

# Make Me Well-Liked: *In re Grand Jury* and the Extension of the Attorney-Client Privilege to Public Relations Consultants in High Profile Criminal Cases

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The attorney-client privilege is the oldest recognized privilege for confidential communication.<sup>1</sup> The rationale for the privilege is that it encourages openness and honesty between attorneys and their clients<sup>2</sup> because attorneys cannot reveal, or be forced to reveal, attorney-client communications made for the purposes of seeking legal advice.<sup>3</sup> However, the privilege often conflicts with the premise that in order for the adversarial system to work most efficiently, all applicable facts must be brought to light.<sup>4</sup> While the privilege has often been extended beyond the traditional attorney-client

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1. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (John T. McNaughton rev. 1961). Wigmore provides a brief history of the privilege:

The history of this privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials until the early 1500's . . . and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign . . . , it would seem that the privilege could hardly have come much earlier into existence, for there could have been but little material for its application.

*Id.* (footnote omitted).

2. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that 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”).

3. *United States v. Nixon*, 418 U.S. 683, 709–10 (1974) (“[G]enerally, an attorney . . . may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law.”).

4. See *infra* notes 25–30 and accompanying text.

relationship to cover communications with professionals who assist the lawyer in understanding the client's needs,<sup>5</sup> several recent decisions have extended the privilege well past traditional boundaries. These decisions allow for privileged communications between a public relations consultant, a client, and counsel.<sup>6</sup>

In *In re Grand Jury*,<sup>7</sup> the court held that in high profile criminal cases, communications between lawyers, clients, and public relations consultants hired by the lawyers to assist them in dealing with the media are protected by the attorney-client privilege when the communications are made for the purpose of giving or receiving advice directed at handling a client's legal problem.<sup>8</sup> Essentially, the court found that in situations where a persistent "drumbeat" against the target of the grand jury investigation is expressed in the media, a public relations firm can assist the lawyer and the client by quelling public reaction.<sup>9</sup> The firm can thus affect the prosecutor's willingness to bring charges or, if charges are brought, affect the severity of those charges.<sup>10</sup> Although the court limited the holding to its particular facts, this Note considers whether the privilege is extended too far when applied to public relations consultants in high-profile criminal matters.

Part I of this Note examines the historical rationale for the attorney-client privilege. Part II considers several cases in which courts have extended the privilege to professionals outside the attorney-client relationship and the rationales for doing so. Part III investigates prosecutorial discretion and the influence of public opinion on the charging decisions of prosecutors. Part IV examines the decision in *In re Grand Jury* and its inconsistency with precedent. It concludes that because the influence of public opinion on prosecutorial discretion is unsubstantiated and conjectural, extending

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5. See *infra* notes 34–52 and accompanying text.

6. See, e.g., *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001).

7. 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

8. *Id.* at 330.

9. *Id.* at 323 (describing the nature of public relations firm's strategy to influence criminal charges).

10. *Id.* at 330.

the privilege in *In re Grand Jury* was improper. Finally, Part V proposes a remedy for cases like *In re Grand Jury* by providing a test that courts should apply when deciding whether or not to so extend the privilege in the future.

### I. THE ATTORNEY-CLIENT PRIVILEGE AND ITS RATIONALE

The attorney-client privilege keeps communications between attorneys and their clients confidential.<sup>11</sup> In federal courts of the United States, the privilege is governed by common law principles as interpreted by the courts.<sup>12</sup> As the oldest of the many common law principles applied in federal courts, the privilege has firm historical roots.<sup>13</sup> But historical pedigree has not deterred courts from modifying the privilege throughout the years, as this Note later discusses.<sup>14</sup>

As originally stated by Wigmore in his treatise on evidence, eight factors form the broad outline of the attorney-client privilege:

- (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 adviser,
- (8) except the protection be waived.<sup>15</sup>

While seemingly basic and narrowly circumscribed, the issue of privilege arises more often and in a greater variety of situations than nearly any other issue in litigation.<sup>16</sup>

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11. 8 WIGMORE, *supra* note 1, § 2292.

12. FED. R. EVID. 501. Rule 501 provides that “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.” *Id.*

13. 8 WIGMORE, *supra* note 1, § 2290, at 542 (“[Attorney-client privilege] is therefore the oldest of the privileges for confidential communications.”).

14. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing privilege between psychotherapist and patient); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (recognizing privilege between corporate employees and corporate counsel); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (recognizing privilege between law firm and accountant).

15. 8 WIGMORE, *supra* note 1, § 2292, at 554.

16. *See* EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 1 (4th ed. 2001) (“Seemingly simple and straightforward, in application

In order for an attorney to provide the most informed legal advice to a client, the attorney must understand the full contours and variations of the privilege—most importantly, to whom and in what context it extends.<sup>17</sup> But to determine those contours and to examine the bounds of the privilege, it is necessary first to understand the underlying rationale for the privilege.

The rationale that most often justifies the privilege is that it is necessary to ensure the proper administration of justice.<sup>18</sup> Several theories articulate how the privilege serves this aim. One often-noted explanation is that an attorney can give well-informed legal advice only when information is given in confidence from client to attorney.<sup>19</sup> Underlying this rationale is the notion that in the absence of all material facts, an attorney is incapable of exploring all potential legal avenues with a client.<sup>20</sup> Thus, in order to make the client feel

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the attorney-client privilege arises in every imaginable situation with all possible permutations. Few issues arise with greater frequency . . . than whether a document is privileged from compelled disclosure by virtue of the attorney-client privilege.”).

17. See, e.g., JACK B. WEINSTEIN ET AL., WEINSTEIN’S EVIDENCE ¶ 503[02], at 503-18 (Supp. 1996) [hereinafter WEINSTEIN’S EVIDENCE] (stating that “the benefit of the privilege is lost unless a fixed rule is applied that can be relied upon by lawyers and clients”). The problems associated with uncertainty in applying the privilege are explained further:

If the privilege is to achieve its purpose of encouraging communications, the communicants must be able to discern at the stage of primary activity, whether the communication will be privileged. An ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefit because persisting uncertainty about the availability of the privilege will discourage some communications.

*Id.* at 503-19 (quoting Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 426 (1970)).

18. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (“[M]aintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice . . . .”); *supra* note 2.

19. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Specifically, the Court stated:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

*Id.*

20. EPSTEIN, *supra* note 16, at 4 (“Without access to all available and relevant facts, an attorney cannot give effective or reliable legal advice.”).

completely secure in expressing all material facts, communications must be privileged.<sup>21</sup> Furthermore, a client who believes that the information provided to an attorney will be unprotected may decide not to retain counsel.<sup>22</sup> Naturally, implementation of a policy discouraging clients from retaining counsel would undermine the adversarial system and prove detrimental to the administration of justice as a whole.

Another policy rationale behind the privilege is that it results in increased voluntary compliance with regulatory laws.<sup>23</sup> If clients are allowed to speak freely with attorneys in complete confidence, the attorney is better able to provide legal advice that will allow the clients to follow the law.<sup>24</sup> Therefore, in order to ensure that clients respect and adhere to the laws, the privilege encourages full and frank disclosure.

The maxim of strict construction, however, militates for a narrow protection of communications between attorneys and clients.<sup>25</sup> The maxim provides that the attorney-client privilege should be narrowly construed because our justice system's search for truth is limited by the facts available in each case.<sup>26</sup> Naturally, any impediment to the

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21. See, e.g., *United States v. Grand Jury Investigations*, 401 F. Supp. 361, 369 (W.D. Pa. 1975) (stating that "at the base of the attorney-client privilege lies the policy that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered"); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) ("To induce *clients* to make . . . communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity." (quoting MODEL CODE OF EVIDENCE R. 210 cmt. a (1942))).

22. *United Shoe Mach. Corp.*, 89 F. Supp. at 358 (stating that "[i]n a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite" (quoting MODEL CODE OF EVIDENCE R. 210 cmt. a (1942))).

23. EPSTEIN, *supra* note 16, at 6 (explaining that "by promoting a client's freedom of consultation with an attorney, the privilege fosters voluntary compliance with regulatory laws and thereby facilitates the effective administration of the laws").

24. *Id.* (noting that "[t]he ultimate consequence of a reluctance to communicate freely with an attorney, it is feared, would be a diminished ability on the part of attorneys to advise clients as to what the law requires and would diminish the ability of attorneys to urge clients to follow the law").

25. See *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) (attorney-client privilege "should be strictly confined within the narrowest possible limits").

26. See, e.g., *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

facts is an impediment to the truth and a harm to the administration of justice.<sup>27</sup> Therefore, the maxim of strict construction is often cited to restrict use of the privilege except where it is essential.<sup>28</sup>

Furthermore, adhering to the maxim of strict construction is important because the assumptions which justify the privilege are impossible to confirm, while the harm that the privilege causes is easily ascertainable. For this reason, even Wigmore, a “supporter of the privilege,”<sup>29</sup> suggests limiting it to those situations in which it is wholly indispensable.<sup>30</sup> Ultimately, courts must recognize that any privileging of communications will impede the discovery of truth.

## II. EXTENDING THE PRIVILEGE TO “AGENTS” OF THE CLIENT AND THE LAWYER

### *A. Extending the Privilege to Professionals Other than Attorneys*

While Congress has never enacted a detailed explanation of the attorney-client privilege for use by the courts, Supreme Court

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27. See 8 WIGMORE, *supra* note 1, § 2192, at 70. Specifically:

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule . . . .

*Id.*

28. See *Elkins v. United States*, 364 U.S. 206, 234 (1960). Specifically:

As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

*Id.*

29. WEINSTEIN'S EVIDENCE, *supra* note 17, ¶ 503[02], at 503-17.

30. 8 WIGMORE, *supra* note 1, § 2291, at 554. Wigmore states:

Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

*Id.*

Standard 503 contains a definition of the privilege on which courts regularly rely.<sup>31</sup> Standard 503 provides a general statement of the privilege, allowing for protected communications between a client (or a client's agent) and a lawyer (or a lawyer's agent) that have been made for the purposes of obtaining legal advice.<sup>32</sup> The rule provides an obtuse definition of what constitutes a "representative of the lawyer," or, in other words, an agent of the lawyer: "A 'representative of the lawyer' is one employed by the lawyer to assist in the rendition of professional legal services."<sup>33</sup>

In *Upjohn Co. v. United States*,<sup>34</sup> the Supreme Court clarified Standard 503's definition of agent by defining who constitutes an agent of the client.<sup>35</sup> However, courts have struggled to define who

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31. See, e.g., *In re Grand Jury Subpoenas Duces Tecum*, 112 F.3d 910, 926 (8th Cir. 1997) (Kopf, J., dissenting) ("Rule 503 accurately states the federal common law regarding the attorney-client privilege, as this court has consistently stated in the past."); *In re Feldberg*, 862 F.2d 622, 626 (7th Cir. 1988) (stating that Standard 503(d)(1) "captures well the common law of the crime/fraud exception"); *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 n.6 (8th Cir. 1981) ("[C]ourts have continued to look to the proposed rules as a source for defining the federal common law of attorney-client privilege."); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL ¶18.03[1], at 18-16 (1999) [hereinafter WEINSTEIN'S EVIDENCE MANUAL] ("Standard 503 remains a useful starting point in examining the use of the attorney-client privilege in the federal courts today. It is an accurate restatement of actual practice and is cited to frequently.").

32. SUPREME COURT STANDARD 503(b) (1971), reprinted in WEINSTEIN'S EVIDENCE, *supra* note 17, at 503-1. Supreme Court Standard 503(b) states that "[a] client has a privilege to refuse to disclose . . . confidential communications . . . between himself or his representative and his lawyer or his lawyer's representative" that have been "made for the purpose of facilitating the rendition of professional legal services to the client." *Id.*

33. *Id.*

34. 449 U.S. 383 (1981).

35. See generally *id.* In *Upjohn*, independent accountants discovered that a subsidiary of the Upjohn Company had made "payments to or for the benefit of foreign government officials in order to secure government business." *Id.* at 386. In response to these concerns, the company decided to conduct an internal investigation to determine the validity and scope of the payments. *Id.* As part of the investigation, a questionnaire was sent to "All Foreign General and Area Managers" asking for information relating to the investigation. *Id.* at 386-87. The questionnaire informed managers of their ability to speak with their employees about the matter. *Id.* at 387. After the company voluntarily submitted a preliminary report disclosing certain questionable payments to the Securities and Exchange Commission, the Internal Revenue Service ("IRS") launched an investigation to determine the tax consequences of those payments. *Id.* As part of the investigation, the IRS demanded that Upjohn disclose information discovered during its internal investigation. *Id.* at 387-88. Claiming protection under the attorney-client privilege, Upjohn declined to produce much of the information that the IRS demanded. *Id.* Thereafter, the United States filed a petition to enforce the action. *Id.*

The Court began its evaluation of the issue by stating that the privilege "rests on the need

constitutes an agent of the lawyer. Traditional staff of the lawyer, such as law clerks and secretaries, have been considered agents.<sup>36</sup> But beyond the lawyer's staff, who may qualify as a lawyer's agent is not clear.<sup>37</sup> The three most notable figures that courts have deemed agents of the lawyer are accountants, patent agents, and non-testifying experts.<sup>38</sup>

*United States v. Kovel*<sup>39</sup> is the pre-eminent case granting attorney-client privilege to accountants. In deciding whether to extend the privilege to an accountant hired by a law firm to provide tax advice,<sup>40</sup>

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for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* at 389 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). The Court continued by noting that in order for any legal problem to be resolved, all ascertainable facts must be collected by the advocate from the client. *Id.* at 390-91. In order for all relevant facts to be gathered, a lawyer must have access to anyone in a corporation who may possess information necessary to his cause. *Id.* at 391. Ultimately, the Court found that the employees of a corporation fall into this category. *Id.* at 396. Thus, the communications that Upjohn employees had with counsel were privileged. *Id.* at 397. Additionally, the Court spoke to the importance of clarifying the issues surrounding the privilege by noting that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393.

36. 8 WIGMORE, *supra* note 1, § 2301, at 583. Wigmore states:

It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.

*Id.* (footnote omitted).

37. WEINSTEIN'S EVIDENCE MANUAL, *supra* note 31, ¶ 18.03[2][c], at 18-19 ("Office personnel . . . are clearly considered representatives of the lawyer. More difficult is determining who else is 'employed to assist the lawyer in the rendition of professional legal services.'").

38. See WEINSTEIN'S EVIDENCE, *supra* note 17, ¶ 503(a)(3)[01].

39. 296 F.2d 918 (2d Cir. 1961). In *Kovel*, an accountant, who was an employee of a tax law firm, was subpoenaed to provide testimony regarding a client of the firm. *Id.* at 919. The accountant refused to provide any information on the witness stand, claiming "that his status as an employee of a law firm automatically made all communications to him from clients privileged." *Id.* at 920.

40. *Id.* at 919. The court began by noting the tension between drawing out all necessary facts in a given case and the need for confidentiality between a client and those from whom he seeks legal advice. *Id.* at 921. The court first noted that "[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges." *Id.* (quoting 8 WIGMORE, *supra* note 1, § 2192, at 73). On the other hand, in contrast to the need to restrict the privilege, the court noted:

[L]itigation can only be properly conducted by professional men, [and] it is absolutely necessary that a man . . . should have recourse to the assistance of professional



the court reasoned that the “complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others.”<sup>41</sup> The court likened the accountant’s relationship with the attorney to that of a translator hired to help counsel understand a foreign-speaking client.<sup>42</sup> Ultimately, the *Kovel* court held that the privilege attached to the accountant.<sup>43</sup>

Attorney-client privilege has also been extended to patent agents. While this is an issue that has divided federal courts,<sup>44</sup> *In re*

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lawyers, and . . . it is equally necessary . . . that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret . . . .

*Id.* (quoting *Anderson v. Bank*, 2 Ch.D. 644, 649 (1876)).

41. *Id.* at 921. Additionally, the court found that the privilege could not be limited solely to “menial or ministerial employees” of the attorney. *Id.* The court considered “secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts” to fit within this category. *Id.* The court reasoned that in cases where an attorney needs practical assistance, the information provided in meetings involving those assisting him should be kept confidential. *Id.*

42. *Id.* The court went on to point out four situations, using the translator analogy, under which it felt the privilege should apply:

[First,] where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client’s story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney’s behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice.

*Id.*

43. *Id.* at 922. The *Kovel* court recognized that “[w]hat is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice.” *Id.* at 922. Interestingly, the court was forced to draw a distinction between a case in which a client communicates first to his accountant and then consults his attorney on the same matter, and a case in which the client consults his attorney and the attorney brings in an accountant to review the matter. *Id.* The court found that the communications to the accountant would be privileged in the latter instance, but not in the former. *Id.* The underlying notion is that if the client spoke first to the accountant, it would not be for the purpose of receiving legal advice. *Id.* Responding to this seemingly-arbitrary distinction, the court stated that such distinctions are “the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help.” *Id.*

44. *Compare* *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298, 304 (E.D.N.Y. 1992) (extending the privilege to patent agents), *and* *Vernitron Med. Prods., Inc. v. Baxter Labs., Inc.*, 186 U.S.P.Q. (BNA) 324, 325 (D.N.J. 1975) (extending the privilege to

*Ampicillan Antitrust Litigation*<sup>45</sup> provides a good example of the rationales used by courts that so extend the privilege. In determining whether the privilege applied to communications between a client and a patent agent,<sup>46</sup> the court drew from the Supreme Court's holding in *Sperry v. Florida*,<sup>47</sup> and opined that there is little difference between a patent agent and a patent attorney in proceedings before the United States Patent Office.<sup>48</sup> Thus, the *Ampicillan* court held that the patent agent should be given the same rights as an attorney regarding privileged information.<sup>49</sup>

The final group to whom courts often extend the privilege is non-testifying experts.<sup>50</sup> However, even in cases where the courts are willing to extend the privilege to non-testifying experts, the privilege

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patent agents), *with* *Detection Sys., Inc. v. Pittway Corp.*, 96 F.R.D. 152, 155 (W.D.N.Y. 1982) (stating that "no communications from patent agents, whether American or foreign, are subject to an attorney-client privilege in the United States" (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169 (D.S.C. 1975))), and *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 5-6 (N.D. Ill. 1980) (finding no privilege for patent agents).

45. 81 F.R.D. 377 (D.D.C. 1978). *Ampicillan* involved an anti-trust suit. The plaintiffs in the case sought discovery of numerous documents that were "identified by the defendants . . . in their responses to interrogatories submitted by the plaintiffs." *Id.* at 380. After a special court-appointed master made recommendations regarding the documents, the defendants filed several objections to the recommendations. *Id.* at 380-81. The defendants contended *inter alia* that the master erred in "refusing to accord the [attorney-client] privilege to the communications [between a client and] a patent agent." *Id.* at 381.

46. *Id.* The court began by noting the tension between the competing aims of the privilege. *Id.* at 384. The court found that its duty was to strike "a balance between the need for the disclosure of all relevant information and the need to encourage free and open discussion by clients in the course of legal representation." *Id.*

47. 373 U.S. 379 (1963).

48. *Ampicillan*, 81 F.R.D. at 393. Specifically, the court in *Ampicillan* noted that "Congress, in creating the Patent Office, has expressly permitted both patent attorneys and patent agents to practice before that office . . . Thus, in appearance and fact, the registered patent agent stands on the same footing as an attorney in proceedings before the Patent Office." *Id.* The court also noted that "under the congressional scheme, a client may freely choose between a patent attorney and a registered patent agent for representation in [patent] proceedings." *Id.*

49. *Id.* at 394. The court held that "where a client, in confidence, seeks legal advice from a registered patent agent who is authorized to represent that client . . . which thereby necessitates a full and free disclosure from the client to the legal representative so that the representation may be effective, the privilege will be available." *Id.*

50. See *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (holding that federal law recognizes privilege protecting confidential communications between psychotherapist and patient); WEINSTEIN'S EVIDENCE, *supra* note 17, ¶ 503(a)(3)[01].

is limited to communications made to the attorney<sup>51</sup> (as opposed to the knowledge of the client or the knowledge of the attorney obtained in situations other than confidential communications with the client). Thus, only the expert's knowledge in relation to the client is privileged, not any other knowledge the expert may put forth.<sup>52</sup>

### *B. Extending the Privilege to Public Relations Consultants*

The extension of the privilege to accountants, patent agents, and non-testifying experts often rests on arbitrary distinctions regarding the way that information is obtained from the client. However, the privilege in these areas is well-established and poses few problems for attorneys who wish to ensure that their communications with clients will be privileged.<sup>53</sup> But courts have recently extended the privilege to public relations consultants, offering myriad rationales which are difficult to reconcile. While some clear trends have begun to emerge,<sup>54</sup> the state of the law in this area presents difficulties for

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51. See WEINSTEIN'S EVIDENCE, *supra* note 17, ¶ 503(a)(3)[01], at 503-36 to -38. Weinstein notes:

Confusion exists in the cases [regarding experts] because courts have not always drawn the necessary distinctions. . . . A distinction must be drawn between an expert hired to testify at trial and an expert consulted as an adviser who will not testify. The first is a witness who . . . does not fall within the definition of representative of the lawyer. . . .

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In the case of the expert who is not a witness and who qualifies as a representative of the lawyer, a distinction must be drawn based on how his information is obtained.

*Id.* at 503-36 to -37 (footnotes omitted).

52. *Id.* "Applied to the expert situation, this means that the expert's observations, conclusions and information derived from sources other than the client's communication constitute the expert's knowledge, which, like the client's knowledge and the attorney's knowledge, is not privileged." *Id.* at 503-37 to -38. However, "[i]f the expert-representative acquired knowledge from the lawyer, who in turn had obtained it from the client, then the privilege would apply." *Id.* at 503-38.

53. See Thomas J. Molony, Note, *Is the Supreme Court Ready To Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of Jaffee v. Redmond*, 55 WASH. & LEE L. REV. 247 (1998) (weighing the pros and cons of protecting communications between accountants and clients and illustrating the extent to which this privilege is established).

54. See Joseph F. Savage Jr. & Sarah Rimsky Levitin, *Feeding the Beast While Protecting the Attorney-Client Privilege: A Public Relations Professional Privilege*, 17 No. 11 White Collar Crime Rep. (West) 1 (2003) (pointing out some rules that may emerge from the three

attorneys who seek public relations help but wish to keep their communications with these firms privileged.

In *Calvin Klein Trademark Trust v. Wachner*,<sup>55</sup> the court refused to extend the attorney-client privilege to communications between a client, his lawyer and a public relations consultant.<sup>56</sup> The law firm had retained a public relations firm because of concern about the effect a lawsuit might have on Calvin Klein's constituencies.<sup>57</sup> But in the course of litigation, the court refused to extend attorney-client privilege to the public relations firm on three grounds.

First, the court stated that, under *Kovel*,<sup>58</sup> only documents that reveal confidential communications from a client for the purpose of seeking legal advice should receive the protection of the privilege.<sup>59</sup> None of the documents the court reviewed contained such communications.<sup>60</sup> Second, even if the documents did contain some communications from the client for the purpose of seeking legal advice, the privilege would be waived upon their disclosure to the public relations firm,<sup>61</sup> because the documents seemed to seek only "ordinary public relations advice."<sup>62</sup> Finally, the court noted that an

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cases discussed in this Note).

55. 198 F.R.D. 53 (S.D.N.Y. 2000).

56. *Id.* at 54.

57. *Id.* The law firm claimed to have hired the public relations firm in order to:

[U]nderstand the possible reaction of [Calvin Klein's] constituencies to the matters that would arise in the litigation, to provide legal advice to [Calvin Klein], and to assure that the media crisis that would ensue—including responses to requests by the media about the law suit and the overall dispute between the companies—would be handled responsibly . . . .

*Id.* (internal quotations omitted). On the other hand, the defendant contended that the public relations firm had been hired to "wage a press war against the defendant." *Id.* (internal quotations omitted). However, the court dismissed this rationale, noting:

None of the[] vague and largely rhetorical contentions by the . . . parties is particularly helpful to assessing the purpose of the documents here in issue, many of which appear on their face to be routine suggestions from a public relations firm as to how to put the "spin" most favorable to [Calvin Klein] on successive developments in the ongoing litigation.

*Id.*

58. 296 F.2d 918 (2d Cir. 1961).

59. *Calvin Klein*, 198 F.R.D. at 54.

60. *Id.*

61. *Id.*

62. *Id.* The court added that the public relations firm's own "Account Activity Report"

extension of the privilege to the public relations firm would stand in contravention of the maxim of strict construction.<sup>63</sup> Because the work performed by the public relations firm did not differ from what it would have been had the client hired the firm directly, extending the privilege was unnecessary.<sup>64</sup>

On the other hand, some courts have been willing to extend the privilege to communications with public relations firms. In *In re Copper Market Antitrust Litigation*,<sup>65</sup> defendant Sumitomo Corporation was a foreign entity unsophisticated in public relations.<sup>66</sup> None of Sumitomo's corporate executives were proficient enough in English to conduct media relations.<sup>67</sup> Thus, the firm hired a "crisis management" public relations firm in response to fears of litigation and an investigation by the Commodities Futures Trading Commission.<sup>68</sup> In considering whether to extend the attorney-client

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showed that the work they had been doing for the law firm "consisted of such activities as reviewing press coverage, making calls to various media to comment on developments in the litigation, and even 'finding friendly reporters.'" *Id.* at 54–55. Whether such advice would be helpful to the law firm, the court noted, is immaterial if the information does not "enabl[e] counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice." *Id.* at 55.

63. *Id.* The court stated that "it must not be forgotten that the attorney-client privilege, like all evidentiary privileges, stands in derogation of the search for truth so essential to the effective operation of any system of justice: therefore, the privilege must be narrowly construed." *Id.*

64. *Id.* The court found that while some clients consider public relations to be absolutely necessary in modern trial advocacy, such necessity does not justify extending the privilege to a public relations firm. *Id.* The court stated that "[i]t may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status." *Id.*

65. 200 F.R.D. 213 (S.D.N.Y. 2001).

66. *Id.* at 215. The court stated that the Sumitomo Corporation had "no prior experience in dealing with issues relating to publicity arising from high profile litigation, and . . . lacked experience in dealing with the Western media." *Id.*

67. *Id.* "Only two of the three executives in Sumitomo's Corporate Communications Department had English language facility and those individuals' English language skills were not sufficiently sophisticated for media relations." *Id.*

68. *Id.* Sumitomo feared that any statements made could become a liability during future litigation or investigation. *Id.* at 215–16. According to the court, "[t]he chief object of [the public relations firm's] engagement was damage control, *i.e.*, the management of press statements in the context of anticipated litigation to ensure that they do not themselves further damage the client." *Id.* (internal quotations omitted). The public relations firm assisted Sumitomo in preparation of talking points, press releases, and several other public relations-related documents intended for several different audiences. *Id.* at 216. Many of the documents contained legal advice from Sumitomo's law firm and in-house counsel. *Id.* Therefore, the court

privilege to the public relations firm,<sup>69</sup> the court cited *Upjohn Co. v. United States*<sup>70</sup> for the proposition that communications between the corporation's counsel and a corporate client's agents possessing the requisite information needed to give effective legal advice should be privileged.<sup>71</sup> Next, the court found the public relations firm to be an agent of the Corporation.<sup>72</sup> Reasoning by analogy, the court stated that as long as the public relations firm possessed information that counsel needed to render proper legal advice,<sup>73</sup> communications between the firm and Sumitomo's outside counsel should be protected.<sup>74</sup>

### III. PROSECUTORIAL DISCRETION AND PUBLIC OPINION

The American legal system provides prosecutors with broad discretion<sup>75</sup> in determining "whether to investigate, grant immunity,

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found that the public relations firm "acted as Sumitomo's agent and its spokesperson when dealing with the Western press on issues relating to the copper trading scandal." *Id.* at 215.

69. *Id.* at 217. The court first looked to Supreme Court Standard 503. *Id.* The court noted that many courts have interpreted the Standard so as to "protect[] communications between lawyers and agents of a client where such communications are for the purpose of rendering legal advice." *Id.*

70. 449 U.S. 383 (1981).

71. *Copper Market*, 200 F.R.D. at 218. The court listed the factors on which the *Upjohn* court based its holding:

[T]he communications had been made to Upjohn's counsel by its employees acting at the direction of their corporate superiors; that the information was needed to supply a basis for legal advice concerning potential litigation relating to the subject matter of the communications; that the communications concerned matters within the scope of the employees' corporate duties; and that the employees were aware that the communications were for the purpose of rendering legal advice for the corporation.

*Id.*

72. *Id.* at 219. Specifically, the court found that "for purposes of the attorney-client privilege, [the public relations firm] can fairly be equated with the Sumitomo for purposes of analyzing the availability of the attorney-client privilege to protect communications to which [the public relations firm] was a party concerning its scandal-related duties." *Id.*

73. *Id.* The court found no distinction between *employees* that speak with counsel (as in the *Upjohn* case) and a *consultant* hired by the corporation that does the same. *Id.* The court stated that "[i]n applying the principles set forth in *Upjohn*, there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice." *Id.*

74. *Id.*; see *supra* note 72.

75. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal

or permit a plea bargain, and to determine whether to bring charges, what charges to bring, when to bring charges, and where to bring charges.”<sup>76</sup> Generally, the rationale for providing prosecutors with such broad discretion is twofold: (1) The separation of powers doctrine suggests that prosecutors, as agents of the executive branch, are responsible for enforcement of the law,<sup>77</sup> and (2) the factors which must be evaluated in deciding whether to prosecute are not well-suited for judicial review.<sup>78</sup> However, while prosecutorial discretion is broad, it is not unlimited; prosecutors must establish probable cause,<sup>79</sup> they are limited by constitutional constraints,<sup>80</sup> and

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laws.” (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“Government retains ‘broad discretion’ as to whom to prosecute.” (quoting *Goodwin*, 457 U.S. at 380 n.11)); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in prosecutor’s discretion.”); WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.2(a), at 10 (2d ed. 1999) (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”).

76. Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279, 1280–81 (2002) (footnotes omitted).

77. See, e.g., *Armstrong*, 517 U.S. at 464 (noting that federal prosecutors “are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, § 3, and citing 28 U.S.C. §§ 516, 547)); *United States v. Martin*, 287 F.3d 609, 623 (7th Cir. 2002) (noting that prosecutor has broad power to indict because it is an exercise of executive power); *United States v. Jones*, 287 F.3d 325, 334 (5th Cir. 2002) (decision to prosecute is “a proper exercise of executive discretion” (quoting *United States v. Webster*, 162 F.3d 308, 333 (5th Cir. 1998))).

78. See, e.g., *Wayte*, 470 U.S. at 607 (“Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”); see also *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (holding that broad discretion is appropriate because the prosecutor, not the courts, must evaluate the strength of the case, allocation of resources, and enforcement priorities).

79. *Armstrong*, 517 U.S. at 464 (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

80. See, e.g., *Wayte*, 470 U.S. at 608 (finding motive improper when it is “‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification’” (quoting *Bordenkircher*, 434 U.S. at 364, and *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); *Bragan v. Poindexter*, 249 F.3d 476, 481 (6th Cir. 2001) (holding prosecutorial discretion is not unfettered and government acts are unconstitutional if intended to penalize defendant for exercise of constitutional right); *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997) (holding defendant’s political activity cannot be motivation for criminal prosecution).

courts will question prosecutorial decisions not reached in good faith.<sup>81</sup>

At the federal level, prosecutorial discretion is guided by the Department of Justice's Attorney General's Manual, the handbook for United States Attorneys throughout the country.<sup>82</sup> In determining when a prosecutor should bring charges against a possible offender, the Manual provides little substantive guidance, stating that "[t]he attorney for the government should commence . . . Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."<sup>83</sup> Thus, the Attorney General's Manual advocates what might be called a reasonable likelihood of conviction standard for prosecutorial charging decisions. Recent scholarship suggests that this standard is a typical prosecutorial charging standard throughout the country.<sup>84</sup> The reason for the popularity of such a standard is aptly summarized as follows:

Given limited resources and full, if not burgeoning, caseloads, there is simply no practical and legitimate reason for a prosecutor to proceed to trial in a case that has no reasonable prospect of resulting in a conviction. Thus, as a purely tactical

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81. See, e.g., *United States v. Los Santos*, 283 F.3d 422, 428 (2d Cir. 2002) (holding that in order to allow district court to grant downward departure based on prosecutorial delay, delay must have been in bad faith or unreasonable); *United States v. Wolf*, 270 F.3d 1188, 1190 (8th Cir. 2001) (holding court may review prosecutor's refusal to file substantial-assistance downward-departure motion if prosecutor acted in bad faith); *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1264–65 (10th Cir. 1999) (noting that the court can review government's refusal to move for downward departure under Sentencing Guidelines if government acted in bad faith).

82. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-1.100 (1997) ("The United States Attorneys' Manual is . . . designed as a quick and ready reference for United States Attorneys, Assistant United States Attorneys, and Department attorneys responsible for the prosecution of violations of federal law. It contains general policies and some procedures . . .").

83. *Id.* § 9-27.220. Additionally, the manual provides that prosecution should be declined if the prosecutor believes that "1. [n]o substantial Federal interest would be served by prosecution; 2. [t]he person is subject to effective prosecution in another jurisdiction; or 3. [t]here exists an adequate non-criminal alternative to prosecution." *Id.*

84. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 684 (1992) ("[V]irtually all prosecutors require, at least at the time of trial, that the government's case present a reasonable likelihood of conviction.").



matter, prosecutors will not proceed, to trial at least, with cases presenting no reasonable likelihood of conviction.<sup>85</sup>

Beyond this evidentiary standard, there is nothing else a prosecutor *must* consider in making charging decisions. But, naturally, what a prosecutor *does* consider is not limited to what a prosecutor *must* consider.<sup>86</sup>

Rather, scholarship suggests several other factors that may influence prosecutors' charging decisions. Examples of considerations that prosecutors take into account include "the ethical appropriateness of their behavior,"<sup>87</sup> "the fairness of their charging decisions" as a whole,<sup>88</sup> the positions of defense counsel on a case,<sup>89</sup> the strength of police officers' convictions about a case,<sup>90</sup> a sense of loyalty to the victims of the crime,<sup>91</sup> individual aspirations,<sup>92</sup> and the influence of public opinion and attention.<sup>93</sup> While each of these factors is likely influential to a prosecutor's charging decision, no factor is dispositive. The relative weight afforded each factor is likely a function of two things: the character of the specific prosecutor's office and the character of the individual prosecutor assigned to the case.<sup>94</sup> Thus, with the exception of likelihood of conviction based on

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85. *Id.* at 685.

86. *Id.* at 684.

87. *Id.*

88. *Id.*

89. *Id.* at 691 ("With the adoption of an adversary ethic, some prosecutors advocate extreme positions in an attempt to counterbalance the position of defense counsel. Some prosecutors also respond in kind to defense tactics, feeling that adversary combat cannot be fought with unequal weaponry.") (footnote omitted).

90. *Id.* at 689 ("Prosecutors also come into prolonged and recurrent contact with police officers. As a result, prosecutors may tend to regard police officers as their clients. Thus, some prosecutors may be reluctant to derail prosecutions, particularly where the police officers feel strongly about the case.") (footnote omitted).

91. *Id.* ("[P]rosecutors may come to know victims as real people, possibly likeable people, and very often persons deserving of consideration and sympathy. Quite naturally, prosecutors may develop loyalty to victims, and that loyalty may influence the prosecutors' decisions.").

92. *Id.* at 688 ("Some prosecutors have political or other ambitions, and consequently, they are concerned about their status and advancement within the prosecutors' office. That advancement may often depend upon one's image of being fearless about prosecuting difficult cases.") (footnotes omitted).

93. *Id.* at 688 ("Particularly where cases generate public attention, the prosecutors' office may be reluctant to appear ameliorative. In such cases, there is likely enhanced pressure upon the assigned [decision-maker] to obtain a conviction.") (footnote omitted).

94. *Id.* at 687.

available evidence, the suggestion that any one of the competing factors is more influential to a prosecutor's decision than another is nearly impossible to prove.<sup>95</sup>

There are several reasons that prosecutors should seek uniformity in decision-making and avoid decisions based solely on variable and capricious reasons such as public opinion, political ambition, or personal animus. First, “[d]ecisions that reflect high moral values and impart a ‘minister of justice’ consideration inspire a heightened respect for our judicial system.”<sup>96</sup> Naturally, as agents of the judicial system, prosecutors have a substantial interest in encouraging such respect. Conversely, “a widespread lack of uniformity with respect to discretionary decision-making by prosecutors reduces the public’s perception that the legal system employs a fair and ethical process.”<sup>97</sup> Finally, because of the highly detrimental consequences a criminal charge can bring upon a citizen,<sup>98</sup> “the possibility of charging an innocent person [is] ‘the single most frightening aspect of the prosecutor’s job.’”<sup>99</sup>

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95. See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511 (2000). The article posits that “allegations of improper use of discretion premised upon racial bias are nearly impossible to prove.” *Id.* at 1518. Clearly, if bias based on a concrete factor such as race is nearly impossible to prove, it would be more difficult to prove the influence that an ephemeral factor, such as public opinion, would have on a prosecutor’s decision-making process.

96. *Id.* at 1514 (quoting MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (1999)).

97. *Id.* The article further explains that “[a] lack of uniformity is particularly problematic when it occurs through actions of prosecutors, who unlike judges do not have an exclusively neutral role in the criminal justice system.” *Id.*

98. Melilli, *supra* note 84, at 672. Specifically, the author notes:

[T]he mere filing of a criminal charge can have a devastating effect upon an individual’s life, including potential pretrial incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges. Such consequences may well have a permanent effect that is not cured even by an acquittal at trial.

*Id.* (footnotes omitted).

99. *Id.* (quoting DAVID M. NISSMAN & ED HAGEN, *THE PROSECUTION FUNCTION* 13 (1982)).

IV. EXTENDING THE PRIVILEGE TO PUBLIC RELATIONS  
CONSULTANTS IN HIGH PROFILE CRIMINAL MATTERS: THE CASE OF  
IN RE *GRAND JURY*

A. *In re Grand Jury*

In the case of *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*,<sup>100</sup> the court held that in high profile criminal matters, communications between the target (“Target”)<sup>101</sup> of a grand jury investigation and a public relations firm hired by her lawyers were privileged.<sup>102</sup> Target’s lawyers hired a public relations firm, claiming concern that unbalanced press reports in the media would create public sentiment that would be detrimental to Target’s interests.<sup>103</sup> The public relations firm’s goal was to provide a counterweight to the press reports so that prosecutors and regulators could make informed decisions about how to proceed against Target without added public pressure.<sup>104</sup>

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100. 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

101. Throughout the opinion, the court referred to the grand jury target solely as “Target.” *See, e.g., id.* at 322. The court stated that “[i]n view of the importance of this issues [sic], this redacted version of the opinion, which substitutes pseudonyms for names and omits other identifying information, is being filed in the public records of the Court.” *Id.* (footnote omitted).

102. *Id.* at 332. Notably, the court held this regardless of whether the communications were made within or without the presence of her attorney: “The . . . 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 [the public relations] [f]irm. The Court is of the view that both types of communications are covered by the privilege . . .” *Id.* at 331.

103. *Id.* at 323. The court quoted the record: “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.” *Id.* (internal quotations omitted).

104. *Id.* at 323–24. Specifically:

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 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.

*Id.* at 323 (internal quotations omitted). However, the court noted that the “[f]irm’s activities were not limited to advising Target and her lawyers” and included other interaction with the

After some preliminary discussion about the attorney-client privilege,<sup>105</sup> the court recited the rationale of *United States v. Kovel*,<sup>106</sup> and affirmed the importance of *Kovel* to Target's case.<sup>107</sup> The court found that, like the lawyer's need for accounting help in *Kovel*, the lawyers in *In re Grand Jury* "need[ed] outside help," which justified hiring the public relations firm.<sup>108</sup> The court also noted that consultants used by lawyers to help in trial advocacy and preparation are often afforded the privilege.<sup>109</sup>

Next, the court considered whether a lawyer's effort to influence public opinion for the sake of neutralizing the environment around prosecutors and regulators could serve as a client service for which the privilege should be extended.<sup>110</sup> The court stated that there is a modern trend to view the lawyers role vis-à-vis public opinion

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media. *Id.* at 324. Beyond advising, the "[f]irm spoke extensively to members of the media, in some instances to find out what they knew and, where possible, where the information came from. And it conveyed to members of the media information that the Target defense team wished to have disseminated." *Id.* (footnote omitted).

105. *Id.* at 324–26. First, the court set out the broad outline of the privilege. *Id.* at 324. The court noted that the privilege applies to (a) communications between the client and the lawyer, *id.* at 324, and that (b) the privilege has been extended to agents of the lawyer in certain instances, *id.* at 325. The court stated that "the privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services." *Id.*

106. 296 F.2d 918 (2d Cir. 1961).

107. *In re Grand Jury*, 265 F. Supp. 2d at 326.

108. *Id.* (quoting *Kovel*, 296 F.2d at 922). The court stated:

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 . . . . [T]he Court accepts that this was a situation in which the lawyers . . . "need[ed] outside help," as they presumably were not skilled at public relations.

*Id.* (quoting *Kovel*, 296 F.2d at 922). However, the court distinguished the advice given in the case at bar from the technical advice given in *Kovel*. *Id.*

109. *Id.* The court noted:

[C]onsultants 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.

*Id.*

110. *Id.*

broadly.<sup>111</sup> In support of this proposition, the court cited Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nevada*<sup>112</sup> and recent scholarship,<sup>113</sup> and noted that many courts award attorney's fees for lawyers' efforts to influence public opinion.<sup>114</sup> Next, the

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111. *Id.* at 326–27. Initially, the court noted that the lawyer's role in the world of public opinion has historically been minor. Specifically:

[T]he proper role of lawyers vis-à-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.

*Id.* at 326. However, the court then discussed the modern trend toward a broader view of the lawyer's role vis-à-vis public opinion. *Id.* at 326–27.

112. *Id.* at 327. In *Gentile*, 501 U.S. 1030 (1991), a lawyer in Nevada held a press conference hours after his client had been indicted on criminal charges. *Id.* at 1033. Later, the criminal case was tried and the client was acquitted. *Id.* Thereafter, the Nevada State Bar filed suit against the lawyer alleging violation of a Nevada Supreme Court Rule that prohibited an attorney from making “an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” *Id.* (quoting NEV. CT. R. 177(1)). The lawyer argued that he made the comments because “unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors.” *Id.* at 1042. Approving of the lawyer's argument, the court stated:

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.

*Id.* at 1043.

113. See, e.g., 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 (2002) (discussing generally the practical considerations lawyers face when taking a high-profile criminal case); Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995) (arguing that legal norms should change with the times, allowing lawyers more freedom to influence public opinion).

114. *In re Grand Jury*, 265 F. Supp. 2d at 327; see also Moses, *supra* note 113, at 1848–49.

court distinguished<sup>115</sup> *Calvin Klein Trademark Trust v. Wachner*<sup>116</sup> and *In re Copper Market Antitrust Litigation*.<sup>117</sup>

The court found that *Copper Market* was distinguishable from the case before the court because “*Copper [Market]* disposed of the privilege issue by concluding that the public relations firm in substance was part of the client whereas Target [in the present case] makes no similar assertion.”<sup>118</sup> In distinguishing *Calvin Klein*, the court found the present situation different because the public relations firm in *Calvin Klein* “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 . . . was ‘simply providing ordinary public relations advice.’”<sup>119</sup>

Finally, turning to the issue of prosecutorial discretion,<sup>120</sup> the court stated that prosecutors are influenced by public opinion when making charging decisions.<sup>121</sup> Furthermore, advocacy in a public forum cannot “be conducted in disregard of its potential legal ramifications,”<sup>122</sup> and dealing with the media is “not a matter for

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115. *In re Grand Jury*, 265 F. Supp. 2d at 328.

116. 198 F.R.D. 53 (S.D.N.Y. 2000).

117. 200 F.R.D. 213 (S.D.N.Y. 2001).

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

119. *Id.* (quoting *Calvin Klein*, 198 F.R.D. at 54).

120. *Id.* at 330. Earlier in the decision, the court framed the major issue in the case in terms of prosecutorial discretion:

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

*Id.* at 326.

121. *Id.* at 330. Specifically, the court stated:

[I]t 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.

*Id.*

122. *Id.* The court noted that “[q]uestions such as whether the client should speak to the media at all, whether to do so directly or through representatives, whether and to what extent to

amateurs.”<sup>123</sup> The court was persuaded that some of the most “fundamental client functions” would be impaired if lawyers were not able to frankly discuss client matters with their public relations consultants.<sup>124</sup> Ultimately, the court held<sup>125</sup> that communications between the lawyers, Target, and the public relations firm were protected by the privilege.<sup>126</sup>

### *B. Evaluating In re Grand Jury: An Improper Extension of the Privilege*

The following section examines the court’s problematic *In re Grand Jury* decision. First, the decision is inconsistent with precedent.<sup>127</sup> Second, it is not in accord with the historical justifications for the attorney-client privilege.<sup>128</sup> Finally, the court’s reliance on the power of public opinion over prosecutorial discretion to justify an extension of the privilege is improper.<sup>129</sup>

#### 1. *In re Grand Jury* is Inconsistent with Prior Precedent

The *In re Grand Jury* decision is inconsistent with prior cases that have extended the attorney-client privilege beyond the confines of the

comment on specific allegations, and a host of others can be decided without careful legal input only at the client’s extreme peril.” *Id.*

123. *Id.*

124. *Id.* The court listed some of these 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.” *Id.*

125. *Id.* at 331. The Court held:

(1) [C]onfidential 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.

*Id.*

126. After stating its general holding, the court considered whether Target’s communications, which took place outside the presence of her attorneys, would be protected by the privilege. *Id.* In response to this inquiry, the court cited *Kovel* and held that it would be mere formalism to hold that such conversations would not be protected “provided the purpose of the confidential communication was to obtain legal advice.” *Id.*

127. See *infra* notes 130–53 and accompanying text.

128. See *infra* notes 154–56 and accompanying text.

129. See *infra* notes 157–64 and accompanying text.

attorney-client relationship.<sup>130</sup> First, it is inconsistent with *United States v. Kovel*,<sup>131</sup> which extended the privilege to accountants. In *Kovel*, the assistance sought by the attorney was accounting advice.<sup>132</sup> Presumably, without this advice the attorney could not have understood completely the evidence before him and provided his client with the most effective legal advice. But *In re Grand Jury* is a different situation. The *In re Grand Jury* case did not primarily involve technical advice of the sort given to the *Kovel* attorney.<sup>133</sup> Furthermore, the public relations advice sought in *In re Grand Jury* assisted the attorney with matters that were only peripheral to the substantive merits of the case.<sup>134</sup>

*In re Grand Jury* is also inconsistent with *In re Ampicillan Antitrust Litigation*,<sup>135</sup> in which the privilege was extended to patent agents because of their similarities to patent attorneys.<sup>136</sup> While lawyers may perform some public relations functions, the similarities between a lawyer and a public relations expert are hardly equivalent to those between a patent agent and a patent attorney. Application of the *Ampicillan* rule to *In re Grand Jury* is therefore inappropriate.

Finally, the *In re Grand Jury* court intimated that the case at bar was not the same as those cases involving non-testifying experts.<sup>137</sup> But the court noted that the privilege had been extended to consultants used by lawyers to help in trial advocacy and preparation,<sup>138</sup> implicitly suggesting that there is a strong similarity between public relations consultants and expert witnesses. Such analogy is mistaken. The difference between trial consultants and a public relations firm is that trial consultants are used to assist the lawyer with *trial* advocacy. The public relations firm, on the other hand, is used for *pre-trial* advocacy or to avoid trial at all.<sup>139</sup> The rule

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130. See *supra* notes 34–52 and accompanying text.

131. See *supra* notes 39–43 and accompanying text.

132. See *supra* note 40 and accompanying text.

133. 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003).

134. See *supra* note 108.

135. See *supra* notes 45–49 and accompanying text.

136. See *supra* notes 46–49 and accompanying text.

137. *In re Grand Jury*, 265 F. Supp. 2d at 326.

138. *Id.*

139. *Id.* at 323–24; see also *supra* notes 103–104 and accompanying text.



for non-testifying experts is too dissimilar to be applied in *In re Grand Jury*.

*In re Grand Jury* is also difficult to reconcile with other cases that have extended the privilege to public relations consultants.<sup>140</sup> In *Calvin Klein*, the court stated that whether advice from a public relations expert would be helpful to the law firm is immaterial if the information does not “enabl[e] counsel to understand aspects of the client’s own communications that could not otherwise be appreciated in the rendering of legal advice.”<sup>141</sup> The *In re Grand Jury* court did not explain away this rationale. While the court found that the public relations firm assisted the lawyers in *applying* Target’s communications in the media,<sup>142</sup> the court did not explain how the public relations firm helped the lawyers *understand* Target’s communications. Also, the court in *Calvin Klein* held that extending the privilege to public relations experts stands in contravention of the maxim of strict construction.<sup>143</sup> The maxim applies with equal force in all cases in which the privilege is invoked,<sup>144</sup> and thus the decision in *In re Grand Jury* also stands in contravention. Thus, the court’s attempt to distinguish itself from *Calvin Klein* is unconvincing.<sup>145</sup>

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140. See *supra* notes 55–74 and accompanying text.

141. 198 F.R.D. at 55.

142. *In re Grand Jury*, 265 F. Supp. 2d at 324.

143. 198 F.R.D. at 55.

144. See *supra* notes 25–30 and accompanying text.

145. For a discussion of why the *In re Grand Jury* court distinguished *Calvin Klein*, see *supra* note 115 and accompanying text. The court’s rationale is unpersuasive for the following reasons. First, the court stated that the client in *Calvin Klein* had a relationship with the public relations firm that “antedated the litigation.” *In re Grand Jury*, 265 F. Supp. 2d at 329. Presumably, the suggestion is that if the client had a prior relationship with the public relations firm, then the work performed by the firm would be more like ordinary public relations work and less like legal work. This reasoning is unpersuasive. Working for the client in the past does not dictate that the present work will be any different.

Second, the court stated that in *Calvin Klein*, “the client was a corporation addressing an array of constituencies including customers and shareholders.” *Id.* But this fact would require an intricate knowledge of public relations, suggesting more of a need for public relations help than in *In re Grand Jury*.

Finally, the court claimed that the advice in *Calvin Klein* was “simply . . . ordinary public relations advice.” *Id.* (internal quotations omitted). However, the *In re Grand Jury* court never explained what comprises “ordinary public relations advice” and why the advice given by the public relations experts in the case at hand was not such advice. Thus, because the rationale of *Calvin Klein* applies with equal force to *In re Grand Jury*, and because the reasons given for distinguishing the two cases are unconvincing, the *In re Grand Jury* court should not have departed from the holding of *Calvin Klein*.

*In re Grand Jury* is also inconsistent with *Copper Market*,<sup>146</sup> which extended the attorney-client privilege to a public relations firm. While the two cases initially appear to be quite similar,<sup>147</sup> digging deeper reveals crucial differences. In *Copper Market*, the court considered the public relations firm to be incorporated into the staff of the Sumitomo Corporation.<sup>148</sup> But the *In re Grand Jury* public relations firm was not considered to be incorporated into Target's staff. Additionally, Sumitomo was a foreign corporation that was highly unsophisticated regarding the Western press and had no executives with English skills sufficient for media relations.<sup>149</sup> Hence, Sumitomo needed the public relations firm not only to serve as a translator to the press, but simply to deal with the press at all. In *In re Grand Jury*, there was no suggestion that the lawyers would not have been able to deal with the press without the assistance of the public relations firm. Rather, the firm was needed only because the lawyers wanted to deal with the press in a more skillful manner.<sup>150</sup>

As the previous paragraphs discuss, *In re Grand Jury* is difficult to reconcile with precedent. The case adds confusion to an area of law where certainty is needed.<sup>151</sup> In evaluating the case, one cannot help but recall the Supreme Court's admonishment in *Upjohn Co. v. United States*<sup>152</sup> regarding the value of an uncertain privilege. The court warned that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>153</sup>

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146. 200 F.R.D. 213 (S.D.N.Y. 2001). For a discussion of this case, see *supra* notes 65–74 and accompanying text.

147. For instance, both Target's lawyers and the Sumitomo Corporation hired the public relations experts because they feared that any statements they might make could be a liability regarding future legal positions. See *supra* note 68 and accompanying text.

148. *Copper Market*, 200 F.R.D. at 219.

149. *Id.* at 215.

150. *In re Grand Jury*, 265 F. Supp. 2d at 323–24.

151. See *supra* note 17 and accompanying text.

152. 449 U.S. 383 (1981).

153. *Id.* at 393.

2. *In re Grand Jury* is Not in Accord with the Historical Justifications for the Attorney-Client Privilege

*In re Grand Jury*'s discrepancy with precedent is only one of its drawbacks. The case also does little to further those rationales that traditionally have justified the privilege.<sup>154</sup> The most common rationale for the privilege has two aspects: (a) the privilege eases clients' fears of disclosing material information and (b) an attorney can give well-informed legal advice only when all material information is disclosed.<sup>155</sup> The extension of the privilege to a public relations firm does nothing to encourage a client's frank disclosure of material information to his attorney. While it may encourage forthright disclosure from the client to the public relations firm, there is no reason that all material facts would not be brought out in the absence of the firm.

The privilege is also justified on the ground that by allowing free consultation between client and attorney, a client is more likely to voluntarily comply with regulatory laws.<sup>156</sup> Again, because the extension of the privilege to a public relations firm does not encourage the client to open up to his attorney, the attorney is in no better position to advise his client than he would be without such an extension.

3. *In re Grand Jury* Places Improper Emphasis on the Power of Public Opinion over Prosecutorial Discretion

The *In re Grand Jury* decision is also problematic because the court partially rests its holding on the influence that public opinion has on prosecutorial discretion.<sup>157</sup> This rationale is unsubstantiated, speculative, and hardly a valid reason to extend the privilege to public relations experts.

The *In re Grand Jury* court was correct in recognizing the broad discretion that prosecutors have regarding criminal defendants.<sup>158</sup>

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154. See *supra* notes 18–24 and accompanying text.

155. See *supra* notes 19–22 and accompanying text.

156. See *supra* notes 23–24 and accompanying text.

157. 265 F. Supp. 2d at 330.

158. See *supra* notes 75–76 and accompanying text.

However, this expansive discretion is constrained by legal, institutional, and ethical considerations. First, prosecutors are limited legally by the requirements that they establish probable cause,<sup>159</sup> that they do not prosecute selectively,<sup>160</sup> and that they make charging decisions in good faith.<sup>161</sup> Second, they are inhibited institutionally by limited resources and full caseloads, which lower the probability that they will proceed with a case if there is not a substantial likelihood of conviction.<sup>162</sup> Third, they are constrained by ethical considerations, such as a realization of the serious consequences of a criminal charge to a citizen.<sup>163</sup> Finally, prosecutors are motivated to inspire a heightened respect for their profession by avoiding charging decisions that appear to be based on arbitrary considerations, that are inconsistent, or that appear unethical or unfair.<sup>164</sup>

Even in light of these constraints, certainly some prosecutors will make charging decisions based on variable and capricious reasons such as political ambition or personal animus. Some will even be influenced by public opinion. However, public opinion is but one of a myriad of reasons why a prosecutor may charge a particular defendant.<sup>165</sup> No evidence shows that public opinion holds a place any higher or lower in importance to prosecutors than, for example, the strength of a police officer's convictions about a case or a sense of loyalty to the victims of the crime. If a prosecutor has probable cause and there is a substantial likelihood of conviction in the case, nothing makes it illegal for a prosecutor to consider the tone of public sentiment when deciding whether to bring charges. However, such consideration will only be part of a many-factored analysis.

In summary, prosecutors have broad discretion to bring criminal charges. Alongside legal, institutional, and ethical constraints, there are innumerable factors that influence charging decisions. While it may be true that one such factor is negative public opinion about a potential defendant, there is no convincing proof that it is a more

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159. *See supra* note 79 and accompanying text.

160. *See supra* note 80 and accompanying text.

161. *See supra* note 81 and accompanying text.

162. *See supra* note 85 and accompanying text.

163. *See supra* notes 98–99 and accompanying text.

164. *See supra* notes 96–97 and accompanying text.

165. *See supra* notes 87–93 and accompanying text.

dominating factor than other substantial concerns. Thus, public opinion should not be regarded as worthy of hindering the administration of justice by suppressing facts that may be crucial to the search for truth.

#### V. PROPOSAL

As Part IV of this Note suggests, the extension of the attorney-client privilege to public relations experts, using the rationale set forth in *In re Grand Jury*, is improper. The case is difficult to reconcile with precedent and rests on an unsubstantiated presupposition regarding the influence of public opinion on prosecutorial discretion. Ultimately, the case may open the door to a jurisprudence in which the privilege will be extended to outside practitioners for any number of “modern” client services.

Courts should only extend the attorney-client privilege in cases that present the most compelling need. Thus, when a court must decide whether to extend the privilege to practitioners other than those traditionally allowed the privilege, they should follow a two-step inquiry: (1) whether the extension of the privilege in the present situation is easily reconcilable with precedent, and (2) whether the rationale used to justify the extension is so far beyond mere supposition that not extending it would inherently prejudice the proper administration of justice. Following this framework would avoid uncertain application of the privilege and prevent the suppression of facts that may be necessary in the search for truth.

Under this proposal, there may still be situations in which the extension of the privilege to public relations experts would be proper. For instance, the extension of the privilege in cases like *Copper Market*<sup>166</sup> might pass muster. In that case, the function of the public relations firm was quite similar to that of a translator for the corporation, a practitioner traditionally extended the privilege by the courts. Furthermore, that the company needed a public relations firm because they had no understanding of the Western media and no employees with English skills sufficient to speak with the media is

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166. 200 F.R.D. 213 (S.D.N.Y. 2001).

far beyond mere supposition. Thus, the extension of the privilege in *Copper Market* fits nicely within the framework articulated above.

Finally, what is most important in any decision is that courts remain mindful of the problems that an uncertain privilege presents; attorneys and clients only benefit from the privilege when they are sure that its application will be respected by the court. Great injustices can occur when information that a party believes will be privileged is deemed not to be in a later proceeding. If courts are fully aware of the damage caused by an uncertain privilege, the chance of such injustices occurring is minimal.

## VI. CONCLUSION

The attorney-client privilege is a valuable part of the American legal system. While the situations in which it arises are as variable as the cases that come before our courts, its function remains constant: it helps ensure, through the free and frank disclosure of ideas between attorneys and clients, the proper administration of the justice system.<sup>167</sup> However, when attorneys and clients are uncertain whether their communications will be privileged in later proceedings, the benefits of the privilege vanish.

In *In re Grand Jury*, the court's decision to extend the attorney-client privilege to public relations consultants creates just such uncertainty. To remedy the problem the case presents, courts throughout the country should only extend the privilege in cases easily reconcilable with precedent and justified by a substantiated rationale. Only when courts are fully aware of the damage caused by an uncertain privilege will they establish a jurisprudence that properly ensures the beneficial effects of the privilege.

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167. See *supra* notes 18–22 and accompanying text.