



Protecting the Confidentiality of the Work of an 'Outsider' On the Defense Team

Maximizing the Protections of The Attorney-Client Privilege And Work Product Doctrine

Complex white collar criminal cases increasingly require counsel to investigate and understand facts in many different industries, engage in considerable pretrial practice, and prepare for lengthy trials. Most lawyers cannot do this alone. Lawyers are not experts in every industry, nor can they get ready for every part of trial without outside assistance. For instance, a white collar defense lawyer will be able to conduct internal corporate investigations but probably cannot personally trace funds through overseas banks in complex international financial transactions. A public defender will know how to build a legal argument to exclude evidence obtained illegally but will not be qualified to investigate the background of the police officers who conducted the search. Defense counsel can strategize about the testimony from former employees that

would strengthen his case, but counsel will need help finding witnesses located overseas or even cross-country. And a trial lawyer can imagine the perfect demonstrative to help the jury understand her key point, but she likely has no idea how to turn this abstract idea into a usable trial exhibit.

A good lawyer knows when to ask for help. In these types of cases, counsel will need people with specific expertise to join the defense team. These individuals may be accountants, private investigators, public relations firms, lobbyists, translators, trial and jury consultants, economists, environmental consultants, graphic designers, or photocopying vendors. Truly complex litigation is a team effort — and that team will naturally include some lawyers and some nonlawyers. To cull the benefit of the entire team's expertise, however, the lawyer must talk with these "outsiders" about the case and likely describe some or all of the lawyer's defense strategy along the way.

Working with nonlawyers in complex criminal cases is a necessary but risky proposition. They are not employees of the client or employees of the lawyer's firm. The risk of waiving attorney-client privilege or work product doctrine protections when disclosing strategy is not one to take lightly. Particularly in aggressive, high-stakes cases, prosecutors will take every opportunity to discover defense strategy, and that may include seeking documents created, or other information discovered, by every member of the defense team who is not a lawyer. As a result, lawyers must take considerable care to protect communications with these "outsiders." If defense counsel fails to develop a record to show that the work done by an individual who is not an attorney is privileged or

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protected by the work product doctrine, then a court could deliver defense strategy straight to the government. It should be the obligation of every lawyer to know the law governing communications with individuals who are not attorneys and to take adequate precautions to keep their work confidential.

This article explains what practicing lawyers need to know about working with nonlawyers. First, it provides an overview of the application of the attorney-client privilege and the work product doctrine to work by nonattorneys. Next, the article offers step-by-step guidance to put the defense attorney in the best possible position to resist the government's efforts to obtain discovery of the defense consultant's work. The article then explains how to defend against a prosecutor who seeks materials prepared by members of the defense team who are not attorneys. Finally, the article addresses several frequently used nonlawyers and describes the case law applying, or refusing to apply, protections to them. Lawyers can take specific steps described to make it as difficult as possible for prosecutors to overcome these protections.

There are two caveats: First, this article focuses on nonattorneys retained by lawyers to help behind the scenes. It does not address the role of testifying experts who are subject to specific disclosure rules. Second, although this article focuses on criminal litigation in the federal courts, lawyers with mixed civil and criminal practices should feel comfortable extending these principles to the civil side of their work.

The Basics

The attorney-client privilege generally attaches when legal advice of any kind is sought by a client from an attorney, the communications are made in confidence, and the protection has not been waived. Courts narrowly construe the privilege, and the burden of proof is on the party claiming the privilege.

Normally, the presence of a third party waives the attorney-client privilege. However, communications with consultants who are not attorneys are privileged if the communications are "made in confidence for the purpose of obtaining legal advice from the lawyer."¹ For example, in *United States v. Kovel*, a law firm hired an accountant to help the law firm represent a client under grand jury investigation for federal income tax violations.² The U.S. Court of Appeals for the Second Circuit held that privilege

applied to the accountant's work because he had helped interpret the client's financial records so that the attorneys could understand the client's legal position. As the court put it, "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases."³ Privilege extended to such "outside help" to promote "effective consultation between the client and the lawyer."⁴

Many courts have interpreted *Kovel* to extend privilege to a variety of services for attorneys performed by nonattorneys. The decisions usually take one of two approaches. They may follow *Kovel*'s lead and evaluate whether the outside consultant is acting as a "translator" who helps the lawyer understand nonlegal concepts, thus allowing the lawyer to provide better legal advice to her client. Alternatively, courts have followed the "functional equivalent" approach, which analyzes whether the outside consultant served as the equivalent of a company employee and was performing tasks for which the company did not have the resources or expertise on its own.⁵

Nonetheless, these cases do not address the application of privilege to every type of nonlawyer used by counsel. The analysis varies among cases because each relationship between attorney and client and between attorney and "outsider" is different from the last. Courts have refused to extend privilege to some nonlawyer services, such as lobbying and public relations. They have extended it to other nonattorneys, such as jury consultants. As a result, case law cannot provide absolute certainty that counsel's relationship with a nonlawyer will be privileged. For this reason, the practical steps the attorney takes during litigation may make all the difference in later convincing a court — a court that is likely without precedent to guide it — to refuse to order the client to disclose the substance of work by an "outsider" on the defense team.

In contrast to the privilege, the protection of the work product doctrine is broader and less easily waived, making it a more predictable bulwark against disclosure. This judicially created doctrine shields all documents created in anticipation of litigation by or for a party, its representative, or its consultant or agent. Its goal is to create a "zone of privacy in which a lawyer can prepare and develop legal theories and strategies 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries."⁶

Although most lawyers associate the work product doctrine with its historical roots in civil litigation,⁷ the common law work product doctrine also applies in criminal cases.⁸ That is because "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."⁹ As long as the specter of an indictment looms, the work product doctrine will likely protect from disclosure the work of a defense team member who is not an attorney. This doctrine therefore is key for criminal defense counsel or counsel conducting internal corporate investigations or involved in grand jury proceedings.

In addition to the common law work product doctrine, Federal Rule of Criminal Procedure 16(b)(2)(A) appears to impose unyielding prohibitions on discovery of defense counsel's work product. This rule prohibits any discovery of the following categories of work product: "reports, memoranda, or other documents made by ... the defendant's attorney or agent, during the case's investigation or defense."¹⁰ Under Rule 16, there is no provision for any discovery of any work product materials identified in the rule — period. In contrast, the common law work product doctrine, like the work product doctrine codified in Federal Rule of Civil Procedure 26, can be overcome for most materials ("fact work product") if the party has a "substantial need" for the documents and is unable "without undue hardship" to "obtain their substantial equivalent by other means."¹¹ However, even if the court orders discovery of fact work product, the court must still protect against disclosure of "opinion work product": the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.¹²

Nonetheless, it is important to understand the civil standards for work product because courts have at times borrowed common law principles into criminal cases, such as in ruling upon a *subpoena duces tecum* directed to a third party,¹³ or during a grand jury proceeding.¹⁴ Furthermore, even if defense counsel has an exclusively criminal practice, clients may face discovery in parallel civil proceedings, such as in the securities fraud context. In these circumstances, counsel will need to develop case strategy with an

eye to disclosure in either proceeding.

Another advantage of the work product doctrine is its ability to protect communications with nonattorneys after the attorney-client privilege is waived. Unlike waiver in the attorney-client privilege context, waiver of work product protection only occurs when disclosure makes it substantially more likely that an adversary will have access to the documents.¹⁵ If a third party receives documents or information in confidence, and does not widely disclose them, work product protection is usually not waived. Federal Rule of Evidence 502 allows attorneys who inadvertently waive privilege or work product, in either the civil or criminal context, to preserve the protections by taking reasonable means to rectify the error. Of course, if an attorney makes testimonial use of consultants or their materials, then the attorney will have waived work product protection, and a court may allow full inquiry into the subject on cross-examination.¹⁶

The bottom line is that it is the attorney's responsibility to develop an affirmative factual record showing how the work by a nonlawyer was done either (1) for the purpose of facilitating the provision of legal advice, or (2) for the purpose of helping a party in anticipated, or actual, litigation. If an attorney fails to create evidence documenting one of these purposes, then a court may hold that the attorney waived the confidentiality of the work done by an outsider on the defense team — a potentially calamitous result.

Protecting Confidentiality At Key Steps of The Relationship

To maximize the likelihood that a court will extend attorney-client privilege and work product protection to the work of nonattorneys on the defense team, consider the following at each step of the relationship.

Step 1: Hiring Nonlawyer Assistance

A defendant should always retain outside help through counsel. Clients should hire the attorney first, who will then communicate with the consultant or other third-party support staff. It will be considerably more difficult to justify application of the privilege if the client retains the consultant directly or if the client talks with the nonattorney consultant before the client seeks legal help from a lawyer.

When possible, the lawyer should retain nonlawyers for a specific case and not for multiple purposes. While it may be tempting to hire a client's favorite service providers to help defend against criminal charges, it is better to look to companies that do not already do business with the client. Consultants hired specifically for a case are less likely to have prior discoverable communications with the client, which may unintentionally reveal some of the client's thinking on the issues in the case.

Courts have also held that services provided by a client's regular outside accountants or investigators, for example, are unprotected business-related services, even if an attorney benefited from them, unless an engagement letter or other documents show otherwise. For example, in *Cavallaro v. United States*, a company contemplating a merger hired both an accounting firm to provide it with financial advice and also an attorney to provide it with legal advice.¹⁷ Although the accountants' financial planning services were "useful" for the attorney, the lawyer and the accountants worked "on their respective, separate tracks" during the merger.¹⁸ The court later held that the attorney-client privilege did not apply to the accountants' work because there was no evidence showing that their *financial* advice was necessary, or even "highly useful," for the provision of *legal* advice.¹⁹ The court indicated that its analysis would have been different if the company had made an affirmative showing that the financial advice had actually facilitated the attorney's legal advice.²⁰

Thus, before hiring anyone, counsel should consider precisely what expertise and assistance the nonlawyer will bring to the defense team. The nonlawyer must actually help the lawyer, who in turn will provide legal advice to the client on those issues. If the client needs routine accounting advice, for example, neither privilege nor work product protection will apply because the lawyer is merely relaying information as a conduit between the accountant and the client.

If the defense attorney does not really need outside help, then she should not get it.²¹ Every use of a nonattorney creates new opportunities for waivers of confidentiality and increases the possibility that counsel will be forced to produce documents about strategy to the prosecution. And, if the consultant's services are entirely duplicative of in-house or law firm staff, that can be evidence that the pur-

pose of the consultation was not for securing help necessary to the provision of legal advice.²² For discrete tasks, attorneys representing a larger company should see if it is possible to use internal company resources to help, such as information technology and accounting departments, rather than looking to outsiders. Not only is using internal staff simpler and cheaper, it will be easier to claim privilege and avoid waiver if the attorney is working with someone at a client company. However, there are some limitations to using internal personnel: client employees may be less willing to lend a critical eye to decisions made by the company, particularly if the decisions were made by a supervisor or a high-ranking executive. They may also be inclined to report first to inside counsel rather than to outside counsel, or to be less forthright with outside counsel if they see an ongoing problem. The lines of communication are not as controlled. In any case, if the defense attorney does use internal personnel to help, this does not relieve the attorney of the burden of developing a paper trail demonstrating that their work was done for the purpose of assisting the provision of legal advice or in anticipation of litigation.

If the client expands the scope of an outside nonattorney's services beyond legal tasks, then these additional tasks may not be shielded from disclosure by either protection. For example, consider a situation in which a company retains a private investigator to assist outside counsel to investigate an allegation of fraud against the company, in anticipation of civil and criminal actions against the fraudster. The investigator does such a good job of uncovering evidence of fraudulent financial transactions that the company asks the investigator to do regular background checks on all its new hires. While this may be a solid business decision, privilege and work product protection would not apply to the background checks because the investigator's work no longer related to litigation or legal advice. As a result, defense counsel for the fraudster may be able to get that work. (Query, however, whether this additional work would be relevant to the case, and thus discoverable at all.)

Step 2: Interviewing a Consultant

Interviewing the consultant is the defense attorney's best opportunity to

conduct due diligence on how the relationship will work and make sure the work meets the lawyer's standard for confidentiality. When reaching out to a third party for help on a case, the defense attorney should always identify herself as an attorney, and explain that she cannot reveal confidential information until she signs an engagement letter and runs a conflicts check. Nonlawyers will naturally want to know a lot about the case when counsel makes initial contact, which invites a waiver of confidentiality.

For example, think about a scenario in which lawyers contact forensic scientists to learn about whether they can help analyze physical evidence in a criminal case. This inquiry requires defense counsel to explain the basic facts of the case. Each scientist will be interested in the case's history and will want to hear more. While it is very tempting to share war stories with an eager listener, be careful of falling into the trap of telling them too much before they sign an engagement letter. The safest bet during early communications is to stick to public information and only to disclose what is necessary for the consultant to decide whether to

accept the engagement.

It is critical to find out during the interview how the nonlawyers will keep the defendant's information confidential. Depending on the sensitive nature of the case, the defense attorney may need to find out how their computer systems work and how counsel can share documents and analyses securely. It also can be useful to find out what kind of confidentiality training their employees receive. If the consultant mentions that he regularly uses subcontractors, this is a red flag — counsel plainly has less control as the layers of nonlawyers expand. At a minimum, however, each subcontractor should sign a confidentiality agreement.

Defense counsel should also make sure the consultant will use only lawful means to do his job. It is important that investigators, for example, do not trespass on private property to find a witness, or harass anyone to talk, or investigate personal information that is not legally available. Think about a situation in which defense lawyers interview two consultants to help with collecting on a court judgment in a fraud case. The first consultant insists that he can obtain bank balance infor-

mation on the defendant and that it is totally appropriate to do so. The other makes clear that this information is not legally available under bank privacy laws and refuses to do so. Who gets the job? Needless to say, the law firm should choose the second consultant. Even though investigators may be loath to reveal their trade "secrets," it is the lawyer's obligation to make sure the methods that will be used by all of the team members are entirely appropriate and could be justified in a court if necessary.

Step 3: The Engagement Letter

An engagement letter is the key document to protect confidential documents and communications. It is the best way to create a written record that the attorney retained outside help for the purpose of either facilitating the provision of confidential legal advice or providing assistance to defense counsel during the course of the criminal case. The letter will be between the law firm or lawyer and the consultant. The contents of an engagement letter are largely within the attorney's control, and she should take this opportunity to develop a concrete record of the relationship.



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Down the line, the letter could end up as an exhibit to a motion to compel, so it should be written with an eye towards disclosure. An engagement letter also gives the outside consultant clear directions on confidentiality procedures before he begins work.

This step is where defense counsel will likely see the biggest difference between retaining large consulting or accounting firms, and independent firms or solo consultants. Large firms will have a standard engagement letter that has been carefully drafted and vetted by their internal lawyers. In most instances defense counsel can negotiate minor changes to their standard letter to cover the points discussed below. If a case involves particularly sensitive information, the defense lawyer could also draft a side letter setting out the specific measures that will be taken in the engagement to protect confidential information, though this is rarely necessary. Large consulting firms, by their nature, have well-established practices to keep information confidential, including sophisticated

information technology systems to handle even the most sensitive litigation matters. While it is always a good idea to talk about the issues below, large firms will have dealt with all of them before and are well equipped to handle them with little discussion.

With all of this in mind, here are a few guidelines for drafting an engagement letter:²³

- ❖ Spell out the exact legal nature of the work to be done. For example, the letter should say that the nonlawyer is being hired to assist in the provision of legal advice to a specific client, and that the nonlawyer's work should be considered confidential, privileged, and work product. The defense attorney should identify the specific case or investigation on which the consultant is working.
- ❖ Require that all directions will come from attorneys only. In addition, the defense attorney should make clear that the consultant may not take any

significant steps without conferring with the attorney.

- ❖ Direct the nonlawyer to give written work and oral updates to attorneys only.
- ❖ Specify that all bills go to the attorney first. The client will also want to review the invoices and work performed by the consultant, and this is entirely appropriate.
- ❖ Give guidelines on use of subcontractors or consider prohibiting them entirely. If there is a key subcontractor, then the lawyer can retain them separately.
- ❖ Instruct the consultant that everyone working on the case is equally bound to follow the guidelines in the letter.
- ❖ Include a statement requiring the consultant to conduct his work in accordance with all applicable laws, and making it the consultant's responsibility to know and follow the law.

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- ❖ Indicate how the defense attorney and the consultant will handle disputes about their relationship, such as with an arbitration provision, as opposed to allowing the confidential relationship to be aired in court in a breach of contract action.
- ❖ Set forth how defense counsel and the consultant will handle a subpoena for confidential documents that the prosecutor or a third party sends directly to the nonattorney. At a minimum, the letter should require the consultant to notify defense counsel if he receives a subpoena or document request, even after the case ends. The consultant will likely request an indemnification clause in the engagement letter in which the defendant agrees to pay for production expenses and attorneys' fees.
- ❖ Explain the nonlawyer's obligations to preserve or return documents after the relationship ends. In general, all communications with an outside consultant need to be preserved. They may be requested in discovery in a later civil case, and it would be inappropriate to discard them if such a case may be pending.

Step 4: Communicating During the Engagement

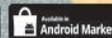
After the engagement letter is signed, the defense attorney needs to follow through on its procedures. In particular, the lawyer's communications with the nonlawyer must show that the nonlawyer's work is related to confidential legal services. Here are a few practical guidelines:²⁴

- ❖ Share information with consultants on a need-to-know basis. While the lawyer should not hide important information from the consultants (because it risks keeping the consultant from doing her best work), meetings can be limited to those who need to be there and documents circulated only to those who need to see them.²⁵ One way to do this is to define at the beginning of the engagement who will work on the case from the consultant's side, and then restrict communications to those individuals.
- ❖ Make clear on the face of all communications that they relate to legal advice by marking them privileged and work product-protected. Of course, the label on top of the page does not automatically block disclosure,

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sure, so the communications themselves should indicate how they relate to legal advice or assist in the litigation. For example, a lawyer's direction might say something like, "For the *State v. Jones* case, please do X, Y, and Z."

- ❖ While it may be useful to begin the engagement with a written task list for the consultant, these tasks will certainly change over time. There is a fine line between, on the one hand, creating an affirmative record of privilege and work product protection for a reviewing court and, on the other hand, avoiding putting every task in writing in case there is later court-ordered disclosure.
- ❖ Keep the identity and existence of all nonlawyer members of the legal team confidential (unless a court or another law requires disclosure, such as in pretrial discovery).
- ❖ Do not allow anyone regular access to the nonattorney's work who is not on the legal team. If the nonattorney does other work for defense counsel's law firm or for the client,

defense counsel should have a firewall set up between both teams.

Together, these precautions will help the defense lawyer establish, if necessary, that her communications are protected by the attorney-client privilege and the work product doctrine. They are far better than relying on the lawyer's memory of what happened.

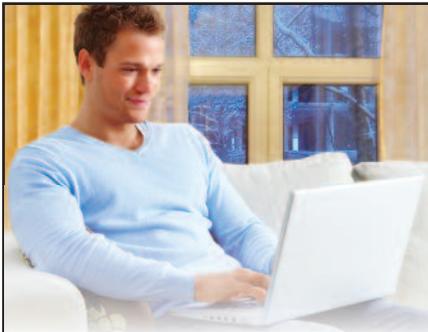
It is also a good idea to give the nonlawyers confidentiality guidelines suitable for people of all levels of experience with legal work. These guidelines are likely not necessary when working with large consulting firms as they already have many of these practices in place, but it is always helpful to keep them in mind.²⁶

- ❖ An attorney should be copied on each communication with the client or included on any emails or meetings with the client.
- ❖ Do not mix business-related communications and litigation-related communications. Do not send "mixed-subject" emails.
- ❖ Seek permission before sharing any

information about the case with any third parties.

- ❖ Do not forward emails from the lawyer to any third parties.
- ❖ When creating a new document for this matter, mark it “confidential, privileged, and work product. Prepared at the direction of counsel.”
- ❖ Create a separate investigation file and billing number for this matter.
- ❖ Use password protection for electronic files and email accounts.
- ❖ Communications regarding payment of invoices should be separate from all other communications, since their protection under the privilege is less certain.

Billing narratives are the first stop for a court when it looks to see whether a nonattorney’s work related to legal advice. The lawyer must weigh the benefit of generic invoices, which, if ordered to be disclosed, will deny the opponent any insight into the lawyer’s



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strategy, against the benefit of detailed invoices, which will help make clear the privileged nature of the work in the first place.

Step 5: After Termination of the Relationship

The attorney-client privilege and work product doctrine survive the termination of the relationship for the work completed during the engagement. Still, as extra security, specify in the engagement letter that confidentiality obligations continue beyond the end of the contract. And the defense attorney must always send a “goodbye” letter in which she clearly ends the relationship, restates confidentiality obligations, and reminds nonlawyers of their document retention duties. In a particularly sensitive matter, counsel may want to ask for all materials to be returned.

What to Do If the Government Subpoenas The Nonlawyer’s Work

Sometimes, in a criminal case, the government may subpoena documents related to the case held by a nonlawyer consultant or service provider on the defense team. Although this aggressive strategy is not usually successful, even the possibility of disclosing confidential documents needs to be taken seriously. A misstep by the consultant is a windfall for the prosecution, giving the prosecution documents and leverage that it previously lacked.

The first step when the defense lawyer receives a request for these documents depends wholly on the context of the case. In a civil case, counsel should first object to the document request on privilege and work product grounds (and any other relevant objections), and then wait to see if the other side wishes to pursue the documents through a motion to compel. In a criminal case, the best strategy is to call the prosecutor to find out what she wants. While she may not tell defense counsel precisely what she is looking for, it is possible that defense counsel may be able to narrow the request by consent and avoid expensive and time-consuming briefing. However, if the prosecutor is unable to narrow the request, or clearly wants work that the defense lawyer believes is properly protected by the attorney-client privilege or the work product doctrine, then either defense counsel or the consultant will need to file a motion to quash the subpoena.

If the dispute over the documents continues, it may be necessary to produce a privilege log of defense counsel’s communications with her consultant. This is the reason retention of defense counsel’s communications with the consultant is critical. Should counsel destroy documents and they are later requested, counsel or her client could face sanctions for spoliation, including fines or adverse inference instructions at trial. Requests for documents and subpoenas *duces tecum*, by their nature, ask for *documents* and not for *unwritten communications*, such as what was said on a telephone call or in a meeting, so there is a limit to what the government can obtain if the majority of the communications were by telephone or in person. In this day and age, however, it is nearly impossible not to create a record of communications by email.

A Rule 17 (or the equivalent state court) subpoena will be directed to the party that has the documents — the consultant — and thus the lawyer will need to consider who will pay to respond. This is where the indemnification provision in the engagement letter comes into play. The client will likely be required to pay any expenses involved in responding to a subpoena, such as reviewing or logging documents. Large consulting firms may require that their own lawyers review documents that are responsive to the subpoena, and those lawyers’ bills will then be sent to the defense lawyer’s client for payment. But for smaller or solo consultants, the burden will be on the client to pay directly for defense counsel’s time to review documents and challenge the requests (or to hire separate counsel to do so). While it is extremely unlikely that a client would agree to waive privilege or work product protection (or that it would make strategic sense to do so), one cost-saving possibility is to simply produce the documents without a fight.

If a defense attorney has followed the guidance above and if the consultant is properly assisting the defense team to develop privileged advice or to help defend against criminal charges, then there is a low chance that a court will order disclosure of the documents. As with everything in the law, however, there are exceptions. If a court orders the production of the documents, then the lawyer should be sure to review them before they are produced. This will reduce the risk of inadvertent waiver in case something was included in the production about a topic different than the one requested, and also will

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give defense counsel an opportunity to find out what the other side will learn from the documents. Also, keep in mind that there is some precedent extending the work product doctrine to the selection or compilation of publicly available documents by an attorney or an attorney's agent.²⁷

Whether Privilege Has Been Applied to Specific Types of Nonlawyers

The attorney-client privilege and the work product doctrine are more likely to apply to certain types of nonattorneys than to others. For example, disputes rarely come up over communications with full-time employees at law firms or public defender offices such as secretaries, law clerks, information technology staff, receptionists, messengers, interns, and file clerks. In-house support staff's job is clearly to help attorneys provide legal services and to assist in litigation. These protections also routinely extend to similar staff employed outside the firm, such as foreign language interpreters, photocopying vendors, and other document management services. Likewise, communications with fact analysts retained for litigation also tend to be protected. This includes consulting, nontestifying experts such as economists, psychiatrists, forensic scientists, and handwriting experts.

If the defense attorney is working with experts in her case, however, she will need to take care to avoid having her testifying expert rely on the work done by her nontestifying, nonlawyer team members. Under Federal Rule of Criminal Procedure 16, the defense must provide reciprocal disclosure of its experts' testimony, including disclosure of "the witness's opinions [and] the bases and reasons for those opinions."²⁸ Likewise, if the consultant intends to provide expert testimony in a civil case, Rule 26 of the Federal Rules of Civil Procedure requires specific disclosures, including the "assumptions" and "facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed."²⁹ If the testifying expert or any other witness refreshes his or her recollection by reading privileged or work product-protected documents, then Federal Rule of Evidence 612 may well make those documents discoverable.

Private Investigators

One of the most commonly used

types of consultants in a criminal case is a private investigator, and the protections of privilege and work product generally extend to them.³⁰ Investigators are a unique type of consultant because they are constantly talking with third parties and have considerable leeway in how they do their work. As a result, working with private investigators carries some hidden dangers. Investigators frequently subcontract confidential work to others, sometimes without telling the client. In addition, if the defense attorney uses investigators overseas, she will need to be sure that cultural differences do not create any problems. For example, while it may be culturally appropriate to bribe a government official to get information in another country, that does not mean the defense attorney's investigator should do so. An investigator who breaks the law can create all sorts of problems for counsel, starting with the possibility that a court may order disclosure of any communications to determine whether the wrongdoing has tainted the prosecution.

Accountants

Protection is also likely to extend to accountants used solely for litigation or investigations.³¹ For example, defense lawyers in white collar criminal cases often need accountants to explain the complex accounting rules at play and to analyze documents to help craft a defense. (This is an area in which testifying and nontestifying experts might overlap.) However, if the accounting advice provided was not necessary for the provision of legal advice, and was merely to provide financial advice to the client, then a court may order disclosure. This problem frequently arises when attorneys are involved in routine tax and auditing work, as well as in litigation. Courts are often skeptical of privilege and work product claims over a company's regular accountants, and demand proof that their work was not merely done in the ordinary course of business. (However, a separate federal civil tax preparation privilege³² and a free-standing civil auditor-auditee privilege exist in some states that may help protect this work from disclosure.)

In contrast, a company's independent auditors are not there to help outside counsel provide legal advice. Consequently, lawyers and clients may waive the *attorney-client privilege* when they share information with a company's independent auditors, although the disclosure may not waive the *work*



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product protections if the disclosure is made in confidence. For instance, in *Merrill Lynch & Co. v. Allegheny Energy Inc.*, the government was investigating Merrill Lynch for criminal fraud.³³ Merrill Lynch conducted an internal investigation through counsel, and gave its independent auditors documents containing the investigation's confidential results.³⁴ Although Merrill Lynch's disclosure waived the attorney-client privilege, it did not waive work product protection because the auditors were not Merrill Lynch's litigation adversaries and the auditors maintained the confidentiality of the reports.³⁵

Trial Preparation Consultants

Many lawyers also work with consultants to get ready for trial. For example, a lawyer may get help with mock jury trials, focus groups, jury selection, witness preparation, demonstrative exhibits, and other forms of trial preparation. This creates an obvious risk, given that lawyers must discuss their case strategy with these consultants. Typically, even the fact that the lawyer is engaging in such activities is intended to remain confidential. Even though it is unclear whether attorney-client privilege will apply, the

work product doctrine should protect communications between attorneys and trial consultants. This is particularly true if the consultant's advice is tailored to the particular case or witness, and is not merely a generic tip sheet or published article.

For example, in *In re Cendant Corp. Securities Litigation*, litigation counsel retained a psychologist, Phillip C. McGraw (TV's "Dr. Phil"), who at the time was a consulting expert in trial strategy and deposition preparation.³⁶ Because counsel and Dr. McGraw understood their work to be confidential, Dr. McGraw "participated in frank and open discussions" with counsel and witnesses "regarding counsel's view of the important facts of the case, the contentions of the parties, and ... trial themes, theories, and strategies."³⁷ Later on, opposing counsel sought full disclosure of Dr. McGraw's advice to the client's senior manager before his deposition.³⁸ On appeal, the U.S. Court of Appeals for the Third Circuit refused to order disclosure of the communications among the manager, Dr. McGraw, and counsel.³⁹ The work product doctrine covered their communications because they reflected and implicated counsel's strategy for the deposition.⁴⁰

At the same time, although the

content of communications with a trial consultant may be protected, the work product doctrine might not protect from disclosure the fact that a consultant was used. Courts have allowed parties to ask a testifying witness a few general impeachment questions about the interaction of the testifying witness with trial and deposition consultants. For instance, prosecutors may ask whether the witness met with a trial or deposition consultant, the purpose of any such meeting, who was present, the date and duration of the meeting, and whether the witness practiced or rehearsed his testimony.⁴¹

Lobbyists and Public Relations Consultants

In contrast, neither the work product doctrine nor the attorney-client privilege is likely to protect the work of lobbyists or public relations consultants on a legal team. Simply put, it is very hard to show that the predominant purpose of lobbying or press communications was for litigation or the provision of legal advice, especially when the lawyer concerned is criminal defense counsel. This is true even if a lawyer is acting as the lobbyist or public relations consultant. “[M]atters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of the lobbying efforts.”⁴²

Privilege likewise does *not* apply to ordinary work by outside public relations firms, such as the normal review of press coverage, making calls to media, and finding friendly reporters.⁴³ In-house public relations consultants have a better chance of being kept confidential, but courts may still find that the documents are unrelated to securing legal advice.⁴⁴

The high showing necessary for protection to apply to public relations consultants was illustrated in the trial of Martha Stewart on criminal charges of insider trading.⁴⁵ Early in the case, counsel for Stewart hired a public relations firm “out of a concern that ‘unbalanced and often inaccurate press reports about [Stewart] 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.”⁴⁶ The public relations firm’s goal was “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.”⁴⁷ However, this strategy backfired: prosecutors merely issued subpoenas to the public relations firm for all communications among Stewart, her lawyers, and the firm.⁴⁸

Nevertheless, the court refused to order disclosure of these communications. Relying on the privilege framework set forth in *Kovel*, the court found the public relations firm had in fact facilitated the provision of legal advice.⁴⁹ The court noted that Stewart’s lawyers needed to advise their client on “[q]uestions such as whether the client should speak to the media at all, whether to do so directly or through representatives, [and] whether and to what extent to comment on specific allegations.”⁵⁰ The court recognized that Stewart’s lawyers could not provide this advice on their own, because “dealing with the media in a high profile case probably is not a matter for amateurs.”⁵¹ The court therefore held that privilege should extend to:

- (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.⁵²

The court also held that work product protection would apply to all communications with the public relations firm made in anticipation of litigation.⁵³ The court accordingly ordered disclosure only of communications between Stewart and her public relations firm that did not include her lawyers.

For most attorneys, however, meeting these standards will be an uphill battle. Even in high-profile criminal cases, privilege is unlikely to apply unless either (1) the public relations consultant is helping the attorney mitigate massive negative media attention in order to avoid an indictment or a conviction, or (2) the consultant is helping the attorney advise the client on the legal risks of speaking publicly. And most cases do not require lawyers to cope with national media attention. If a client decides to take on the risk of using public relations consultants, defense counsel should take

extra care in making sure that written communications with them reflect the provision of legal advice.

Concluding Thoughts

In the end, there are no promises in privilege law. Courts examine each communication independently, and few appellate decisions control their analyses. Moreover, much of the precedent discussed here arose in the context of civil litigation rather than criminal cases. Yet by following these tips, the criminal defense lawyer can place her defense team in the best position possible to protect the confidentiality of the work of the entire defense team, including work done by “outsiders.” The defense lawyer can also effectively defeat the prosecution’s

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efforts to obtain this protected work through discovery. Most important, these steps will free the lawyer to use the outside expertise that she needs to obtain an acquittal in the criminal case.

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Notes

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

2. *Id.*

3. *Id.*

4. *Id.*

5. *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001).

6. *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 383–384 (2d Cir. 2003).

7. See *Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947).

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

9. *Id.* at 238.

10. FED. R. CRIM. P. 16 (b)(2)(A).

11. FED. R. CIV. P. 26(b)(3)(A).

12. FED. R. CIV. P. 26(b)(3)(B).

13. *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988).

14. *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 185–86 (2d Cir. 2007).

15. See *United States v. Johnson*, 378 F. Supp. 2d 1041, 1047 (N.D. Iowa 2005).

16. *Nobles*, 422 U.S. at 239.

17. *Cavallaro v. United States*, 284 F.3d 236, 247–49 (1st Cir. 2002).

18. *Id.* at 249.

19. *Id.*

20. *Id.*

21. See generally Michael J. Lyle & Eric C. Lyttle, *Media Consultants: Preserving Privilege*, NAT'L L.J. (July 28, 2008).

22. See generally Efrem M. Grail, et al., *Outsiders In? The Use of Independent Consultants and the Attorney-Client Privilege: Rules to Protect Your Clients' Confidences and Avoid a Waiver*, ReedSmith Bulletin 03-44 (May 2003).

23. See generally Charles L. Babcock & Crystal J. Parker, *How to Protect Privilege With Respect to Communications With Litigation-Related Public-Relations Consultants*, Jackson Walker L.L.P. (Sept. 2011), available at http://www.martindale.com/members/Article_Atachment.aspx?od=1113797&id=1342198&filename=asr-1342200.Protect.pdf; Colleen T. Davies, et al., *Using Public Relations Firms in Litigation to Protect the*

Company, ReedSmith Product Liability Update (Aug. 2007).

24. See generally sources cited *supra* note 23.

25. See generally Michael N. Levy & Todd A. Ellinwood, *The Applicability of the Attorney-Client Privilege to Nonattorney Members of the Legal Team*, White Collar/Investigations & Enforcement, available at <http://www.bingham.com/Publications/Files/2005/04/The-Applicability-of-the-Attorney-Client-Privilege-to-Non-Attorney-Members-of-the-Legal-Team>.

26. See generally David Jacoby & Judith S. Roth, *Attorneys and Public Relations Consultants: Privileged or Perilous Communications?*, IBA Legal Practice Division, Litigation Committee Newsletter 19, 21 (Sept. 2008); Steven M. Kohn & Juliet W. Starrett, *Preserving the Attorney-Client Privilege: A Lawyer's Guide to Protection of Client Communications*, IADC Newsletter (Jan. 2005); sources cited *supra* note 23.

27. *Sporck v. Peil*, 759 F.2d 312, 315–17 (3d Cir. 1985).

28. FED. R. CRIM. P. 16(b)(1)(C).

29. FED. R. CIV. P. 26(b)(4)(C).

30. See *Nobles*, 422 U.S. at 239–41.

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

32. 26 U.S.C. § 7525.

33. *Merrill Lynch & Co. v. Allegheny*

Energy Inc., 229 F.R.D. 441, 446–49 (S.D.N.Y. 2004).

34. *Id.* at 444.

35. *Id.* at 446–49.

36. *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 660 (3rd Cir. 2003).

37. *Id.* at 667.

38. *Id.* at 660, 666–67.

39. *Id.* at 667.

40. *Id.*

41. *Hynix Semiconductor Inc. v. Rambus Inc.*, Nos. CV-00-20905, C-05-00334, C-06-00244, 2008 WL 397350, at *1 (N.D. Cal. Feb. 10, 2008).

42. *In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 285 (S.D.N.Y. 2001) (citation omitted).

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

44. *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001).

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

46. *Id.* at 323.

47. *Id.*

48. *Id.* at 322.

49. *Id.* at 325–26.

50. *Id.* at 330.

51. *Id.*

52. *Id.* at 331.

53. *Id.* at 331–32. ■

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