff Writer
In Print: Tuesday, April 27, 2010
http://www.tampabay.com/news/localgovernment/office-depot-billing-disputed/1090581 8/23/2010

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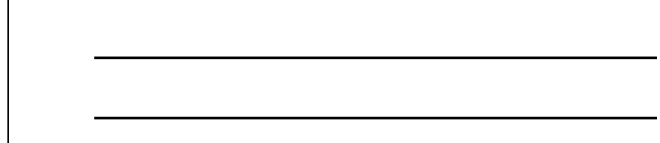
Disgruntled former employee email blasts to customers & media daily


Last Updated on Thursday, 12 August 2010 17:43 Written by Peter Fiore Thursday, 12 August 2010 13:32
OfDepot Scandal – Unethical, fraudulent, now racist?
Depot accused over delays in settling overcharges with Detroit Public Schools
Read more: OfDepot Scandal - Depot delays Detroit

- Former employee email accuses Office Depot of racism towards government customer


FOR IMMEDIATE RELEASE
Press Release 10.27.2009 by whistle blower David Sherwin
239-774-7493 - davidsherwin@comcast.net
Lee County schools to review Office Depot purchases
Investigation spurs agencies to look for new contracts

- Former employee email threatens to file criminal complaint and probe against Office Depot government customers that do not agree with him.

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Keeping the Media honest

- Letters to the editor – when the media gets the story wrong

  "I am writing to bring to your attention some examples of the false and misleading statements contained in the above-referenced News Reports prepared by Wendy Saltzman, a reporter at your station."

Office DEPOT

VIA EMAIL

June 11, 2009

[redacted]

Re: **CBS Atlanta News Report Regarding Fulton County School Board ("FCS") Contract with Office Depot – May 14, 2009, June 8-10, 2009 (the "News Reports").**

Dear [redacted],

I am writing to bring to your attention some examples of the false and misleading statements contained in the above-referenced News Reports prepared by Wendy Saltzman, a reporter at your station. This is now the second letter that Office Depot has provided to your station correcting inaccuracies and misstatements. Unfortunately, the first letter, sent by Office Depot Public Relations Senior Manager Jason Shockley on June 9, 2009, went unheeded by your station, and you have continued to allow Ms. Saltzman to report information that is not only false, but is extremely damaging to Office Depot's business and reputation.

I will address each of the News Reports in turn below, stating first the inaccurate or misleading statement followed by Office Depot's response. First, however, I will address a statement that has been made in each of the above News Reports, and indeed has been a theme throughout your broadcasts. Specifically, Ms. Saltzman and others at your station, have stated repeatedly on air that Fulton County Schools has "overpaid" $1.5 million for office supplies through its contract with Office Depot, that the contract is a "$1.5 million waste of your tax money," and that "Office Depot wasn't the lowest bidder" but instead there was "another offer that would have saved the school district $1.5 million." These statements are false and misleading.

In fact, according to a statement from Fulton County Schools, which appears on the school district's website and is available for the public, including Ms. Saltzman to see, Office Depot was the lowest-priced bidder able to perform the terms and conditions of the contract. Further, the company that "reportedly could do the job for $1.5 million lower was not deemed a suitable candidate because of deficiencies in its proposal and a concern that it could not successfully carry out the demands of the contract." Accordingly, any statements that FCS overpaid $1.5 million or could have contracted with this other, lower-priced bidder are inaccurate.

I will now address each of the News Reports.

The May 14, 2009 News Report

Your statement: *Office Depot is under investigation "right here in Georgia" and Office Depot has a "reputation" for overcharging customers (from the June 8, 2009 News Report).*

Office Depot's response: Ms. Saltzman's allegations are false and seemingly based significantly on incomplete information and innuendo. First, and importantly, Office Depot is not under investigation in the State of Georgia. Further, prior to the airing of her May 14, 2009 news story, Office Depot provided information regarding its recent contract with the State of

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Controlling the message

- YouTube Videos – Adding that personal touch!

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Educating and protecting your customer base

- Customer E-mail Blasts

  "Dear Valued Customer:

  For more than 23 years, Office Depot has proven its commitment to the highest level of service, value, and integrity for its customers, which include thousands of public agencies. As part of this commitment, we are pleased to announce the new direction we are taking to further service and improve the value we offer our public sector customers."

Office DEPOT

July 2010

Dear Valued Customer:

For more than 23 years, Office Depot has proven its commitment to the highest level of service, value, and integrity for its customers, which include thousands of public agencies. As part of this commitment, we are pleased to announce the new direction we are taking to further service and improve the value we offer our public sector customers.

As you may know, Office Depot was awarded the office supplies contract by Los Angeles County in 1996, 2000, and 2005. The LA County agreement, which serves as the lead agency contract for the U.S. Communities Government Purchasing Alliance, is set to expire on January 1, 2011, and LA County is currently soliciting proposals for a new contract (the "RFP"). For the reasons set forth below, we have chosen not to submit a proposal. Needless to say, we did not make this decision lightly, and we are committed to fulfilling the terms of our current agreement through the end of the year.

We chose not to submit a proposal because the RFP contains terms that are substantially different than our prior office supplies contract. We believe these terms are onerous and inconsistent with our long-term strategies and ability to provide the best value on office supplies to our customers, including a low-price structure that customers have come to expect and enjoy. Instead, we plan to develop alternative cooperative agreements that we believe you will find exciting and allow us to continue to serve you.

We understand that the current economic climate is especially tough on our public sector customers. We want you to know that our decision is grounded in our belief that we can provide the greatest value to our public sector customers by offering full and diverse programs that will focus on choice, flexibility and deep savings. You will have the option to purchase quality products, services and solutions through one of our competitively solicited alternative cooperative contract offerings, or directly outside of a cooperative arrangement. Whatever program works for you, Office Depot will continue to deliver extraordinary value in the public marketplace and will provide you a seamless transition to the program that best meets your specific needs.

U.S. Communities is a Valued Partner
As part of our current purchasing cooperative offerings, we will still have agreements through U.S. Communities. We deeply appreciate and value our partnership with U.S. Communities and will continue our relationship through the expiration of our current Los Angeles County agreement and through our national contracts for technology and school supplies under the U.S. Communities umbrella. Through our lead agency agreement with Fairfax County Public Schools, we offer approximately 3,500 school and educational supplies. Through Tech Depot, we have a lead agency contract with the County of Fairfax (Virginia), which offers thousands of technology products to public agencies nationwide. These specialty offerings enhance our full arsenal of cooperative options and assist us in bringing significant value to public sector agencies across the country.

We Will Keep You Fully Informed
We are excited about the future and are looking forward to continuing to help you realize significant savings on your office supply purchases. We will be contacting you individually in the coming weeks to discuss the various offerings that Office Depot has available. You are a valued Office Depot customer and we will do everything we can to ensure any transition is smooth for you.

We know the public sector, we know your office supply needs, and we know how to take care of your business. We have unparalleled customer service, robust supply chain operations, impeccable on-time next day delivery, sophisticated online capabilities, and industry-leading product assortment.

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Educating the front line and communicating through them

- Talking Points for our sales people

Office DEPOT

Talking Points for Customer X

Below are the talking points for your upcoming conversations with Customer X. These are for discussion purposes only and should not to be forwarded to the customer.

Background on Customer X:

- Customer X has been a valued partner of Office Depot for more than a decade.
- Since 2003, Customer X has piggybacked onto the State of Bliss Agreement, which prior to 2006 was a stand alone agreement.
- In January 2006, the State of Bliss agreement joined the Ultimate program. Customer X followed the State and has participated in the Ultimate Program since that time, enjoying excellent products and service at deeply discount prices.
- In fact, from January 2006 through December 2009, the County has saved approximately 30.13% or $1.5 million over retail pricing on the Ultimate Program.
- We appreciate the opportunity to provide you with this information. If you have any questions or need further clarification, please do not hesitate to call me.

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Educating the Street

- Preparing FAQs for our Investor Relations website

Office Depot | Investor FAQs Page 1 of 4

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Investor FAQs

U.S. Communities/LA County

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Influencing key stakeholders

Multi-tiered approach:

- Government Relations
  - We have engaged lobbyists in various states to assist in resolving current and anticipated governmental inquiries and investigations, and to address stories by the media.
  - This includes preparing written statements for lobbyists to present to government officials.
- Executive Committee
  - Ensuring our company's leadership is always prepared to handle the media and control the message

When "No Comment" is not the Best Comment: Crisis Communications

(Outline of Presentation by Steve Calkins and Supplemental Information)

I. Famous Historic Quotes – The origins of "No Comment"
   A. Napoleon Bonaparte famous words "I fear the newspapers more than a hundred thousand bayonets."
   B. Winston Churchill's famous words: "No comment" is a splendid expression. I am using it again and again.

II. Famous "No Comments" - Next Question, Thank You, and Denial
   A. Sports Agent Drew Rosenhaus' "Next Question"
   http://www.youtube.com/watch?v=41rdU-3fiMA&NR=1
   B. Drew Rosenhaus' recovery with humor to the "Next Question"
   http://www.youtube.com/watch?v=nHoq7xJGWro&feature=related
   C. The polite "Thank you" answer akin to "No Comment" by Tiger Woods
   http://www.youtube.com/watch?v=2mrLzzNSbfg&NR=1&feature=fvwp
   The Denial by President Bill Clinton
   http://www.youtube.com/watch?v=KiIP_KDQmXs

III. The Legal Right of the Media and the Subject of its story
   A. 1st Amendment – Freedom of the Press
      - Freedom of the Press is a constitutional right that provides individuals, including media, the freedom of communication and expression. Media outlets include television, radio, internet, blogs, twitter, e-mail, newspapers and magazines.

   B. Defamation or "Defamation of Character"
      - The subject of the media story also has its rights, particularly if the media oversteps.
      - Defamation or "Defamation of Character" is the act, through either spoken or written words, of harming the reputation of another by making a false statement to a third person. (Black's Law Dictionary)
         - If the media says or writes something about your company that harms its reputation, or that prevents existing or future customers from doing business with or associating with your company, defamation may have occurred.
            1. Slander - is spoken or oral defamation.
            2. Libel - is written defamation.

         - To create liability for defamation there must be:
            1. a false and defamatory statement concerning another;
            2. an unprivileged publication to a third party;
            3. fault amounting at least to negligence on the part of the publisher; and
            4. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

            RESTATEMENT (SECOND) OF TORTS § 558 (2010)

IV. How Johnson & Johnson successfully handled the Tylenol crisis
   A. The Tylenol Crisis in 1982 resulted in 7 deaths due to Extra-Strength Tylenol capsules laced with Cyanide
   B. Initial media exposure was so devastating Tylenol's market share dropped over 12%.*
   C. It became such a crisis that the New York Times declared that Johnson & Johnson could never "sell another product under that name. There may be an advertising person who thinks he can solve this, and if they find him, I want to hire him, because then I want him to turn our water cooler into a wine cooler."*
   *Source: http://www.crp.uqam.ca/pages/docs/rapports/Revue_litterature_Merck.pdf

   D. Tylenol's Response & Comeback to the Crisis**
      - Customer safety first, recalled all bottles, no advertising and took responsibility.
      - Worked with authorities to capture individual and issue reward.
      - Offered to exchange all Tylenol capsules purchased.
      - Marketed reissue of new product (tamper resistant) and provided coupons.
      - Prepared talking points for sales force (2200 members) to medical community.
      - Received positive media coverage due to taken action and social responsibility. Media played a big role, as disapproving coverage would have likely destroyed Tylenol's reputation.

      **Source: How an effective PR Campaign saved Johnson & Johnson, *by Tamara Kaplan, The Penn. State Univ.*
      http://www.aerobiologicalengineering.com/wxk116/TylenolMurders/crisis.html

V. Working with the Media
   A. Press releases – announcements that Office Depot proactively provides to media outlets to announce new initiatives, products, earnings, etc.
   B. Media statements – responsive statements to address a specific media need or inquiry.
   C. Media alerts – to announce an event to which we are inviting members of the media.
   D. "B-Roll" – broadcast video packages that we provide to television or visual media outlets for use during a broadcast.
   E. Arranging interviews – with executives on topics such as earnings, product initiatives, etc.
   F. Speeches, presentations, and video scripts – for executive leadership to use during conferences, news appearances, and interactions with investors, media, etc.
   G. Developing relationships – host select media outlets at headquarters during launches/promotions.

VI. The Good, the Bad and Ugly – What Office Depot has dealt with recently
   A. In addition to routine matters, Office Depot also prepares internal and external communications when there are "crisis" situations.
   B. For the past 2½ years, Office Depot has dealt with an unusual and constant barrage of media attacks in the following formats:
      - Traditional media - newspaper, television, magazine, and business journal stories
      - Blogs – personally attacking the Company's leadership
      - Disgruntled former employee sending daily email blasts to customers and media

VII. Office Depot's plan for crisis communication
   A. Until February 2008, Office Depot - 100% of the time - responded that "We do not comment on pending litigation."

- For the past 2½ years we have been under a media assault due to a confluence of factors
    1. Former disgruntled employee/self-proclaimed “whistleblower”
    2. Public sector government contract audits
- Between February 2008 through July 2010 there have been **1,370** media placements regarding Office Depot’s government contracts business.
- Since February 2008 Office Depot has responded to several hundred media inquires.
- Office Depot’s issues are different than Tylenol, Exxon and BP, as those companies were dealing with a single incident.
- Office Depot has become adept at managing the media
    1. Our Public Relations staff not only works with our business units, but also very closely with the legal department.
    2. The legal department drives the media and customer responses.

B. Examples of Media crisis communications
    - Keeping the Media honest - Letters to the editor – when the media gets the story wrong
    - Controlling the message - YouTube Videos – Adding that personal touch!
    - Educating and protecting your customer base - Customer E-mail Blasts
    - Educating the front line and communicating through them - Talking Points for our sales people
    - Educating the Street - Preparing FAQs for our Investor Relations website
    - Influencing key stakeholders
        - Multi-tiered approach:
            1. Government Relations
                - We have engaged lobbyists in various states to assist in resolving current and anticipated governmental inquiries and investigations, and to address stories by the media.
                - This includes preparing written statements for lobbyists to present to government officials.
            2. Executive Committee
                - Ensuring our company’s leadership is always prepared to handle the media and control the message

Additional Materials

Checklist

Media Considerations

☑ Live interview

☑ Video message

- ☑ YouTube – broad distribution
- ☑ Link for Video with Message – to select audience

☑ Media statement – prepared in advance to cover broad issues related to the matter (you control the message)

☑ Media responses – answer particularized questions

Customers Considerations

☑ Customer letter

☑ Talking points

☑ E-mail blasts

Shareholders Considerations

☑ Talking points for calls with analysts, when appropriate (prepared with legal department to ensure compliance with Regulation FD)

☑ FAQs

Office DEPOT.

CONTACT:
Jason Shockley
Office Depot
561-438-0037

THE COOPERATIVE PURCHASING NETWORK AWARDS OFFICE SUPPLIES CONTRACT TO OFFICE DEPOT

Agreement Enables Office Depot To Provide Office Supplies and Services To Thousands Of Government Agencies Throughout The Country

Boca Raton, Fla., July 27, 2010 -- Office Depot® (NYSE: ODP), a leading global provider of office products and services, today announced it has been awarded a contract for office supplies by The Cooperative Purchasing Network (TCPN).

TCPN is a governmental agency that contracts on behalf of K-12 schools, local governments, colleges and universities. The new agreement with Office Depot includes office and school supplies, furniture, technology products and copy and print services provided at significant discounts and savings to eligible public agency customers. TCPN competitively bids and awards contracts to national vendors in accordance with purchasing procedures mandated by state procurement laws and regulations. TCPN contracts are available for use and benefit all entities that must comply with state purchasing laws (public and private schools, colleges and universities, cities, counties, non-profits, and all governmental entities). This cooperative was established under state law to help other governmental entities operate efficiently and economically.

"Office Depot is proud to once again have the opportunity to partner with TCPN to provide our government customers with unprecedented value, selection and the highest quality products," said Steve Schmidt, President of Office Depot's North American Business Solutions Division. "Office Depot has enjoyed a great relationship with TCPN spanning many years, and we look forward to continuing to serve these agencies with solutions that best meet their needs."

TCPN is a national governmental purchasing cooperative providing commodity and service contracts to public entities throughout the country that utilize the cooperative's contracts. Since 1997, Office Depot has served as a provider of office and school supplies and services for TCPN's public and non-profit agencies. The continuation of this partnership provides significant savings to customers, ultimately saving taxpayers' dollars.

"Office Depot continues to offer competitive prices that enable our members to control their operating expenses," said Jason Wickel, Director from TCPN. "In today's economic environment, government agencies are mandated to find ways to save money. Through this new contract, public agencies across the country will be able to fulfill this obligation."

To learn more about the products and services available at Office Depot, please visit your local Office Depot retail store location or www.officedepot.com. To become a fan of Office Depot on Facebook and receive exclusive content, offers and more, please visit www.facebook.com/officedepot. To follow Office Depot on Twitter, please visit www.twitter.com/officedepot.

About Office Depot
Every day, Office Depot is Taking Care of Business for millions of customers around the globe. For the local corner store as well as Fortune 500 companies, Office Depot provides products and services to its customers through 1,598 worldwide retail stores, a dedicated sales force, top-rated catalogs and a $4.2 billion e-commerce operation. Office Depot has annual sales of approximately $12.1 billion, and employs about 41,000 associates around the world. The Company provides more office products and services to more customers in more countries than any other company, and currently sells to customers directly or through affiliates in 53 countries.

Office Depot's common stock is listed on the New York Stock Exchange under the symbol ODP and is included in the S&P 500 Index. Additional press information can be found at: http://mediarelations.officedepot.com.

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Office DEPOT.

MEDIA STATEMENT

Office Depot today announced that it has chosen not to submit a bid under the current lead agency Request for Proposal ("RFP") for office supplies through the U.S. Communities Government Purchasing Alliance. The Company believes that the RFP contains terms that could not only negatively impact its profitability but also the means to provide cost effective alternatives to public sector customers that buy through the U.S. Communities program.

Office Depot intends to seek alternative cooperative partners with terms consistent with the Company's long-term value strategy, including lower administrative fees. Office Depot will continue to deliver extraordinary value in the public marketplace and will provide customers with a seamless transition to the program that best meets their specific needs. Office Depot believes it can maintain a large percentage of its customers that currently buy office supplies through the US Communities cooperative by offering full and diverse alternative programs that will focus on choice, flexibility and deep savings. Office Depot intends to provide customers with the option to purchase quality products, services and solutions through other competitively solicited cooperative contracts, or directly outside of a cooperative arrangement.

Office Depot appreciates and values its partnership with U.S. Communities and will continue its relationship through the expiration of the lead agency contract for office supplies on January 1, 2011, and through the Company's other national contracts for technology and school supplies that are under the U.S. Communities cooperative. Through the lead agency agreement with Fairfax County Public Schools, Office Depot offers approximately 3,500 school and educational supplies. Through Tech Depot, the Company has a lead agency contract with the County of Fairfax (Virginia), which offers thousands of technology products to public agencies nationwide. These specialty offerings enhance the full arsenal of cooperative options and assist Office Depot in bringing significant value to public sector agencies across the country.

Office DEPOT

July 2010

Dear Valued Customer:

For more than 23 years, Office Depot has proven its commitment to the highest level of service, value, and integrity for its customers, which include thousands of public agencies. As part of this commitment, we are pleased to announce the new direction we are taking to further service and improve the value we offer our public sector customers.

As you may know, Office Depot was awarded the office supplies contract by Los Angeles County in 1996, 2000, and 2005. The LA County agreement, which serves as the lead agency contract for the U.S. Communities Government Purchasing Alliance, is set to expire on January 1, 2011, and LA County is currently soliciting proposals for a new contract (the "RFP"). For the reasons set forth below, we have chosen not to submit a proposal. Needless to say, we did not make this decision lightly, and we are committed to fulfilling the terms of our current agreement through the end of the year.

We chose not to submit a proposal because the RFP contains terms that are substantially different than our prior office supplies contract. We believe these terms are onerous and inconsistent with our long-term strategies and ability to provide the best value on office supplies to our customers, including a low-price structure that customers have come to expect and enjoy. Instead, we plan to develop alternative cooperative agreements that we believe you will find exciting and allow us to continue to serve you.

We understand that the current economic climate is especially tough on our public sector customers. We want you to know that our decision is grounded in our belief that we can provide the greatest value to our public sector customers by offering full and diverse programs that will focus on choice, flexibility and deep savings. You will have the option to purchase quality products, services and solutions through one of our competitively solicited alternative cooperative contract offerings, or directly outside of a cooperative arrangement. Whatever program works for you, Office Depot will continue to deliver extraordinary value in the public marketplace and will provide you a seamless transition to the program that best meets your specific needs.

U.S. Communities is a Valued Partner

As part of our current purchasing cooperative offerings, we will still have agreements through U.S. Communities. We deeply appreciate and value our partnership with U.S. Communities and will continue our relationship through the expiration of our current Los Angeles County agreement and through our national contracts for technology and school supplies under the U.S. Communities umbrella. Through our lead agency agreement with Fairfax County Public Schools, we offer approximately 3,500 school and educational supplies. Through Tech Depot, we have a lead agency contract with the County of Fairfax (Virginia), which offers thousands of technology products to public agencies nationwide. These specialty offerings enhance our full arsenal of cooperative options and assist us in bringing significant value to public sector agencies across the country.

We Will Keep You Fully Informed

We are excited about the future and are looking forward to continuing to help you realize significant savings on your office supply purchases. We will be contacting you individually in the coming weeks to discuss the various offerings that Office Depot has available. You are a valued Office Depot customer and we will do everything we can to ensure any transition is smooth for you.

We know the public sector, we know your office supply needs, and we know how to take care of your business. We have unparalleled customer service, robust supply chain operations, impeccable on-time next day delivery, sophisticated online capabilities, and industry-leading product assortment.

These successes demonstrate that Office Depot is dedicated to its partnership with the public sector, where together we continue to take care of business. To learn more, please contact your sales associate today. Additionally, should you have any general customer service questions, please contact our customer service department at 888.263.3423 (888.2.OFFICE).

Sincerely,

Steve Schmidt
President, Business Solutions Division

Office DEPOT.

VIA EMAIL

June 11, 2009

[redacted]

Re: CBS Atlanta News Report Regarding Fulton County School Board ("FCS") Contract with Office Depot – May 14, 2009, June 8-10, 2009 (the "News Reports").

Dear [redacted],

I am writing to bring to your attention some examples of the false and misleading statements contained in the above-referenced News Reports prepared by Wendy Saltzman, a reporter at your station. This is now the second letter that Office Depot has provided to your station correcting inaccuracies and misstatements. Unfortunately, the first letter, sent by Office Depot Public Relations Senior Manager Jason Shockley on June 9, 2009, went unheeded by your station, and you have continued to allow Ms. Saltzman to report information that is not only false, but is extremely damaging to Office Depot's business and reputation.

I will address each of the News Reports in turn below, stating first the inaccurate or misleading statement followed by Office Depot's response. First, however, I will address a statement that has been made in each of the above News Reports, and indeed has been a theme throughout your broadcasts. Specifically, Ms. Saltzman and others at your station, have stated repeatedly on air that Fulton County Schools has "overpaid" $1.5 million for office supplies through its contract with Office Depot, that the contract is a "$1.5 million waste of your tax money," and that "Office Depot wasn't the lowest bidder" but instead there was "another offer that would have saved the school district $1.5 million." These statements are false and misleading.

In fact, according to a statement from Fulton County Schools, which appears on the school district's website and is available for the public, including Ms. Saltzman to see, Office Depot was the lowest-priced bidder able to perform the terms and conditions of the contract. Further, the company that "reportedly could do the job for $1.5 million lower was not deemed a suitable candidate because of deficiencies in its proposal and a concern that it could not successfully carry out the demands of the contract." Accordingly, any statements that FCS overpaid $1.5 million or could have contracted with this other, lower-priced bidder are inaccurate.

I will now address each of the News Reports.

The May 14, 2009 News Report

Your statement: Office Depot is under investigation "right here in Georgia" and Office Depot has a "reputation" for overcharging customers (from the June 8, 2009 News Report).

Office Depot's response: Ms. Saltzman's allegations are false and seemingly based significantly on incomplete information and innuendo. First, and importantly, Office Depot is not under investigation in the State of Georgia. Further, prior to the airing of her May 14, 2009 news story, Office Depot provided information regarding its recent contract with the State of

Georgia. Specifically, Office Depot informed Ms. Saltzman of the following information, which she ignored:

- In February 2008, the State of Georgia suspended Office Depot pending a debarment determination and in June 2008, the State issued its debarment determination.
- The State rationalized its decision primarily on its belief that a total of ten items, which it selected for testing, were priced incorrectly or were discontinued and were not identified with proper substitutes. Office Depot thoroughly researched those items and conclusively showed the State that the items were correctly priced. Office Depot also offered a solution to ensure users could more easily identify substituted products in accordance with the contract.
- In January 2008, the State of Georgia provided Office Depot with the results of its own core-product pricing audit, which asserted overcharges of only $230,000 on sales of about $16.5 million. While Office Depot disagreed substantively with a significant portion of the audit (for example, the auditor incorrectly included contract pricing for purchases made before the new contract was implemented), it nonetheless showed that pricing accuracy was extremely high and well within the degree of commercial reasonableness given the volume of purchases.
- Subsequently, and following extended discussions with the State in July 2008, the State of Georgia rescinded its suspension and debarment determinations.
- Today, Office Depot continues to offer superior products and services to government agencies in the State of Georgia through stand-alone agreements or through our program with U.S. Communities, which we believe evidences the satisfaction of our sales and services by Georgia customers.
- There was not nor is there an "investigation" by Georgia enforcement agencies regarding our contract.

Further, not only did Ms. Saltzman refuse to include any of the above in her story, she also failed to provide Office Depot with an opportunity to respond to allegations about Office Depot's other government contracts, which she "reported on" during her May 14 and June 8 News Reports.

The June 8-10, 2009 News Reports

Your statement: The school district is paying more than the general public would pay if they "walked into one of Office Depot's stores," in violation of the contract.

Office Depot's response: As Mr. Shockley informed you in his June 9, 2009 letter, this statement is inaccurate. The contract provides that FCS users will receive the lowest price (contract or retail) when purchasing in Office Depot retail stores when using a registered purchasing card. Accordingly, FCS users who use their registered purchasing card in an Office Depot retail store will not pay more than the general public. In fact, overall, FCS receives better pricing than that offered to retail customers. Specifically, we recently determined that FCS saved approximately $302,028 during the first three months (from February 1, 2009 through May 6, 2009) by purchasing items under the FCS contract than had it purchased these same items on Office Depot's retail web site.

Your statement: FCS paid $50 more for three printers than the price paid by the general public, which is a "significant overcharge."

Office Depot's response: While Ms. Saltzman does not identify the particular printers, Office Depot has determined that on April 27, 2009, FCS did purchase three printers (SKU 139455), however, the retail price on these items was not $199.99 on that day as Ms. Saltzman asserts,

and FCS did not pay more than retail customers on that day. As you know, Mr. Shockley informed Ms. Saltzman of this inaccuracy in his June 9, 2009 letter.

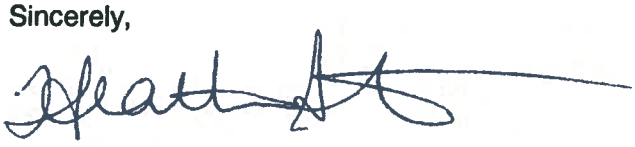
In her response, Ms. Saltzman acknowledged that she was not looking at the price the public would have paid on the same day FCS purchased the printers. She states that this is a price that she found for these printers weeks later. This is not responsible journalism. Ms. Saltzman reported that FCS paid more than the general public for an item; however, she did not research or confirm the exact amount that the general public paid for the item the day that FCS purchased it. Then, when Office Depot corrected the misrepresentation, Ms. Saltzman failed to correct the inaccuracy in her report the following evening.

Your statement: Office Depot charged more than the contractually agreed-upon price for 95 items listed in the bid "in violation of the contract" and from the June 10, 2009 report, the school district is now "demanding Office Depot refund the school's money."

Office Depot's response: This statement is extremely misleading and inaccurate. Prior to the airing of this report, Office Depot had already proactively reconciled the account and determined that there were inadvertent account setup errors that had resulted in overpayments of approximately 2%. Office Depot and FCS worked *together* to resolve the issue and Office Depot is currently processing credits to the school district's account.

In sum, Ms. Saltzman continues to ignore communications and information provided by Office Depot in direct response to her questions and has failed to provide Office Depot with an opportunity to comment on particularly damaging allegations prior to airing them, other than demanding an on-camera interview. However, we do not believe that Ms. Saltzman has any intention of conducting a fair and unbiased interview with Office Depot. Accordingly, we have offered time and again to answer any specific questions that she has in writing. However, she has continuously declined to provide any opportunity for Office Depot to respond in that way. In fact, this same issue has been raised by FCS about Ms. Saltzman. On the FCS website, the school district indicates that "information was shared on numerous occasions with the news station but it was not included in the stories." As you know, it is incumbent on any reporter to ensure that allegations, particularly allegations of misconduct, are grounded in accurate and confirmed facts. It is my understanding that there will be yet another segment airing this evening. Office Depot expects that you will correct these inaccuracies and that you will ensure that Office Depot is made aware of any further allegations in your newscast prior to its airing.

Sincerely,



Heather Stern
Senior Litigation Counsel

Office DEPOT.

Talking Points for Customer X

Below are the talking points for your upcoming conversations with Customer X. These are for discussion purposes only and should not to be forwarded to the customer.

Background on Customer X:

- Customer X has been a valued partner of Office Depot for more than a decade.
- Since 2003, Customer X has piggybacked onto the State of Bliss Agreement, which prior to 2006 was a stand alone agreement.
- In January 2006, the State of Bliss agreement joined the Ultimate program. Customer X followed the State and has participated in the Ultimate Program since that time, enjoying excellent products and service at deeply discount prices.
- In fact, from January 2006 through December 2009, the County has saved approximately 30.13% or $1.5 million over retail pricing on the Ultimate Program.
- We appreciate the opportunity to provide you with this information. If you have any questions or need further clarification, please do not hesitate to call me.

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Investor FAQs

Print Page Close Window

U.S. Communities/LA County

Q. Is it true that Office Depot is not participating in the U.S. Communities/LA County RFP?

A. Yes. Office Depot was awarded the office supplies contract by Los Angeles County in 1996, 2000, and 2005. The LA County agreement, which serves as the lead agency contract for office supplies under the U.S. Communities Government Purchasing Alliance, is set to expire on January 1, 2011. LA County is currently soliciting proposals for a new contract (the "RFP"). For the reasons set forth below, and in consultation with our Board of Directors, we have chosen not to submit a proposal. We deeply appreciate and value our 14+ year partnership with LA County and U.S. Communities. Needless to say, we did not make this decision lightly. Office Depot has honored and will continue to honor fully the terms of the existing office supplies contract it has with LA County until that agreement expires on January 1, 2011.

Q. Why did Office Depot choose not to bid?

A. The Company believes that performing under the terms in the new general office supplies agreement could negatively impact Office Depot's profitability and lead to an operating loss with respect to this business. Operating profits for this business are currently in the low single digits as a percentage of projected annual sales of approximately $515 million.

Q. What comprises the $515 million in projected annual sales?

A. This is the estimate of projected sales under the Los Angeles County lead agency contract for office supplies only. Thus, it excludes projected sales to certain customers, including the States of Florida and Arkansas, which are soliciting proposals for stand-alone agreements outside of the U.S. Communities cooperative. (We are currently participating in these solicitations.) It further excludes anticipated sales made through our lead agency agreement with Fairfax County Public Schools, under which we offer approximately 3,500 school and educational supplies through the U.S. Communities cooperative.

Q: What could be the financial impact on Office Depot of choosing not to bid on the U.S. Communities/LA County RFP?

A. Given that the operating profit for this business is currently in the low single digits as a percentage of projected annual sales of approximately $515 million, we believe that we could manage our infrastructure costs as needed in the short term to mitigate the potential financial impact of current business not retained. We also intend to work aggressively to retain our customers and grow the business directly and through new cooperative agreements either with U.S. Communities or other associations.

Q: What is Office Depot's strategy for retaining current customers?

A. Office Depot believes it can maintain a large percentage of its customers that currently buy office supplies through the U.S. Communities cooperative by offering full and diverse alternative programs through other competitively solicited cooperative contracts, or directly outside of a cooperative arrangement. Office Depot intends to seek alternative cooperative partners with terms consistent with the Company's long-term value strategy, including lower administrative fees.

Office Depot will continue to deliver extraordinary value in the public marketplace and will provide customers with a seamless transition to the program that best meets their specific needs. Although the participating public agencies utilize the U.S. Communities cooperative program as a vehicle to purchase office supplies, these are Office Depot customers that we will continue to service through an alternative cooperative strategy, individual standalone agreements, or direct relationships.

Q: Is Office Depot currently working with any other buying cooperatives?

Office Depot | Investor FAQs

A. Yes. For example, we recently announced that we were awarded a contract for office supplies by The Cooperative Purchasing Network (TCPN). We will provide full details on other offerings in the near future. Additionally, we can support standalone agreements or, as is the case today, customers can purchase office supplies directly from Office Depot without a formal contract – depending on their preferences and purchasing guidelines. Office Depot will continue to deliver extraordinary value in the public marketplace and will provide customers with a seamless transition to the program that best meets their specific needs.

Q: Why does Office Depot think customers will continue to purchase from the Company?

A. Although the office supply contract under the U.S. Communities program is a vehicle for public agencies that require competitively bid agreements to purchase office supplies, the participating public agencies are Office Depot customers and they have come to rely on us to provide extraordinary value and solutions to their office supply needs. We believe that a vast majority of our customers will want to continue to utilize Office Depot as their trusted business partner and that they will embrace our new public sector offerings. Through this transition, our customers will improve their ability to purchase the products, services and solutions they need at the most competitive pricing in the marketplace. Our selling proposition has not changed. We have unparalleled customer service, robust supply chain operations, impeccable on-time next day delivery, sophisticated online capabilities, and industry-leading product assortment. These successes demonstrate that Office Depot is dedicated to its partnership with the public sector.

Q: Will you continue to work with U.S. Communities outside of general office supplies?

A. Yes. As part of our current purchasing cooperative offerings, we will still have options through U.S. Communities. We deeply appreciate and value our partnership with U.S. Communities and will continue our relationship through the expiration of our current Los Angeles County agreement and through our national contracts for technology and school supplies under the U.S. Communities umbrella. Through our lead agency agreement with Fairfax County Public Schools, we offer approximately 3,500 school and educational supplies. Through Tech Depot, we have a lead agency contract with the County of Fairfax (Virginia), which offers thousands of technology products to public agencies nationwide. These specialty offerings enhance our full arsenal of cooperative options and assist us in bringing significant value to public sector agencies across the country.

Top

Restatement of the Law — Torts
Restatement (Second) of Torts
Current through April 2010

Division 5. Defamation
Chapter 24. Invasions Of Interest In Reputation
Topic 1. Elements Of A Cause Of Action For Defamation

§ 558. Elements Stated

Link to Case Citations

To create liability for defamation there must be:
(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Comment:

a. On what constitutes defamatory matter, see § 559. On the requirement of falsity and when a statement is true or false, see § 581A.

b. On the applicability of the defamatory matter to the plaintiff, see § 564. See, also, § 580A, Comment *f*.

c. On the meaning of the word "privileged" see § 10. On the situations in which one is privileged to defame another, see §§ 583 to 612.

d. On what constitutes a publication, see § 577.

e. On what constitutes the requisite fault regarding the falsity or defamatory character of the matter published, see §§ 580A and 580B.

f. On what kinds of defamatory publications are actionable irrespective of special harm, see §§ 569-574.

g. On the types of defamatory publications that are actionable because they have resulted in special harm to the person defamed, see § 575.

h. On damages recoverable, see § 621. On special harm as an element of damages, see §§ 622 and 622A.

Case Citations

Reporter's Notes & Cross References Through December 1977

— June 1987Case Citations 1978 — June 1987

— June 1998Case Citations July 1991 — June 1998

— June 2009Case Citations July 1998 — June 2009

Reporter's Notes & Cross References Through December 1977:

REPORTER'S NOTE

This Section has been changed by the addition of Clause (c) as a result of the Supreme Court's constitutional decisions.

As an index section, it refers to the sections where the notes for the individual elements are to be found.

The Tylenol Crisis:

How Effective Public Relations Saved Johnson & Johnson.

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by Tamara Kaplan, The Pennsylvania State University

"Public Relations is the management function that establishes and maintains mutually beneficial relationships between an organization and the public on whom its success or failure depends." (Broom, Center, Cutlip, 1)

In the fall of 1982, McNeil Consumer Products, a subsidiary of Johnson & Johnson, was confronted with a crisis when seven people on Chicago's West Side died mysteriously. Authorities determined that each of the people that died, had ingested an Extra-Strength Tylenol capsule laced with cyanide. The news of this incident traveled quickly and was the cause of a massive, nationwide panic. These poisonings made it necessary for Johnson & Johnson to launch a public relations program immediately, in order to save the integrity of both their product and their corporation as a whole.

The Story of the Tylenol Poisonings

When 12 year-old Mary Kellerman of Elk Grove Village, Ill., awoke at dawn with cold symptoms, her parents gave her one Extra-Strength Tylenol and sent her back to bed. Little did they know, they would wake up at 7:00 a.m. to find their daughter dying on the bathroom floor. (Beck, 32)

That same morning, Adam Janus, 27, of Arlington Heights, Ill., took Extra- Strength Tylenol to appease a minor chest pain. An hour later, Janus suffered a cardiopulmonary collapse and died suddenly. That very evening, when relatives gathered at Janus' home, Adam's brother Stanley, 25, and his wife Theresa, 19, took Tylenol from the same bottle that had killed their loved one. They were both pronounced dead within the next 48 hours. (Tifft, 18)

Mary Reiner, 27, of the neighboring suburb, Winfield, died after taking two Tylenol capsules the next day. Reiner, who was dead within hours at the local hospital, had just recently given birth to her fourth child. Paula Prince, 35, a United Airlines stewardess, was found dead in her Chicago apartment with an open bottle of Extra- Strength Tylenol nearby. Mary McFarland, 31, of Elmhurst, Ill., was the seventh victim of the cyanide-laced Tylenol capsules. (Beck, 32) (Tifft, 18)

The cause of these strange and sudden deaths did not remain a mystery for long. The connection to Tylenol was discovered within days with the help of two off-duty firemen who were at home listening to their police radios. The two men, Philip Cappitelli and Richard Keyworth were exchanging information about the deaths, when they realized that Tylenol was mentioned in two of the reports. The men made some assumptions and told their superiors that there was a possibility that the over the counter drug was the mysterious killer. (Tifft, 18)

The Extra-Strength Tylenol capsules in question were each found to contain 65 milligrams of cyanide. The amount of cyanide necessary to kill a human is five to seven micrograms, which means that the person who tampered with the pills, used 10,000 times more poison than was needed. Dr. Thomas Kim, chief of the Northwest Community Hospital at the time of the poisonings, said, "The victims never had a chance. Death was certain within minutes." (Tifft, 18) (Tylenol Murders, 3)

The nation was warned about the danger of Tylenol as soon as a connection could be made. Police drove through Chicago announcing the warning over loudspeakers, while all three national television networks reported about the deaths from the contaminated drug on their evening news broadcasts. A day later, the Food and Drug Administration advised consumers to avoid the Tylenol capsules, "until the series of deaths in the Chicago area can be clarified." (Tifft, 18)

Officials at McNeil Consumer Products made clear that the tampering had not taken place at either of its plants, even though cyanide was available on the premises. A spokesman for Johnson & Johnson told the media of the company's strict quality control and said that the poisonings could not have been performed in the plants. Because the cyanide laced Tylenol had been discovered in shipments from both of the company's plants and had only been found in the Chicago area, authorities concluded that any tamperings must have occurred once the Tylenol had reached Illinois. (Beck, 33)

The tainted Tylenol capsules were from four different manufacturing lots. Evidence suggests that the pills were taken from different stores over a period of weeks or months. The bottles, some of which had five or less cyanide laced capsules and one which had ten, were tampered with and then placed back on the shelves of five different stores in the Chicago area. It seems that the person responsible for the deaths, spent a few hours distributing the laced bottles of Tylenol. (Tylenol Murders, 2)

The publicity about the cyanide laced capsules immediately caused a nationwide panic. A hospital in Chicago received 700 telephone calls about Tylenol in one day. People in cities across the country were admitted to hospitals on suspicion of poisoning by cyanide. (Tifft, 18)

Along with a nationwide scare, the poisoned capsules brought with them copycats, who attempted to simulate the tamperings in Chicago. In the first month after the Tylenol related deaths, the Food and Drug Administration counted 270 incidents of suspected product tampering. Although, the FDA thinks this number may have been inflated by the hysteria of consumers who blame any type of headache or nausea on food and medicine they think may have been poisoned. The FDA estimated that only about 36 of the cases were, "true tamperings." (Church, 27)

After this crisis, Johnson & Johnson was faced with quite a dilemma. They needed to find the best way to deal with the tamperings, without destroying the reputation of their company and their most profitable product, Tylenol. Many marketing experts thought that Tylenol was doomed by doubts that the public may have had to whether or not the product was safe. "I don't think they can ever sell another product under that name," advertising genius Jerry Della Femina told the New York Times in the first days following the crisis. "There may be an advertising person who thinks he can solve this and if they find him, I want to hire him, because then I want him to turn our water cooler into a wine cooler." (Knight, 2)

What Did Johnson and Johnson Do?

Della Femina was quite wrong in assuming that Tylenol would never sell again. Not only is Tylenol still one of the top selling over the counter drugs in this country, but it took very little time for the product to return to the market. Johnson and Johnson's handling of the Tylenol tampering crisis is considered by public relations experts to be one of the best in the history of public relations.

The public relations decisions made as a result of the Tylenol crisis, arrived in two phases. The first phase was the actual handling of the crisis. The comeback of both Johnson & Johnson and Tylenol, was the second phase in the public relations plan. The planning for phase two began almost as soon as phase one was being implemented.

Phase one of Johnson & Johnson's public relations campaign was executed immediately following the discovery that the deaths in Chicago were caused by Extra- Strength Tylenol capsules. As the plan was constructed, Johnson & Johnson's top management put customer safety first, before they worried about

their companies profit and other financial concerns.

The company immediately alerted consumers across the nation, via the media, not to consume any type of Tylenol product. They told consumers not to resume using the product until the extent of the tampering could be determined. Johnson & Johnson, along with stopping the production and advertising of Tylenol, recalled all Tylenol capsules from the market. The recall included approximately 31 million bottles of Tylenol, with a retail value of more than 100 million dollars. (Broom, Center, Cutlip, 381)

This was unusual for a large corporation facing a crisis. In many other similar cases, companies had put themselves first, and ended up doing more damage to their reputations than if they had immediately taken responsibility for the crisis. An example of this was the crisis that hit Source Perrier when traces of benzene were found in their bottled water. Instead of holding themselves accountable for the incident, Source Perrier claimed that the contamination resulted from an isolated incident. They then recalled only a limited number of Perrier bottles in North America. (Broom, Center, Cutlip, 59, 381)

When benzene was found in Perrier bottled water in Europe, an embarrassed Source Perrier had to announce a world wide recall on the bottled water. Apparently, consumers around the world had been drinking contaminated water for months. Source Perrier was harshly attacked by the media. They were criticized for having little integrity and for disregarding public safety. (Broom, Center Cutlip, 59)

Johnson & Johnson, on the other hand, was praised for their actions by the media for their socially responsible actions. Along with the nationwide alert and the Tylenol recall, Johnson & Johnson established relations with the Chicago Police, the FBI, and the Food and Drug Administration. This way the company could have a part in searching for the person who laced the Tylenol capsules and they could help prevent further tamperings. Johnson & Johnson was given much positive coverage for their handling of this crisis. (Atkinson, 2) (Broom, Center, Cutlip, 381)

An article by Jerry Knight, published in The Washington Post on October 11, 1982, said, "Johnson & Johnson has effectively demonstrated how a major business ought to handle a disaster." The article stated that, "This is no Three Mile Island accident in which the company's response did more damage than the original incident." The Washington Post cited many incidents where public relations programs at large companies failed in crisis situations. They applauded Johnson & Johnson for being honest with the public.

The Washington Post article stressed that it must have been difficult for the company to withstand the temptation to disclaim any possible link between Tylenol and the seven sudden deaths in the Chicago area. They added that the company never attempted to do anything, other than try to get to the bottom of the deaths.

According to the article, "what Johnson & Johnson executives have done is communicate the message that the company is candid, contrite, and compassionate, committed to solving the murders and protecting the public." The Washington Post also mentioned that Johnson & Johnson almost immediately put up a reward of $100,000 for the killer.

The Kansas City Times published an article on November 12, 1982, by Rick Atkinson, that was comprised of interviews with top executives at Johnson & Johnson shortly after the Tylenol crisis. James E. Burke, chairman of the board of the corporation at the time of the tamperings, said that the poisonings put everyone at Johnson & Johnson into shock. He did say though, that some of the initial public relations decisions pertaining to this case were easy to make.

Burke said that the decisions to pull advertising for Tylenol, recall all of the bottles from the lots that were laced with cyanide, and send warnings to health professionals, were made with no hesitation. Although it seemed almost impossible that Johnson & Johnson could be held responsible for any of the tamperings, the corporation had a hard decision to make: Should they implement a nationwide recall on the product?

There was a great deal of discussion on recalling Tylenol on a national level. Some executives worried about the panic that could result in the industry over such a wide scale recall. There were arguments over which Tylenol products to pull and arguments over whether recalling 100 million dollars in Tylenol would humor the killer and spur him to poison other products. The executives held off on the huge recall through the first weekend after the deaths.

That Saturday, three of the victims of the poisoned capsules were buried. There was coverage of the burials that night on television. Johnson & Johnson executives wept not only out of grief, but some out of guilt. One top executive said, "it was like lending someone your car and seeing them killed in a traffic accident." That weekend, opposition to the national recall all but vanished and it was announced on Tuesday that 31 million bottles of Extra-Strength Tylenol capsules would be pulled off of merchants shelves.

On Thursday, as a final step in this phase of Johnson & Johnson's public relations plan, the company offered to exchange all Tylenol capsules that had already been purchased for Tylenol tablets. It was estimated that millions of bottles of Tylenol capsules were in consumers homes at the time. Although this proposition cost Johnson & Johnson millions more dollars, and there may not have been a single drop of cyanide in any of the capsules they replaced, the company made this choice on their own initiative in order to preserve their reputation. (Knight, 2)

Tylenol's Comeback

The planning for phase two of Johnson & Johnson's public relations plan, or the "comeback" phase, was already in the works by the time the first phase had been completed. Tylenol, which had a massive advertising budget prior to the poisonings, had become the number one alternative to aspirin, in the nation. The product had 37 percent of the market for over-the-counter painkillers. (Knight, 2) Because Tylenol was such a huge money-maker for Johnson & Johnson, the company unleashed a extensive marketing and promotional program to bring Tylenol back to it's position as the number one over-the-counter analgesic in the United States. (Johnson & Johnson)

Chairman of the board, James E. Burke said, in regard to the comeback, "It will take time, it will take money, and it will be very difficult; but we consider it a moral imperative, as well as good business, to restore Tylenol to it's preeminent position." (Johnson & Johnson)

In November, less than six weeks after the nation learned of the sudden deaths in Chicago, Johnson & Johnson subsidiary, McNeil Consumer Products, revealed its public relations plan for the recovery of Tylenol, at their sales conference in New Brunswick, New Jersey. There were five main components of the McNeil/ Johnson & Johnson comeback crusade. (Johnson & Johnson)

Tylenol capsules were reintroduced in November baring a new triple-seal tamper- resistant packaging. The new packaging was appearing on market shelves by December, making McNeil Consumer Products the first company in the pharmaceutical industry to react to the Food and Drug Administration's new regulations and the national mandate for tamper-resistant packaging. (Johnson & Johnson)

To advocate the use of Tylenol to customers who may have strayed from the brand as a result of the tamperings, McNeil Consumer Products provided $2.50-off coupons that were good towards the purchase of any Tylenol product. The coupons could be obtained by consumers calling a special toll-free number. This offer was also made in November and December through popular newspapers where the $2.50 coupon was printed. (Johnson and Johnson)

Sales people at McNeil planned to recover former stock and shelf facing levels for Tylenol by putting a new pricing program into effect. This new program gave consumers discounts as high as 25 percent. Also, a totally new advertising campaign was put in the works. The new advertising program was launched in 1983. (Johnson & Johnson)

Finally, over 2250 sales people from Johnson & Johnson domestic affiliates were asked by Johnson & Johnson to make presentations to people in the medical community. These presentations were made by the millions to promote support for the reintroduction Tylenol. The Tylenol comeback was a great success. Many executives attribute the success of the comeback to the quick actions of the corporation at the onset of the Tylenol crisis. They think that if Johnson & Johnson had not been so direct in protecting the public interest, Tylenol capsules would not have reemerged so easily. (Johnson & Johnson)

An article by Howard Goodman, published in The Kansas City Times, on November 12, 1982, covering a press conference where James E. Burke launched Johnson & Johnson's national campaign for the comeback of Tylenol, applauded the corporation's efforts. The article, in a sense, provided free advertising for Tylenol's new packaging, stating, "the package has glued flaps on the outer box, which must be forcibly opened. Inside a tight plastic seal surrounds the cap and an inner foil seal wraps over the mouth of the bottle... The label carries the warning: 'Do not use if safety seals are broken.' " This article was just the type of coverage that Johnson & Johnson needed to promote their recovery.

More positive coverage of the Tylenol comeback was published in Advertising Age Magazine on November 15, 1982, in an article written by Nancy Giges. Not only did this article tell of Johnson & Johnson's new tamper-resistant packaging, but it outlined the corporation's entire plan for recovery.

The New York Times, published an article by, Tamar Lewin, on December 24, 1982, that announced to consumers that Tylenol had, in a short period of time, gained back much of the market that it lost prior to the cyanide deaths. The article stated that at that time Tylenol had 24 percent of the market for pain relievers, not much less than the 37 percent of the market that the product held before the crisis. This article continued the media trend of publicizing Tylenol's comeback in a positive light.

How Did Johnson & Johnson Make These Decisions?

The public relations decisions made in light of the Tylenol crisis had to have come from somewhere. This basis for decision making became a bit more clear in 1983, when the New Jersey Bell Journal published article written by Lawrence G. Foster. Foster, Corporate Vice President of Johnson & Johnson, at the time of the Tylenol poisonings, joined the company in 1957 and helped the company build its first public relations department. In this article he explains that Johnson & Johnson simply turned to their corporate business philosophy, which they call "Our Credo," when determining how to handle the Tylenol situation.

Foster discusses that although, at the time of the crisis, corporate planning groups were including crisis management in their preparations for a healthy business environment, no crisis management plan would have been appropriate to tackle the Tylenol poisonings. This is because no management could ever be prepared for a tragedy of this scale. So, Johnson & Johnson turned to their credo for help. "It was the credo that prompted the decisions that enabled us to make the right early decisions that eventually led to the comeback phase," said David R. Clare, president of Johnson & Johnson at the time. (Foster, 2)

The credo was written in the mid-1940's by Robert Wood Johnson, the company's leader for 50 years. Little did Johnson know, he was writing an outstanding public relations plan. Johnson saw business as having responsibilities to society that went beyond the usual sales and profit incentives. In this respect, Foster explained, Johnson outlined his company's responsibilities to: "consumers and medical professionals using its products, employees, the communities where its people work and live, and its stockholders." Johnson believed that if his company stayed true to these responsibilities, his business would flourish in the long run. He felt that his credo was not only moral, but profitable as well.

As the Tylenol crisis began and became more serious as the hours went by, Johnson & Johnson top management turned to the credo for guidance. As the credo stressed, it was important for Johnson & Johnson to be responsible in working for the public interest. The public and medical community was alerted of the crisis, the Food and Drug Administration was notified, and production of Tylenol was stopped.

The first important decision, that put Johnson & Johnson's public relations program in the right direction, was made immediately by the public relations department with complete support from the management. This decision was for the company to cooperate fully with all types of news media. It was crucially important because the press, radio, and television were imperative to warning the public of the ensuing danger. Without the help of the media, Johnson and Johnson's program would have been completely ineffective. (Foster, 3)

From this point on, the media did much of the company's work. Queries from the press about the Tylenol crisis were beyond 2,500. Two news clipping services found over 125,000 news clippings on the Tylenol story. One of the services claimed that this story had been given the widest US news coverage since the assassination of President John F. Kennedy. The television and news coverage on the crisis was just as extensive. (Foster, 3)

It is clear that the media played a huge role in Johnson & Johnson's public relations campaign following the seven deaths by cyanide-laced Extra-Strength Tylenol capsules. If the company had not fully cooperated with the media, they would have, in turn, received much less positive media coverage. Disapproving coverage by the media could have easily destroyed Tylenol's reputation permanently.

By creating a public relations program that both protected the public interest and was given full support by media institutions in the US, Johnson & Johnson was able to recover quickly and painlessly from possibly the greatest crisis ever to hit the pharmaceutical industry.

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LEXSEE 2003 U.S. DIST. LEXIS 14586

Analysis
As of: Jan 23, 2008

SHARON HAUGH, Plaintiff, -v- SCHRODER INVESTMENT MANAGEMENT NORTH AMERICA INC., SCHRODERS PLC, SCHRODER INVESTMENTS (BERMUDA) LIMITED, SCHRODERS INC., and MICHAEL DOBSON, Defendants.

02 CIV. 7955 (DLC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2003 U.S. Dist. LEXIS 14586; 92 Fair Empl. Prac. Cas. (BNA) 1043

August 25, 2003, Decided
August 25, 2003, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by, Claim dismissed by *Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 2003 U.S. Dist. LEXIS 15973 (S.D.N.Y., Sept. 15, 2003)*

PRIOR HISTORY: *Haugh v. Schroder Inv. Mgmt. N. Am., Inc., 2003 U.S. Dist. LEXIS 7989 (S.D.N.Y., May 14, 2003)*

DISPOSITION: Defendants' motion to compel denied.

CASE SUMMARY:

PROCEDURAL POSTURE: In an age discrimination employment action, defendant employer filed a motion to compel discovery of 15 documents that plaintiff employee sent to a public relations consultant engaged by the employee's former attorney and discovery of one document that the consultant sent to the attorney. The employee argued that the attorney-client privilege or the work product doctrine protected the documents.

OVERVIEW: The attorney hired the consultant to provide advice as to media strategy as it impacted the discrimination action and to handle media communications. The documents sent by the employee to the consultant included a draft letter to the employer's chief executive officer, background information on the employee's position, marked-up press releases, and handwritten notes. The document sent by the consultant to the attorney was a list of topics for a scheduled meeting. The court held that the attorney-client privilege did not apply because the consultant did not perform anything other than standard public relations services and the communications at issue were not made for the purpose of obtaining legal advice. However, the documents were protected by the work product doctrine set forth in *Fed. R. Civ. P. 26(b)(3)* because they were all prepared in anticipation of litigation. The employer articulated substantial need for only one document that tended to contradict the employee's statement that her termination came as a surprise; however, this document, which included an annotated letter drafted by the attorney, was entitled to heightened protection as the attorney's opinion work product.

OUTCOME: The court denied the motion to compel.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > Elements

Evidence > Privileges > Attorney-Client Privilege > Waiver
[HN1] The broad outlines of the attorney-client privilege are clear: (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 protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. The burden of establishing all of the necessary elements of the privilege is on the party asserting it.

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > Scope
Legal Ethics > Client Relations > Confidentiality of Information
[HN2] There is precedent for expanding the attorney-client privilege to those assisting a lawyer in representing a client. Where the communications from the client to a consultant are made in confidence and for the purpose of obtaining legal advice from the attorney, the communication is privileged. The privilege, however, should be narrowly construed and expansions cautiously extended.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN3] Where a party fails to show that communications with a public relations consultant were made for the purpose of obtaining legal advice from her attorney as opposed to public relations advice from the consultant, the communications are not protected by the attorney-client privilege.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN4] See *Fed. R. Civ. P. 26(b)(3)*.

Civil Procedure > Discovery > Methods > General Overview
Evidence > Privileges > Attorney-Client Privilege > Elements
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN5] The work product privilege is distinct from and broader than the attorney-client privilege. As the Second Circuit has held, where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within *Fed. R. Civ. P. 26(b)(3)*. The Second Circuit has rejected the view that a document must be created primarily or exclusively for the litigation in order to qualify for protection. The doctrine extends to notes, memoranda, witness interviews, and other materials, whether they are created by an attorney or by an agent for the attorney. Once it is established that a document was prepared in anticipation of litigation, work-product immunity protects documents prepared by or for a representative of a party, including his or her agent.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN6] The core goal of the work product doctrine is to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries. The doctrine protects a lawyer's ability to prepare his client's case, protects against the disclosure of the attorney's mental impressions, conclusions, strategies, or theories, and also avoids the unfairness that would occur if one party were allowed to appropriate the work of another.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Discovery > Privileged Matters > Work Product > Opinion Work Product
Legal Ethics > Client Relations > Confidentiality of Information
[HN7] A finding that a document falls within the work product doctrine does not end the inquiry. Indeed, the Second Circuit has explained that although a finding under this test that a document is prepared because of the prospect of litigation warrants application of *Fed. R. Civ. P. 26(b)(3)*, this does not necessarily mean that the document will be protected against discovery. Rather, it means that a document is eligible for work-product privilege. The district court can then assess whether the party seeking discovery has made an adequate showing of substantial need for the document and an inability to obtain its contents elsewhere without undue hardship. *Rule 26(b)(3)* goes on to state, however, that even upon this showing of substantial need and undue hardship, mental

impressions, opinions, or legal theories of an attorney receive heightened protection. Attorney work product can thus conceptually be divided into two classes: that which recites factual matters and that which reflects the attorney's opinions, conclusions, mental impressions or legal theories. A heightened standard of protection must be accorded "opinion" work product that reveals an attorney's mental impressions and legal theories. An attorney's protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information.

COUNSEL: [*1] For Plaintiff: Marc E. Kasowitz, Aaron H. Marks, Kasowitz, Benson, Torres & Friedman LLP, New York, NY.

For Defendants: Christine N. Kearns, Julia Judish, Shaw Pittman LLP, Washington, D.C. Christopher P. Reynolds, Morgan, Lewis & Bockius, LLP, New York, NY.

JUDGES: DENISE COTE, United States District Judge.

OPINION BY: DENISE COTE

OPINION

OPINION AND ORDER

DENISE COTE, District Judge:

Defendants bring a motion to compel production of sixteen documents for which plaintiff claims protection under the attorney-client or work product privileges. Fifteen of the documents are communications sent to a public relations consultant engaged by plaintiff's former counsel; the sixteenth was sent by the consultant to the attorney. The asserted attorney-client privilege cannot extend to a public relations consultant on the facts of this case. Defendants are unable, however, to overcome work product protection for these documents. The motion is denied.

BACKGROUND

Until her employment was terminated on May 9, 2002, plaintiff Sharon Haugh ("Haugh") was Chairman of defendant Schroder Investment Management North America, Inc. ("SIMNA"). At the time her employment ended, Haugh was presented with [*2] a draft press release and a separation agreement, which she refused to sign. In the weeks following, articles discussing her departure from SIMNA appeared in industry publications. Believing that her former employers had engaged in unlawful age discrimination, Haugh filed a charge with the Equal Employment Opportunity Commission on June 26. After the EEOC issued a right to sue letter on September 23, Haugh commenced this action on October 7. In her complaint, Haugh alleges, *inter alia*, that defendants engaged in unlawful age discrimination in deciding to terminate her employment.

This motion concerns the involvement of Laura J. Murray ("Murray"), a public relations consultant who is also a lawyer licensed to practice in the state of Texas. Plaintiff's former counsel, Arkin Kaplan LLC ("Arkin"), retained Murray in September 2002, and sent Murray a formal retention letter on October 3, 2002. [1] The retention letter states that Murray will "provide us advice to assist us in providing legal services to Ms. Haugh." The letter provided that Murray would look only to Haugh for payment. It included the following statement regarding confidentiality: "You further understand that our [*3] communications with you are confidential and privileged."

1 Arkin Kaplan withdrew as counsel in December 2002.

According to the affidavit of Stanley S. Arkin, he hired Murray to help defend Haugh from further attacks in the media which he anticipated would occur once she filed her lawsuit. Mr. Arkin expected that Murray's role in the case "would include media strategy as it impacted on our litigation and the consequent support and handling of media communications." Mr. Arkin's affidavit identifies, as tasks performed by Murray, assisting in the preparation of a press release issued at the time this action was filed, participating in strategy sessions with Arkin and Haugh, reviewing materials sent by Haugh "for impact on our litigation strategy," advising Arkin as to possible "public reactions," handling media communications and preparing a "detailed agenda" for a meeting held with Arkin and Haugh "on one occasion." Mr. Arkin further affirms that "Murray attended meetings at my office with Ms. Haugh and lawyers [*4] at my firm. The purpose of these meetings was to discuss Ms. Haugh's claims and to develop a litigation and media strategy. . . ." Murray's affidavit largely echoes the statements made in the affidavit submitted by Mr. Arkin, although she notes that she "always considered the legal ramifications and potential adverse use of press releases." Murray affirms:

> My responsibilities in connection with this matter included media strategy as it impacted on Ms. Haugh's litigation and the consequent support and handling of media communications. To this end, I participated in strategy sessions with lawyers from the Arkin Firm and Ms. Haugh and offered advice. For example, at the direction of lawyers at the Arkin Firm, I reviewed materials received from Ms.

> Haugh not only from the standpoint of public relations but, most importantly, for impact on litigation strategy. Further, I was to advise as to possible public reactions at various stages of the litigation and to handle media communications, including the issuance of a press release at the time the complaint was filed.

Haugh has not submitted an affidavit in conjunction with this motion. In the days immediately after the lawsuit [*5] was filed, press reports were published that appear to reflect the plaintiff's press release. Mr. Arkin is quoted in at least one of the reports.

None of the documents at issue on this motion, which were submitted for *in camera* review, originated with Arkin. With one exception, they were sent from plaintiff to Murray; many were sent simultaneously to Arkin. They appear to have been sent between the dates of September 23 and October 15, 2002. [2] Among the documents which were sent to Murray is a draft of a letter addressed to the CEO of defendant Schroders, Michael Dobson, apparently prepared months earlier by an attorney who represented Haugh before she retained Arkin. Several documents contain background information on Haugh's position and SIMNA and her industry generally, as well as Haugh's notes on the market data she is transmitting. [3] Included also are a marked-up (presumably by Haugh) press release relating to Haugh's departure from SIMNA, seven pages of handwritten notes presumably created by Haugh, and a handwritten note from Haugh to Murray and Arkin, although not explained in the privilege log or otherwise, that may describe Haugh's contacts with three potential witnesses. [*6] There are no requests for legal advice. The single document from Murray is a nine point list of topics for a discussion scheduled to occur on September 23. This document was apparently sent to plaintiff's counsel.

> 2 The plaintiff has not supplied the dates for some of the documents.

> 3 It should be noted that some of the documents (excluding Haugh's annotations), including job descriptions for plaintiff's position, or industry data, would likely be available to defendants without discovery.

DISCUSSION

Attorney-Client Privilege

> [HN1] The broad outlines of the attorney-client privilege are clear: (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 protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 119 F.3d 210, 214 (2d Cir. 1997) [*7] (citation omitted). The burden of establishing all of the necessary elements of the privilege is on the party asserting it, here the plaintiff. *Id.*

Plaintiff accurately points out that [HN2] there is precedent for expanding the attorney-client privilege to those assisting a lawyer in representing a client. Where the communications from the client to a consultant are made in confidence and "for the purpose of obtaining legal advice" from the attorney, the communication is privileged. *United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)*. The privilege, however, "should be narrowly construed and expansions cautiously extended." *United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999)* (per curiam); *see also Int'l Broth., 199 F.3d at 214*. As the Second Circuit observed in endorsing the extension of the extension of the privilege to cover the work of an accountant aiding an attorney in understanding the financial aspects of the client's case, "if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *Kovel, 296 F.2d at 922*. In other words, it is crucial that the party asserting the privilege [*8] show that the communication is made so that the client may obtain *legal* advice *from her attorney*. Given this requirement, it is not surprising that there is limited precedent dealing specifically with the application of the attorney-client privilege to public relations consultants.

Plaintiff has not shown that Murray performed anything other than standard public relations services for Haugh, and more importantly, she has not shown that her communications with Murray or Murray's with Arkin were necessary so that Arkin could provide Haugh with legal advice. The conclusory descriptions of Murray's role supplied by plaintiff fail to bring the sixteen documents within the ambit of the attorney-client privilege. The documents transmitted from plaintiff to Murray and the one document from Murray to Arkin are consistent with the design of a public relations campaign. Plaintiff has not shown that Murray was "performing functions materially different from those that any ordinary public relations" advisor would perform. *Calvin Klein Trademark Trust v. Wachner et al., 198 F.R.D. 53, 55*

(S.D.N.Y. 2000). As such, Haugh's transmission of documents to Murray, even simultaneously [*9] with disclosure to former counsel, and Murray's transmission of a meeting agenda to Arkin, vitiates the application of the attorney-client privilege to these documents.

Plaintiff places great reliance on the recent decision of the Honorable Lewis A. Kaplan in *In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 2003 U.S. Dist. LEXIS 9022, 2003 WL 21262645 (S.D.N.Y. June 2, 2003)*. That decision does not assist Haugh. Judge Kaplan held that the privilege applied to a public relations consulting firm hired to assist counsel to create a climate in which prosecutors might feel freer not to indict the client. *Id. at *3, 6*. He concluded that this was an area in which counsel were presumably unskilled and that the task constituted "legal advice." There is no need here to determine whether *In re Grand Jury Subpoenas* was correctly decided. Haugh has not identified any legal advice that required the assistance of a public relations consultant. For example, she has not identified any nexus between the consultant's work and the attorney's role in preparing Haugh's complaint or Haugh's case for court. A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, [*10] but that decision does not transform their coordination of a campaign into legal advice. *See, e.g., Calvin Klein, 198 F.R.D. at 55*. [HN3] Since Haugh has failed to show that the communications were made for the purpose of obtaining legal advice from her attorney as opposed to public relations advice from Murray, the communications are not protected by the attorney-client privilege.

Work Product

The work product doctrine is codified in *Rule 26(b)(3), Fed. R. Civ. P.*, which states in relevant part:

> [HN4] a party may obtain discovery of documents ... otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure [*11] of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 26(b)(3), Fed. R. Civ. P. [HN5] This privilege is "distinct from and broader than the attorney-client privilege." *United States v. Nobles, 422 U.S. 225, 238 n.11, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975)*; , *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002 318 F.3d 379, 383 (2003)*. As the Second Circuit has held, "where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within *Rule 26(b)(3)*." *United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998)*; *see also United States v. Jacques Dessange, Inc., 2000 U.S. Dist. LEXIS 3734, 2000 WL 310345, at *1 (S.D.N.Y. March 27, 2000)* (DLC). *Adlman* rejects the view that a document must be created "primarily" or "exclusively" for the litigation in order to qualify for protection. *Adlman, 134 F.3d at 1198*. The doctrine extends to notes, memoranda, witness interviews, and other materials, whether they are [*12] created by an attorney or by an agent for the attorney. *See United States v. Nobles, 422 U.S. 225, 238-39, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975)*; *Carter v. Cornell Univ., 173 F.R.D. 92, 95 (S.D.N.Y. 1997)*. "Once it is established that a document was prepared in anticipation of litigation, work-product immunity protects 'documents prepared by or for a representative of a party, including his or her agent.'" *In re Copper Market Antitrust Litigation, 200 F.R.D. 213, 221 (S.D.N.Y. 2001)* (citation omitted).

[HN6] The core goal of the doctrine is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *Adlman, 134 F.3d at 1196* (quoting *Hickman v. Taylor, 329 U.S. 495, 510-11, 91 L. Ed. 451, 67 S. Ct. 385 (1947)*). The doctrine protects a lawyer's ability to prepare his client's case, protects against the disclosure of the attorney's mental impressions, conclusions, strategies, or theories, and also avoids the unfairness that would occur if one party were allowed to appropriate the [*13] work of another. *See id. at 1197*. Both the Supreme Court and this Circuit have repeatedly reaffirmed the "strong public policy" underlying the work product privilege, finding that

> it is essential that a lawyer work with a certain degree of privacy . . . . If discovery of [attorney work product] were permitted much of what is now put down in writing would remain unwritten. . . . And the in-

> terests of the clients and the cause of justice would be poorly served.

Upjohn Co. v. United States, 449 U.S. 383, 397-98, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)

(citation omitted). *See also Adlman, 134 F.3d at 1197*; *In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992)*.

[HN7] A finding that a document falls within the work product doctrine does not, however, end the inquiry. Indeed, the Second Circuit has explained that

> although a finding under this test that a document is prepared because of the prospect of litigation warrants application of *Rule 26(b)(3)*, this does not necessarily mean that the document will be protected against discovery. Rather, it means that a document is *eligible* for work-product privilege. [*14] The district court can then assess whether the party seeking discovery has made an adequate showing of substantial need for the document and an inability to obtain its contents elsewhere without undue hardship.

Adlman, 134 F.3d at 1202-03 (emphasis in original). As noted above, *Rule 26(b)(3)* goes on to state, however, that even upon this showing of "substantial need" and "undue hardship," "mental impressions . . . opinions, or legal theories" of an attorney receive heightened protection. Attorney work product can thus conceptually be divided into two classes: that which recites factual matters and that which reflects the attorney's opinions, conclusions, mental impressions or legal theories. A heightened standard of protection must be accorded "opinion" work product that reveals an attorney's mental impressions and legal theories. *See Upjohn Co., 449 U.S. at 401. See also Adlman, 134 F.3d at 1197*; *In re Steinhardt Partners, L.P., 9 F.3d 230, 234 (2d Cir. 1993)* ("An attorney's protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information. [*15] ")

All of the documents submitted in conjunction with this motion are covered by the work product privilege, as they were all prepared by a party, her agent, attorney or consultant in anticipation of litigation. Defendants have articulated a substantial need only for documents that would tend to contradict Haugh's statement that her termination on May 9, 2002 came as a surprise. This need is potentially addressed by only one document, Document # 40, which is described in the privilege log as a "note to public relations person attaching draft letter by counsel . . .," and is dated in the log, May 6, 2002. As plaintiff points out in her brief, however, this date is misleading. Document # 40 is actually two documents: a handwritten cover letter, presumably from Haugh, and an annotated letter addressed to Schroder's CEO Dobson prepared by Haugh's former counsel. It is the annotated letter that is dated May 6, and there is no reason to believe that these documents were transmitted to Murray any earlier than September. The letter drafted by counsel is entitled to the heightened protection available to documents that reflect the opinion work product of attorneys, which defendants cannot overcome. [*16] The work product doctrine therefore shields the entirety of the documents submitted with this motion.

CONCLUSION

For the reasons stated above, defendants' motion to compel is denied.

SO ORDERED:

Dated: New York, New York

August 25, 2003

DENISE COTE

United States District Judge

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

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

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

[Comment][Pre-2002 version][State Narratives]

DR 7-107 [1200.38] Trial Publicity.

A. A lawyer participating in or associated with a criminal or civil matter, or associated in a law firm or government agency with a lawyer participating in or associated with a criminal or civil matter, shall not make 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 in that matter. Notwithstanding the foregoing, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement so made shall be limited to such information as is necessary to mitigate the recent adverse publicity.

B. A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

1. The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness.

2. In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement.

3. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented.

4. Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration.

5. Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

6. The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

C. Provided that the statement complies with DR 7-107 [1200.38] (A), a lawyer involved with the investigation or litigation of a matter may state the following without elaboration:

1. The general nature of the claim or defense.

2. The information contained in a public record.

3. That an investigation of the matter is in progress.

4. The scheduling or result of any step in litigation.

5. A request for assistance in obtaining evidence and information necessary thereto.

6. A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

7. In a criminal case:

a. The identity, age, residence, occupation and family status of the accused.

b. If the accused has not been apprehended, information necessary to aid in apprehension of that person.

c. The fact, time and place of arrest, resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement.

d. The identity of investigating and arresting officers or agencies and the length of the investigation.

LEXSEE 265 F. SUPP 2D 321

Warning
As of: Dec 13, 2007

IN RE: GRAND JURY SUBPOENAS DATED MARCH 24, 2003 DIRECTED TO (A) GRAND JURY WITNESS FIRM and (B) GRAND JURY WITNESS

M11-189

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

265 F. Supp. 2d 321; 2003 U.S. Dist. LEXIS 9022; 61 Fed. R. Evid. Serv. (Callaghan) 1076

June 2, 2003, Decided
June 3, 2003, Filed

SUBSEQUENT HISTORY: Motion granted by *In re Grand Jury Subpoena, 2003 U.S. Dist. LEXIS 9814 (S.D.N.Y., June 10, 2003)*

DISPOSITION: Government's motion to compel granted in part.

CASE SUMMARY:

PROCEDURAL POSTURE: In the government's grand jury investigation of the target, a former employee of a company, a public relations firm witness and her public relations firm declined to testify and to produce subpoenaed documents claiming attorney-client and work product privileges. The government moved to compel compliance with its subpoenas.

OVERVIEW: The court initially held that the documents withheld from production by the public relations firm that were communications among the target, her lawyers and the public relations firm, or some combination thereof, for the purpose of giving or receiving legal advice, were protected by the attorney-client privilege, but that two conversations and an e-mail between the target and the witness were not protected by the attorney-client privilege because neither the conversations nor the e-mail were at the behest of the target's lawyers or directed at helping the lawyers formulate their strategy. The court then held that, although the documents claimed by the public relations firm to be protected work product were prepared in anticipation of litigation, the government would be allowed to make an ex parte submission as to both its claimed need for the non-attorney opinion work product portions pursuant to *Fed. R. Civ. P. 26(b)(3)* or *Fed. R. Crim. P. 16(b)(2)*, and the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy.

OUTCOME: The government's motion was granted in part allowing the witness to testify regarding her two conversations and an e-mail with the target alone, and allowing the government to make an ex parte submission as to its claimed need for the non-attorney opinion work product portions of the withheld public relations firm documents. The motion was denied in part regarding the remaining documents.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN1] "Work product" refers to material prepared in anticipation of litigation or for trial, including material that reflects the mental impressions, conclusions, opinions or legal theories of an attorney.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN2] The protection afforded to work product is not, technically speaking, an evidentiary privilege.

Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN3] The scope of the attorney-client privilege is governed by *Fed. R. Evid. 501*.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview
Evidence > Privileges > Attorney-Client Privilege > Elements
[HN4] See *Fed. R. Evid. 501*.

Evidence > Privileges > Attorney-Client Privilege > Waiver
[HN5] The broad outlines of the attorney-client privilege are clear: (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 protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

Evidence > Privileges > Attorney-Client Privilege > Scope
Legal Ethics > Client Relations > Confidentiality of Information
[HN6] The attorney-client privilege protects not only communications by the client to the lawyer. In many circumstances, it protects also communications by the lawyer to the client. The attorney-client privilege shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney. Where the client is a corporation, the attorney-client privilege protects both information provided to the lawyer by the client and professional advice given by an attorney that discloses such confidential information.

Evidence > Privileges > Accountant-Client Privilege > Elements
Evidence > Privileges > Accountant-Client Privilege > Scope
Evidence > Privileges > Attorney-Client Privilege > Elements
[HN7] The attorney-client privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services. This principle is applied universally to cover office personnel, such as secretaries and law clerks, who assist lawyers in performing their tasks. But it is applied more broadly as well. For example, the United States Court of Appeals for the Second Circuit holds that a client's communications with an accountant employed by his attorney are privileged where made for the purpose of enabling the attorney to understand the client's situation in order to provide legal advice.

Evidence > Privileges > Accountant-Client Privilege > Elements
Evidence > Privileges > Attorney-Client Privilege > Elements
[HN8] What is vital to the attorney-client privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. This draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant (no privilege as to such communications, even though he later consults his lawyer on the same matter) and others, 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. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of a client and lawyer under conditions where the lawyer needs outside help.

Civil Procedure > Venue > General Overview
Civil Procedure > Trials > Jury Trials > Jurors > General Overview
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN9] The attorney-client privilege extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law. For example, a client's confidential communications to a nontestifying expert retained by the lawyer to assist the lawyer in preparing the client's case probably are privileged. Consultants engaged by lawyers to advise them on matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, how a client should behave while testifying in order to impress jurors favorably, and other matters routinely the stuff of jury and per-

sonal communication consultants come within the attorney-client privilege, as they have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body.

Civil Procedure > Counsel > General Overview
Criminal Law & Procedure > Guilty Pleas > General Overview
Securities Law > Liability > Securities Exchange Act of 1934 Actions > Insider Trading > Duty to Abstain & Disclose > General Overview
[HN10] An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN11] (1) confidential communications, (2) between lawyers and public relations consultants, (3) hired by the lawyers to assist them in dealing with the media, (4) that are made for the purpose of giving or receiving advice, (5) directed at handling the client's legal problems, are protected by the attorney-client privilege.

Evidence > Privileges > Attorney-Client Privilege > Scope
[HN12] For attorney-client privilege purposes, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the attorney-client privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.

Evidence > Privileges > Attorney-Client Privilege > Waiver
Evidence > Privileges > Government Privileges > Waiver
[HN13] Disclosure of communications protected by the attorney-client privilege within the context of another privilege does not constitute waiver of the attorney-client privilege.

Criminal Law & Procedure > Counsel > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview
Evidence > Privileges > Attorney-Client Privilege
[HN14] The work product doctrine, codified in part in *Fed. R. Civ. P. 26(b)(3)* and *Fed. R. Crim. P. 16(b)(2)*, provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial. Both distinct from and broader than the attorney-client privilege, the work product doctrine is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries.

Civil Procedure > Counsel > General Overview
Civil Procedure > Discovery > Methods > General Overview
Civil Procedure > Discovery > Privileged Matters > Work Product > Opinion Work Product
[HN15] Work product falls generally into two categories, which are afforded different levels of protection. Work product consisting merely of materials prepared in anticipation of litigation or for trial is discoverable only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *Fed. R. Civ. P. 26(b)(3)*. Opinion work product, materials that would reveal the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, *Fed. R. Civ. P. 26(b)(3)*, is discoverable, if at all, only upon a significantly stronger showing.

Civil Procedure > Counsel > General Overview
Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects

Evidence > Privileges > Attorney-Client Privilege
[HN16] In criminal cases, the work product doctrine is even stricter than in civil cases, precluding discovery of documents made by a defendant's attorney or the attorney's agents except with respect to scientific or medical reports. *Fed. R. Crim. P. 16(b)(2).*

Civil Procedure > Discovery > Privileged Matters > Work Product > Opinion Work Product
Criminal Law & Procedure > Grand Juries > Secrecy > General Overview
[HN17] While ex parte proceedings in most circumstances are strongly disfavored by our system, the public interest in grand jury secrecy in some cases may trump that important principle. Where an in camera submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure.

COUNSEL: [**1] Appearances:

JAMES B. COMEY UNITED STATES ATTORNEY

[Redacted]

Attorneys for Grand Jury Witness Firm and Grand Jury Witness

[Redacted]

Attorneys for Intervenor Target.

JUDGES: Lewis A. Kaplan, United States District Judge.

OPINION BY: Lewis A. Kaplan

OPINION

[*322] MEMORANDUM OPINION

LEWIS A. KAPLAN, *District Judge.*

This motion poses the troublesome question whether and to what extent the attorney-client privilege and the protection afforded to work product [1] extend to communications between and among a prospective defendant in a criminal case, her lawyers, and a public relations firm hired by the lawyers to aid in avoiding an indictment. The Court's original opinion in this matter was filed under seal in order to protect the secrecy of the grand jury. In view of the importance of this issues, this redacted version of the opinion, [2] which substitutes pseudonyms for names and omits other identifying information, is being filed in the public records of the Court. [3]

1 Except where otherwise indicated, [HN1] "work product" refers to material prepared in anticipation of litigation or for trial, including material that reflects the mental impressions, conclusions, opinions or legal theories of an attorney.

[**2]

2 The Court took into account the views of the parties with respect to the redactions that were required.

3 No inferences should be drawn from the gender of pronouns used to refer to Target and Witness in this redacted version of the opinion.

I. Facts

A. The Procedural Context

The United States Attorney's office began a grand jury investigation of Target, a former employee of the Company, in or before March 2003. On March 24, 2003, it served a grand jury subpoena *ad testificandum* on Witness and another *duces tecum* on Witness's firm ("Firm"), a public relations concern. Counsel for Witness and Firm informed the United States Attorney's [*323] office that Witness would decline to testify and that Firm declined to produce the subpoenaed documents on the ground that the information sought by the grand jury had been generated in the course of Firm's engagement by Target's lawyers, as a part of their defense of Target, and that it therefore was protected by the attorney-client privilege and constituted work product.

The government moved by order to show cause to compel compliance [**3] with the subpoenas, and Target intervened with the government's consent. The Court concluded that the government almost undoubtedly could ask Witness questions as to which there would be no proper objection, even assuming that Target's position were correct, and therefore required Witness to testify before the grand jury while allowing her to assert any objections in response to specific questions and thus to frame the issues more narrowly.

The Court initially required submission of the documents withheld by Firm on grounds of privilege for *in camera* inspection. On May 1, 2003, in an order that remains under seal, it held that certain portions of the documents constituted attorney opinion work product, [4] that the government had not made a showing sufficient to require production of those portions, assuming *arguendo* that such work product ever is discoverable, and directed Target and Firm to indicate whether the privilege objections would be pressed with respect to the remaining portions of those documents. They subsequently informed the Court that they continue to press those objections.

4 That is, it reflected the mental impressions, conclusions, opinions or legal theories of counsel.

[**4] Witness testified before the grand jury. She answered some questions but asserted Target's alleged privilege [5] in response to others.

5 Although [HN2] the protection afforded to work product is not, technically speaking, an evidentiary privilege, the Court uses "privilege" to refer both to attorney-client privilege and to work product protection for ease of expression.

B. The Hiring of Firm

This is a high profile matter. The investigation of Target has been a matter of intense press interest and extensive coverage for months. Witness claims that Target's attorneys hired Firm out of a concern that "unbalanced and often inaccurate press reports about Target 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. [6] 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. [The] objective . . . was to reduce [**5] the risk that prosecutors and regulators would feel pressure from the constant anti-Target drumbeat in the media to bring charges . . . [and thus] to neutralize the environment in a way that would enable prosecutors and regulators to make their decisions and exercise their discretion without undue influence from the negative press coverage." [7] Witness claims that "a significant aspect" of Firm's "assignment that distinguished it from standard public relations work was that [its] target audience was not the public at large. Rather, Firm was focused on affecting the media-conveyed message that reached the prosecutors and regulators responsible [*324] for charging decisions in the investigations concerning . . . Target." [8]

6 Witness Aff. P 8.

7 *Id.* P 9.

8 *Id.* P 12.

C. Firm's Activities

In carrying out her responsibilities, Witness had at least two conversations directly with and sent at least one e-mail directly to Target. [9] On other occasions, Firm interacted with Target's attorneys. [**6] [10] On still others, communications involved Firm, Target and the attorneys and, in a few cases, Target's spouse. [11] Some of the documents produced for *in camera* inspection included discussions about defense strategies, and there is no reason to doubt that this was true of many oral communications. [12] And while Target and Witness perhaps do not so admit in these precise terms, the conversations and e-mails exchanged among this group inevitably included discussion of at least some of the facts pertaining to the matters in controversy.

9 Grand Jury Tr., May 5, 2003, at 18-19, 29-30; Target Priv. 0011.

10 Grand Jury Tr. at 29.

11 *Id.* at 18-21, 29.

12 *See, e.g.*, Witness Aff. P 13.

Firm's activities were not limited to advising Target and her lawyers. Firm spoke extensively to members of the media, in some instances to find out what they knew and, where possible, where the information came from. [13] And it conveyed to members of the media information that the Target defense team [**7] wished to have disseminated. [14]

13 *See id.* P 17.

14 Grand Jury Tr., May 5, 2003, at 21-22, 45-47.

II. Discussion

A. Attorney-Client Privilege

As this matter is entirely federal in nature, [HN3] the scope of the attorney-client privilege is governed by *FED. R. EVID. 501*, which provides in relevant part that [HN4] "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In consequence, the Court looks principally to decisions applying the federal common law of attorney-client privilege.

As the government argues, [HN5] the broad outlines of the attorney-client privilege are clear:

> "(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 protected (7) from disclosure by himself or by the [**8] legal advisor, (8) except the protection be waived." [15]

But two qualifications must be made.

15 *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1036 (2d Cir. 1984)* (internal citations omitted).

First, [HN6] the privilege protects not only communications by the client to the lawyer. In many circumstances, it protects also communications by the lawyer to the client. [16]

16 *E.g., United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994)* (privilege "'shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney.'") (citing *Wells v. Rushing, 755 F.2d 376, 379 n.2 (5th Cir. 1985)*; *In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992)* (where the client is a corporation, the attorney-client privilege protects "both information provided to the lawyer by the client and professional advice given by an attorney that discloses such [confidential] information."); *Thurmond v. Compaq Computer Corp., 198 F.R.D. 475, 480-82 (E.D. Tex. 2000)* (cataloging cases applying privilege to communications from lawyer to client and noting divergence among federal courts concerning scope of such privilege); *Fed. Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 66 (E.D. Va. 1998)* ("The attorney-client privilege . . . extends 'to protect communications by the lawyer to his client . . . if those communications reveal confidential client communications.'") (citing *United States v. Under Seal), 748 F.2d 871, 874 (4th Cir. 1984))*; *Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 115 (N.D. Ill. 1996)* (stating that privilege applies to communications from a lawyer to a client provided "the legal advice given to the client, or sought by the client, [is] the predominant element in the communication"); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 441-42 (S.D.N.Y. 1995)* ("It is now well established that the privilege attaches . . . to advice rendered by the attorney to the client, at least to the extent that such advice may reflect confidential information conveyed by the client.");*l United States v. Int'Bus. Mach. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974)* (privilege applies to communications by a lawyer to a client provided legal advice is the predominant feature of the communication). *Cf. Upjohn Co. v. United States, 449 U.S. 383, 390, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)* (attorneyclient privilege protects "giving of professional advice to those who can act on it"). *See generally* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5491 at 450-54 (1986 & Supp. 2003) (noting variation among federal courts in breadth of application of privilege to communications by attorney to client).

[**9] [*325] Second, [HN7] the privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services. [17] This principle has been applied universally to cover office personnel, such as secretaries and law clerks, who assist lawyers in performing their tasks. [18] But it has been applied more broadly as well. For example, in *United States v. Kovel,* [19] the Second Circuit held that a client's communications with an accountant employed by his attorney were privileged where made for the purpose of enabling the attorney to understand the client's situation in order to provide legal advice. [20] In language pertinent here, Judge Friendly wrote:

> [HN8] "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. We recognize this draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant (no privilege as to such [**10] communications, even though he later consults his lawyer on the same matter . . .) and others, 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. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of a client and lawyer under conditions [*326] where the lawyer needs outside help." [21]

17 *See* SUP. CT. STD .503(a)(3), 503(b), *reprinted in* 3 JOSEPH M. MCLAUGHLIN, WEINSTEIN'S EVIDENCE § 503.01 (2d ed. 2003) (hereinafter WEINSTEIN) (privilege ex-

tends to appropriate communications between and among the client, the lawyer, and a "representative of the lawyer," which is defined as "one employed to assist the lawyer in the rendition of professional legal services.")

18 3 WEINSTEIN § 503.12[3][b].

19 *296 F.2d 918 (2d Cir. 1961).*

20 *Id. at 922.*

21 *Id.* (footnotes and citations omitted).

[**11] *Kovel* helps frame the analysis here. No one suggests that communications between Target and Firm would have been privileged if she simply had gone out and hired Firm as public relations counsel. On the other hand, there is no reason to question the stated rationale for her lawyers' hiring of Firm - that the lawyers viewed altering the mix of public information as serving Target's interests by creating a climate in which prosecutors and regulators might feel freer to act in ways less antagonistic to Target than otherwise might have been the case. Finally, the Court accepts that this was a situation in which the lawyers, in the words of *Kovel,* "needed outside help," as they presumably were not skilled at public relations. The question therefore is whether the problem with which they "needed outside help" related to their provision of what *Kovel* spoke of as "legal advice."

We begin with the obvious. Certainly Firm was not retained to help Target's lawyers understand technical matters to enable the lawyers to advise their client as to the requirements of the law, as was the case in *Kovel.* But it is common ground that [HN9] the privilege extends to communications involving consultants [**12] used by lawyers to assist in performing tasks that go beyond advising a client as to the law. For example, a client's confidential communications to a nontestifying expert retained by the lawyer to assist the lawyer in preparing the client's case - essentially the situation in *Kovel* - probably are privileged. [22] The government in any case concedes that consultants engaged by lawyers to advise them on matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, how a client should behave while testifying in order to impress jurors favorably and other matters routinely the stuff of jury and personal communication consultants come within the attorney-client privilege, as they have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body. [23] The ultimate issue therefore resolves to whether attorney efforts to influence public opinion in order to advance the client's legal position - in this case by neutralizing what the attorneys perceived as a climate of opinion pressing prosecutors and regulators [**13] to act in ways adverse to Target's interests - are services, the rendition of which also should be facilitated by applying the privilege to relevant communications which have this as their object.

22 3 WEINSTEIN § 503.12[5][b].

23 Tr., Apr. 30, 2003, at 4-7, 13-15.

Traditionally, the proper role of lawyers vis-a-vis public opinion has been viewed rather narrowly, perhaps primarily out of concern that extra-judicial statements might prejudice jury pools. Codes of professional conduct, for example, traditionally have limited the extent to which lawyers properly may seek to influence public opinion by proscribing many types of extra-judicial statements concerning pending litigation. [24] More recently, however, there has been a strong tendency to view the [*327] lawyer's role more broadly. [25] Nowhere is this trend more clearly recognized than in the plurality opinion by Mr. Justice Kennedy in *Gentile v. State Bar of Nevada,* [26] where he wrote for four justices:

> [HN10] "An attorney's duties do not begin [**14] inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." [27]

And this statement does not stand alone. Indeed, many courts have compensated lawyers, in making fee awards under civil rights and other statutes, for public relations efforts in recognition of the importance of such work in the clients' interests. [28] But to say that lawyers in fact try [*328] to influence public opinion in the interests of their clients - indeed, to say that they properly may do so and, on occasion, are compensated by courts for such services - does not alone answer the question [**15] before the Court.

24 *See generally* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 COLUM. L. REV. 1811, 1816-25 (1995)* (hereinafter *Spin Control*); 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, 205-06 (2001)* (hereinafter *When Talk Is Not Cheap*).

25 *E.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1999) (allowing lawyers to comment publicly to the extent necessary to neutralize publicity if the lawyer did not initiate the media attention); *Spin Control, 95 COLUM. L. REV. at 1828-44*; Julie R. O'Sullivan, *The* Bakaly *Debacle: The Role of the Press in High-Profile Criminal Investigations* in *Symposium, Bidding Adieu to the Clinton Administration: Assessing the Ramifications of the Clinton "Scandals" on the Office of the President and on Executive Branch Investigations, 60 MD. L. REV. 149, 169-82 (2001)*; S. Bennett, *Press Advocacy and the High-Profile Client,* 30 LOY. L.A. L. REV. 13, 13-20 (1996); *see When Talk Is Not Cheap, 39 AM. CRIM. L. REV. at 223.*

[**16]

26 *501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991).*

27 *Id. at 1043.*

28 *See, e.g., 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)* (affirming district court's award of compensation to prevailing party in civil rights action for attorneys' time spent giving press conferences and performing other public relations work where such work was "directly and intimately related to the successful representation of [the] client."); *Gilbrook v. City of Westminster, 177 F.3d 839, 877 (9th Cir. 1999)* (affirming award to prevailing party in civil rights action for media and public relations activities and noting with approval the district court's finding that public relations work contributed directly and substantially to plaintiffs' litigation goals because "'local politics had a potentially determinative influence on the outcome of settlement negotiations and the availability of certain remedies such as reinstatement'"); *Child v. Spillane, 866 F.2d 691, 698 (4th Cir. 1989)* (Murnaghan, J., dissenting) (stating that public relations work should be compensated as attorney's fees in exceptional cases "involving issues of such vital public concern that lawyers will find it necessary to spend time responding to reporters' questions"); *United States v. Aisenberg, 247 F. Supp. 2d 1272, 1316 (M.D. Fla. 2003)* (awarding fees for public relations services and noting that it was appropriate for counsel for suspects in missing child investigation, "consistent with the rules governing professional conduct, not only to procure the assistance of the public in locating the child but to present a public response, to nurture the clients' diminished public image, and *thereby to reduce public pressure on the prosecution to indict*") (emphasis added). *But see, e.g., Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994)* (affirming disallowance of attorneys' fees under *42 U.S.C. § 1988* for prevailing party for public relations efforts aimed "not at achieving litigation goals, but at minimizing the inevitable public relations damage to the company for suing the governor and the state police to alter the pro-labor police enforcement policies."); *New York State Ass'n of Career Sch. v. State Educ. Dep't, 762 F. Supp. 1124, 1127 (S.D.N.Y. 1991)* ("Plaintiffs' direct effect on the legislative process . . . appears to have been the result of lobbying pressure, and thus an award of attorney's fees is clearly not warranted on that basis.")

[**17] The Court's attention has been drawn to two cases that deal in some respect with the issue of public relations services in the privilege context, *Calvin Klein Trademark Trust v. Wachner* [29] and *In re Copper Market Antitrust Litigation.* [30] Both merit study.

29 *198 F.R.D. 53 (S.D.N.Y. 2000).*

30 *200 F.R.D. 213 (S.D.N.Y. 2001).*

In *Calvin Klein,* the plaintiffs' attorneys hired a public relations firm in anticipation of filing what promised to be a high profile civil suit against a licensee and its well known chief executive. They contended that the purpose was defensive, viz. to assist the lawyers in understanding the possible reaction of the plaintiffs' various constituencies to the litigation, rendering legal advice, and ensuring that media interest in the action would be dealt with responsibly. [31] And they subsequently invoked the attorney-client privilege and work product in an effort to block document production by the public relations firm and one of its employees. [**18]

31 *198 F.R.D. at 54.*

Judge Rakoff rejected the attorney-client privilege claim on three grounds. First, after reviewing the documents, he concluded that few if any of them "contain or reveal confidential communications from the underlying client . . . made for the purpose of obtaining legal advice." [32] Second, the evidence showed that the public relations firm - which had a preexisting relationship with the plaintiffs - was "simply providing ordinary public relations advice so far as the documents . . . in question [were] concerned." [33] Finally, he found no justification for broadening the privilege to cover functions not "materially different from those that any ordinary public relations firm would have performed if they had been hired directly by [the plaintiffs] (as they also were), instead of by [their] counsel." [34]

32 *Id.*

33 *Id.*

34 *Id. at 55.*

[**19] In *Copper Antitrust,* a foreign company, Sumitomo, that found itself in the midst of a high profile scandal involving both regulatory and civil litigation aspects hired a public relations firm because it lacked experience in dealing with Western media. [35] The public relations firm acted as Sumitomo's spokesperson when dealing with the Western press and conferred frequently with the company's U.S. litigation counsel, preparing drafts of press releases and other materials which incorporated the lawyers' advice. [36] When an adversary served a subpoena calling upon the public relations firm to produce all documents relating to its work for Sumitomo, Sumitomo resisted on attorney-client privilege and work product grounds. [37] Judge Swain upheld the attorney-client privilege claim, reasoning that the public relations firm, in the circumstances of this case, was the functional equivalent of an in-house department of Sumitomo and thus part of the [*329] "client." [38] The communications between the firm and the lawyers, she held, therefore were confidential attorney-client interactions.

35 *200 F.R.D. at 215.*

[**20]

36 *Id. at 215-16.*

37 *Id. at 216.*

38 *Id. at 219.*

Although *Calvin Klein* and *Copper Antitrust* both involved situations somewhat analogous to this case, neither resolves the attorney-client privilege problem here.*Copper Antitrust* disposed of the privilege issue by concluding that the public relations firm in substance was part of the client whereas Target makes no similar assertion.*Calvin Klein* was somewhat different from this case because the public relations firm there had a relationship with the client that antedated the litigation, the client was a corporation addressing an array of constituencies including customers and shareholders, and the public relations firm, in Judge Rakoff's words, was "simply providing ordinary public relations advice." [39] Perhaps even more significant, *Calvin Klein,* no doubt in consequence of the arguments made in that case, assumed an answer to the issue now before this Court - whether a lawyer's public advocacy on behalf of the client is a professional legal service that warrants [**21] extension of the privilege to confidential communications between and among the client, the lawyer, and any public relations consultant the lawyer may engage to advise on the performance of that function. Answering that question requires consideration of the policies that inform the attorney-client privilege.

39 *198 F.R.D. at 54.*

> The distinction should not be exaggerated. While Witness describes the nature of Firm's engagement as attempting to influence opinion purely for the impact of a more favorable environment on prosecutors and regulators, and the Court does not question her good faith, it would be ndive to suppose that the effect of Firm's services or, for that matter, Target's motive in agreeing to pay for them, is so unidimensional. Target is a prominent and, according to press reports, relatively young business person. Whatever the outcome of her present legal exposures, she will have a social and, in all likelihood, business life in the future, both of which stand to be affected by public perceptions of her and her conduct while at the Company. Hence, while the Court assumes that Target's chief concern at the time of these communications was to avoid or limit the scope of any indictment and other legal attacks upon her, Firm's engagement, to the extent it succeeds, is likely to have benefits for Target outside the litigation sphere.

[**22] As the Supreme Court said in *Upjohn Co. v. United States,* [40] the purpose of the 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." [41] In this case, construing the privilege to cover the communications involving the public relations consultants would not materially serve the purpose of promoting observance of law for the simple reason that the current controversy concerns the consequences of Target's past conduct, not an effort to conform her present

and future [*330] actions to the law's requirements. If justification is to be found for such a construction, it must lie in the proposition that encouraging frank communication among client, lawyers, and public relations consultants enhances the administration of justice.

40 *449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).*

41 *Id. at 389.*

This reflects a change in the generally accepted view of the privilege's purpose. The privilege, at its inception, belonged to the attorney and was grounded in humanistic considerations, e.g., that it enabled the attorney "to comply with his code of honor and professional ethics." EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 2.3, at 108 (2002); 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); *see also In re Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), aff'd, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951, 9 L. Ed. 2d 499, 83 S. Ct. 505 (1963).* Some have advocated a heavier reliance on such considerations in determining the scope of the privilege today. *See, e.g.,* IMWINKELRIED § 5.3.

[**23] Target, like any investigatory target or criminal defendant, is confronted with the broad power of the government. Without suggesting any impropriety, the Court is well aware that the media, prosecutors, and law enforcement personnel in cases like this often engage in activities that color public opinion, certainly to the detriment of the subject's general reputation but also, in the most extreme cases, to the detriment of his or her ability to obtain a fair trial. Moreover, it would be unreasonable to suppose that no prosecutor ever is influenced by an assessment of public opinion in deciding whether to bring criminal charges, as opposed to declining prosecution or leaving matters to civil enforcement proceedings, or in deciding what particular offenses to charge, decisions often of great consequence in this Sentencing Guidelines era. Thus, in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation.

Nor may such advocacy prudently be conducted in disregard of its potential legal ramifications. Questions such as whether the client should speak to the media [**24] at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others can be decided without careful legal input only at the client's extreme peril. [42] Indeed, in at least one case, the Securities and Exchange Commission ("SEC") charged that a company that was the subject of an investigation violated the securities laws because its public statements concerning the pending investigation were misleading. [43]

42 *See, e.g., Spin Control, 95 COLUM. L. REV. at 1828-42*; Bennett, *Press Advocacy and the High-Profile Client*, 30 LOY. L.A. L. REV. at 18-20; *When Talk Is Not Cheap, 39 AM. CRIM. L. REV. at 203-14.*

43 *In re Incomnet, Inc.*, Exchange Act of 1934 Release No. 40281, 1998 SEC LEXIS 1614, at *12, *17 (July 30, 1998) (allegedly misleading press statements "essentially denied the Commission's investigation").

Finally, dealing with the media in a high profile case [**25] probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed.

This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions - such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication - would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. For example, lawyers may need skilled advice as to whether and how possible statements to the press - ranging from "no comment" to detailed factual presentations - likely would be reported in order to advise a client as to whether the making of particular statements would be in the client's legal interest. And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' [**26] defense strategies and tactics, free of the fear that the consultants [*331] could be forced to disclose those discussions. In consequence, this Court holds that [HN11] (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege. Two points remain however.

As previously noted, Target would not have enjoyed any privilege for her own communications with Firm if she had hired Firm directly, even if her object in doing so had been purely to affect her legal situation. There is a certain artificiality, therefore, in saying that the privilege

applies where the lawyers do the hiring and the other requirements alluded to above are satisfied. The justification, however, is found in Judge Friendly's opinion in *Kovel:* "That is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of a client and lawyer under conditions where the lawyer needs outside [**27] help." [44] Precisely the same rationale applies here.

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

The second remaining issue is the question of Target's communications with the consultants, some of which took place in the presence of the lawyers while others were strictly between Target and Firm. The Court is of the view that both types of communications are covered by the privilege provided the communications were directed at giving or obtaining legal advice. Indeed, in *Kovel*, the Second Circuit recognized that it would be mere formalism to extend the privilege in the former scenario but not the latter, provided the purpose of the confidential communication was to obtain legal advice:

> [HN12] "If the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within [**28] the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." [45]

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

Witness testified before the grand jury that she recalled only two conversations with Target alone and described their general subject matter. [46] One conversation took place on a day on which there had been substantial media coverage, and Target asked Witness for her view of the coverage. [47] The other concerned a problem with a wire service story. [48] Furthermore, one of the documents the Court reviewed *in camera* is an e-mail from Witness to Target alone concerning a *Wall* [**29] *Street Journal* posting. [49]

46 Grand Jury Tr., May 5, 2003, at 30-31.

47 *Id.* at 31.

48 *Id.*

49 Target Priv. 0011.

Neither of the conversations satisfies the standard set forth above - that the communication be made for the purpose of [*332] obtaining legal services. Target has not shown that either conversation was at the behest of her lawyers or directed at helping the lawyers formulate their strategy.

This Court previously held that a portion of the Target-Witness e-mail is opinion work product. [50] The balance, however, is not covered by the attorney-client privilege because there has been no showing that it has a nexus sufficiently close to the provision or receipt of legal advice. Thus, neither these two conversations nor the non-highlighted portion of the e-mail is protected by the attorney-client privilege. On the other hand, Target's communications with Firm personnel alone, or with both the lawyers and Firm personnel, are privileged to the extent the conversations were related to [**30] the provision of legal services. [51]

50 Order, *In re Grand Jury Subpoenas Dated March 24, 2003*, May 1, 2003.

51 That Target's spouse was present during some of these conversations does not destroy any applicable privilege. *See, e.g., Murray v. Board of Educ., 199 F.R.D. 154, 155 (S.D.N.Y. 2001)* [HN13] ("disclosure of communications protected by the attorney-client privilege within the context of another privilege does not constitute waiver of the attorney-client privilege"); *Solomon v. Scientific American, Inc., 125 F.R.D. 34, 36 (S.D.N.Y. 1988)* (no waiver of the attorney-client privilege when privileged information was disclosed to client's wife); *see also* 3 WEINSTEIN § 511.07 ("There is no waiver when the disclosure is made in another communication that is itself privileged.")

In sum, then, the Court sustains the attorney-client privilege objections to questions seeking the content of oral communications among Firm, Target and her lawyers, or any combination thereof, [**31] which satisfy the standard enumerated above. It overrules the claim of

privilege as to the two conversations described in the preceding paragraph.

As all of the documents withheld from production by Firm are communications among Target, her lawyers and Firm, or some combination thereof, for the purpose of giving or receiving legal advice, except for the previously mentioned e-mail from Witness to Target, the Court sustains the attorney-client privilege objections to production of those documents.

B. Work Product

The Court recognizes the possibility that a reviewing court may come to a different conclusion with respect to the attorney-client privilege issue. Accordingly, it deals with the work product objections to the extent they have not been sustained in the May 1, 2003 order.

[HN14] "The work product doctrine, now codified in part in *Rule 26(b)(3) of the Federal Rules of Civil Procedure* and *Rule 16(b)(2) of the Federal Rules of Criminal Procedure*, provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial." [52] Both "distinct from and broader than the attorney-client privilege," [53] the work product doctrine [**32] "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." [54]

52 *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,318 F.3d 379, 383 (2d Cir. 2003).*

53 *United States v. Nobels, 422 U.S. 225, 238 n.11, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975).*

54 *United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998)* (quoting *Hickman v. Taylor, 329 U.S. 495, 511, 91 L. Ed. 451, 67 S. Ct. 385 (1947)).*

[HN15] Work product falls generally into two categories, which are afforded different [*333] levels of protection. Work product consisting merely of materials prepared in anticipation of litigation or for trial is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent [**33] of the materials by other means." [55] Opinion work product - materials that would reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" [56] - is discoverable, if at all, only upon a significantly stronger showing. [57]

55 *FED. R. CIV. P. 26(b)(3).*

[HN16] In criminal cases, the doctrine is even stricter, precluding discovery of documents made by a defendant's attorney or the attorney's agents except with respect to "scientific or medical reports." *FED. R. CRIM. P. 16(b)(2).*

56 56 *FED. R. CIV. P. 26(b)(3).*

57 *See, e.g., Upjohn Co., 449 U.S. at 400-02; In re Grand Jury Proceedings, 219 F.3d 175, 190-91 (2d Cir. 2000); Adlman, 134 F.3d at 1204.*

In this case, Firm withheld nineteen documents from production based in whole or in part on the contention that they are protected work product. The government's initial response was to claim that the documents are [**34] not work product because the government seeks no "materials that reveal Target's attorneys' mental impressions" and, should the Court conclude otherwise, that it is prepared to make an *ex parte* showing of substantial need. [58] At oral argument, moreover, the government disavowed any effort to obtain production of documents containing attorney opinion work product, stating that its interest is limited to obtaining facts. [59] Accordingly, the Court sustained the work product objection to such portions of the documents in its May 1, 2003 order. There remains for consideration the question whether the remaining portions of the documents are protected and, if so, whether the government has made or should be permitted to seek to make an *ex parte* showing of substantial need. [60]

58 Letter, Assistant United States Attorneys, Apr. 24, 2003, at 11-12; *see also* Letter, Assistant United States Attorneys, Apr. 29, 2003, at 6-7.

59 Tr., Apr. 30, 2003, at 33.

60 The Court for convenience uses "substantial need" to refer to the entire requisite showing of substantial need and undue hardship.

[**35] There is no serious question that the remaining portions of the documents withheld are work product, as the government does not dispute that they were prepared in anticipation of litigation. If doubt there were, it would have been eliminated both by the Court's *in camera* review, which confirms that all of the nineteen documents in fact were prepared in anticipation of litigation, and by *Calvin Klein* and *Copper Antitrust*, both of which held that work product protection covers similar materials in circumstances which, for this purpose, were analogous. [61]

265 F. Supp. 2d 321, *; 2003 U.S. Dist. LEXIS 9022, **;
61 Fed. R. Evid. Serv. (Callaghan) 1076

61 *Calvin Klein, 198 F.R.D. at 55-56*; *Copper Antitrust, 200 F.R.D. at 220-21.*

The government implicitly concedes that it has not shown substantial need for the non-opinion work product portions of the documents, requesting instead that it be permitted to attempt such a showing *ex parte.* [62] [HN17] While *ex parte* proceedings in most circumstances are strongly disfavored by our system, the public interest in grand [**36] jury secrecy in some cases may trump that important principle. "Where an *in camera* submission is the only way [*334] to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure." [63]

62 Letter, Assistant United States Attorneys, Apr. 24, 2003, at 12.

63 *In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994)*; *accord In re Marc Rich & Co., 707 F.2d 663, 670 (2d Cir.), cert. denied, 463 U.S. 1215, 77 L. Ed. 2d 1400, 103 S. Ct. 3555 (1983)*; *In re Grand Jury Subpoena Dated August 9, 2000, 218 F. Supp. 2d 544, 551 (S.D.N.Y. 2002), aff'd, 318 F.3d 379 (2d Cir. 2003).*

This proposition creates something of a chicken-and-egg problem. When the Court pressed the government to explain how making a showing of substantial need in the presence of its adversary would prejudice grand jury secrecy, the government indicated that it feared that it could not do so "in [**37] open court without letting the cat out of the bag, so to speak" and acknowledged that this is "somewhat of a Catch 22." [64]

64 Tr., Apr. 30, 2003, at 35.

In the absence of any non-conclusory showing that an explanation of the need for an *ex parte* submission itself would compromise grand jury secrecy, there are two obvious alternatives. One is simply to take the government at its word and unconditionally permit an *ex parte* showing. The other is to deny this aspect of the government's motion. But the choice before the Court need not be so stark. The middle ground is to allow the government to make an *ex parte* showing both of substantial need and of the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy. If the Court concludes that disclosure of the submission would not compromise grand jury secrecy, the government's submission will be disclosed to Target's counsel, who will be permitted to respond before the Court decides whether the government has [**38] shown substantial need for the non-opinion work product. If it does not so conclude, it will proceed directly to rule on the sufficiency of the government's showing of need.

III. Conclusion

For the foregoing reasons, the government's motion is granted to the following extent:

1. Witness shall testify further pursuant to the subpoena served upon her and answer all questions relating to the two conversations she recalls having had with Target alone and such other questions as may be put to her in respect of which there is no claim of privilege consistent with this opinion.

2. The government, on or before May 21, 2003, may make an *ex parte* submission as to both its claimed need for the non-attorney opinion work product portions of the withheld Firm documents and the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy. Any such submission shall be accompanied by a memorandum of law, served on Target's counsel, addressing the question whether the Court should apply Civil *Rule 26(b)(3)*, Criminal *Rule 16(b)(2)*, or some other standard in ruling on the government's motion. [65]

65 No such submission was made.

[**39] SO ORDERED.

Dated: June 2, 2003

(unredacted version dated May 16, 2003)

Lewis A. Kaplan

United States District Judge

Crisis Communication Strategies

Analysis

Case Study: The Johnson & Johnson Tylenol Crisis

Before the crisis, Tylenol was the most successful over-the-counter product in the United States with over one hundred million users. Tylenol was responsible for 19 percent of Johnson & Johnson's corporate profits during the first 3 quarters of 1982. Tylenol accounted for 13 percent of Johnson & Johnson's year-to-year sales growth and 33 percent of the company's year-to-year profit growth. Tylenol was the absolute leader in the painkiller field accounting for a 37 percent market share, outselling the next four leading painkillers combined, including Anacin, Bayer, Bufferin, and Excedrin. Had Tylenol been a corporate entity unto itself, profits would have placed it in the top half of the Fortune 500 (Berge, 1998).

During the fall of 1982, for reasons not known, a malevolent person or persons, presumably unknown, replaced Tylenol Extra-Strength capsules with cyanide-laced capsules, resealed the packages, and deposited them on the shelves of at least a half-dozen or so pharmacies, and food stores in the Chicago area. The poison capsules were purchased, and seven unsuspecting people died a horrible death. Johnson & Johnson, parent company of McNeil Consumer Products Company which makes Tylenol, suddenly, and with no warning, had to explain to the world why its trusted product was suddenly killing people (Berge, 1998).

Primary Evidence. Robert Andrews, assistant director for public relations at Johnson & Johnson recalls how the company reacted in the first days of the crisis: "We got a call from a Chicago news reporter. He told us that the medical examiner there had just given a press conference-people were dying from poisoned Tylenol. He wanted our comment. As it was the first knowledge we had here in this department, we told him we knew nothing about it. In that first call we learned more from the reporter than he did from us." Andrew's dilemma points out something that has become more prevalent with the expansion of 24 hour electronic media. The media will often be the first on the scene, thus have information about the crisis before the organization does (Berge, 1990).

Johnson & Johnson chairman, James Burke, reacted to the negative media coverage by forming a seven-member strategy team. The team's strategy guidance from Burke was first, "How do we protect the people?" and second "How do we save this product?" The company's first actions were to immediately alerted consumers across the nation, via the media, not to consume any type of Tylenol product. They told consumers not to resume using the product until the extent of the tampering could be determined. Johnson & Johnson, along with stopping the production and advertising of Tylenol, withdraw all Tylenol capsules from the store shelves in Chicago and the surrounding area. After finding 2 more contaminated bottles Tylenol realized the vulnerability of the product and ordered a national withdraw of every capsule (Broom, 1994).

By withdrawing all Tylenol, even though there was little chance of discovering more cyanide laced tablets; Johnson & Johnson showed that they were not willing to take a risk with the public's safety, even if it cost the company millions of dollars. The end result was the public viewing Tylenol as the unfortunate victim of a malicious crime (Broom, 1994).

Johnson & Johnson also used the media,

both PR and paid advertising to communicate their strategy during the crisis. Johnson & Johnson used the media to issue a national alert to tell the public not to use the Tylenol product. In the first week of the crisis Johnson & Johnson established a 1-800 hot line for consumers to call. The company used the 1-800 number to respond to inquires from customers concerning safety of Tylenol. They also establish a toll-free line for news organizations to call and receive pre-taped daily messages with updated statements about the crisis (Berge, 1990).

Before the crisis Johnson & Johnson had not actively sought press coverage, but as a company in crisis they recognized the benefits of open communications in clearly disseminating warnings to the public as well as the company's stand (Broom, 1994).

Several major press conferences were held at corporate headquarters. Within hours an internal video staff set up a live television feed via satellite to the New York metro area. This allowed all press conferences to go national. Jim Burke got more positive media exposure by going on 60 Minutes and the Donahue show and giving the public his command messages (Fink, 1986).

Johnson & Johnson communicated their new triple safety seal packaging- a glued box, a plastic sear over the neck of the bottle, and a foil seal over the mouth of the bottle, with a press conference at the manufacturer's headquarters. Tylenol became the first product in the industry to use the new tamper resistant packaging just 6 months after the crisis occurred (Berge, 1990).

Secondary Evidence. The initial media reports focused on the deaths of American citizens from a trusted consumer product. In the beginning the product tampering was not known, thus the media made a very negative association with the brand name.

All 3 networks lead with the Tylenol story on the first day of the crisis. CBS put a human face on the story which contained the following: "When 12 year-old Mary Kellerman of Elk Grove Village, Ill., awoke at dawn with cold symptoms; her parents gave her one Extra-Strength Tylenol and sent her back to bed. Little did they know, they would wake up at 7:00 a.m. to find their daughter dying on the bathroom floor." (Kaplin, pg. 1, 1998)
The print media weighed in with equally damaging headlines: Time Magazine, "Poison Madness in the Midwest," Newsweek, "The Tylenol Scare," The Washington Post, "Tylenol, Killer or Cure."

The media was not only focused on the deaths but it was also pervasive. Throughout the crisis over 100,000 separate news stories ran in U.S. newspapers, and hundreds of hours of national and local television coverage. A post crisis study by Johnson & Johnson said that over 90 percent of the American population had heard of the Chicago deaths due to cyanide-laced Tylenol within the first week of the crisis. Two news clipping services found over 125,000 news clippings on the Tylenol story. One of the services claimed that this story had been given the widest US news coverage since the assassination of President John F. Kennedy (Kaplin, 1998).

Media reporting would continue to focus on Tylenol killing people until more information about what caused the deaths was made available. In most crises media will focus on the sensational aspects of the crisis, and then follow with the cause as they learn more about what happened.

Scholarly Journals. Scholars have come to recognize Johnson & Johnson's handling of the Tylenol crisis as the example for success when confronted with a threat to an organization's existence. Berge lauds the case in the following manner, "The

Tylenol crisis is without a doubt the most exemplary case ever known in the history of crisis communications. Any business executive, who has ever stumbled into a public relations ambush, ought to appreciate the way Johnson & Johnson responded to the Tylenol poisonings. They have effectively demonstrated how major business has to handle a disaster." (pg. 19, 1990)

The Tylenol case was the bases for many of the crisis communications strategies developed by researchers over the last 20 years. Berg's suffering strategy and Benoit's Rectification strategies both were developed from doing case studies of how Johnson & Johnson handled the Tylenol poisonings (Coombs, 1995).

Discussion. The crises category in the Johnson & Johnson Tylenol case is Terrorism. Combs defines terrorism as intentional actions taken by external actors designed to harm the organization directly (hurt employees or customers) or indirectly (reduce sales or disrupt production). Product tampering, hostage taking, sabotage, and workplace violence are examples of terrorism. The violent, outside agent promotes attributions of external locus and uncontrollability.

The Tylenol product tampering clearly fits the Terrorism category. An external agent, presumably, acted to hurt the customers and possibly the employees of Johnson & Johnson. The other categories, Faux Pas, Accidents, or Transgression do not fit in the Tylenol case, so there was no cross-categorization in this case.

Crisis Response Strategies used by Johnson & Johnson: Johnson & Johnson employed Forgiveness and Sympathy strategy for this crisis. Forgiveness strategy seeks to win forgiveness from the various publics and create acceptance for the crisis.

Johnson & Johnson used Remediation and Rectification, both Forgiveness strategies, in the Tylenol crisis. Remediation offers some form of compensation to help victims of the crisis. Johnson & Johnson provided the victim's families counseling and financial assistance even though they were not responsible for the product tampering. Negative feelings by the public against Johnson & Johnson were lessoned as the media showed them take positive actions to help the victim's families (Berg, 1990).

Rectification involves taking action to prevent a recurrence of the crisis in the future. Johnson & Johnson's development of Triple sealed packaging is an example of rectification. They also developed new random inspection procedures before the shipment of Tylenol to retailers (Berg, 1990).

Sympathy strategy was a big component of Johnson & Johnson's crisis communication strategy. Sympathy strategy wins support from the public by portraying the organization as the unfair victim of an attack from an outside entity. Johnson & Johnson's willingness to accept losses by pulling the Tylenol product developed sympathy with the public (Berg & Robb, 1992).

The Johnson & Johnson Tylenol crisis is an example of how an organization should communicate with the various publics during a crisis. The organization's leadership set the example from the beginning by making public safety the organizations number one concern. This is particularity important given the fact that Johnson & Johnson's main mission with Tylenol is to enhance the public's well-being or heath.

Although Johnson & Johnson's leadership performed superbly during the crisis there were some important areas Tylenol improved upon after the crisis. Johnson & Johnson did not have a proactive public

affairs program before the crisis. The only media relations engaged in by Johnson & Johnson was in the advertising and marketing area. In the early stages of the crisis Tylenol was informed about what was going on from a Chicago reporter. If this particular reporter had been more contentious or adversarial the whole crisis may have taken on a different form in the public's perception.

Johnson & Johnson's failure to employ/establish a positive relationship with the media, a key stakeholder, forced the company to respond to the crisis in an advertising-like manner. Johnson & Johnson received criticism from the media for not being genuine due to the slick sales-like response ads run during the crisis. The personal messages with the media from the CEO of the organization enabled Johnson & Johnson to overcome this problem. Today Johnson & Johnson has completely recovered its market share lost during the crisis. The organization was able to reestablish the Tylenol brand name as one to the must trusted over-the-counter consumer products in American. Johnson & Johnson's handing of the Tylenol crisis is clearly the example other companies should follow if the find themselves on the brink of losing everything.

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