

PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE

By Jennifer Becker

Behunin v. Superior Court (2017) 9 Cal.App.5th 833, rev. den. (Jun. 14, 2017)

The Second District holds there is no privilege when attorney-client communications are disclosed to a public relations consultant who was neither necessary for the communications between the attorney and client, nor necessary to further the interests of the client.

Nicholas Behunin, represented by Leonard Steiner and Steiner & Libo, sued Charles and Michael Schwab over a business dispute. Steiner hired Levick Strategic Communications to create a social media campaign, including a website, to pressure the Schwabs to settle.

The Schwabs sued Behunin and Steiner asserting the website falsely associated them with the infamous Indonesian dictator Suharto and his family. The Schwabs served discovery seeking communications among Behunin, Steiner, and Levick. Behunin and Steiner objected based on the attorney-client privilege, asserting Steiner engaged Levick to create and execute legal strategies and tactics relating to Behunin's litigation. The trial court ruled the documents the Schwabs sought from Levick and Steiner were not protected by the attorney-client privilege.

The attorney-client privilege in E.C. § 954 protects confidential communications between a client and his or her attorney made in the relationship. E.C. §§ 912 and 952 limit the privilege to information not

disclosed to third parties other than those present to further the interest of the client in the consultation, or who are reasonably necessary for the transmission of the information or the accomplishment of the lawyer's purpose.

A communication between client and attorney is presumed privileged. A third party eliminates the presumption, and the holder of the privilege must show the communication should remain privileged by demonstrating the disclosure was reasonably necessary to accomplish the client's purpose.

There is no "public relations privilege" under California law. To establish a public relations consultant is encompassed within the attorney-client privilege under an agency theory, the Court adopted a New York template. The holder must show a reasonable expectation of confidentiality under the circumstances, and the public relations consultant was necessary for the client to obtain informed legal advice. "Necessity" is more than useful and convenient; the consultant must be

www.longlevit.com

indispensable or serve some specialized purpose in facilitating the attorney-client communications. A public relations consultant is not typically necessary for a client to obtain legal advice. Media campaigns are not litigation strategy, even if some attorneys consider them desirable.

Behunin provided little evidence to show how Levick was reasonably necessary to assist Steiner to advise Behunin, to litigate his case, to develop a litigation strategy, or to induce the Schwabs to settle. To the contrary, Behunin claimed Steiner was merely a liaison to hire Levick.

The court acknowledged sometimes an attorney's use of a public relations consultant could be necessary to the attorney's purpose. A consultant may help develop a plan to maneuver a lawsuit into an optimal position for settlement, which would make communications between the attorney, the client, and the consultant reasonably necessary. However, Behunin failed to present evidence to come to that conclusion.

The negative publicity objective of Behunin's website campaign extends the privilege too far. Many strategies, such as hiring away employees, lobbying for regulations, and competing with a party may maximize a client's negotiating position and increase the prospects of a favorable settlement. However, communications with headhunters, lobbyists, and lenders who might finance a competing company do not become privileged.

Nor was Behunin's dispute with the Schwabs a "media" case which might justify an attorney's use of a consultant to achieve balanced coverage of a notorious case.

Some public relations consultants are so closely aligned with a party they are the

functional equivalent of corporate employees seeking legal advice for their employer. The functional-equivalent cases require a detailed factual showing the consultant is responsible for a key corporate job, has a close working relationship with the company's principals on matters critical to the company's position in litigation, and have information possessed by no one else at the company. Levick was not the "functional equivalent" of Behunin's employee.

Levick and Behunin did not share a common interest in securing legal advice related to the same shared matter. Steiner hired Levick on behalf of Behunin, not to advise Levick. Levick may have wanted its public relations campaign to succeed, but that is not a sufficient common interest to protect communications as attorney-client privileged.

Comment: The court did not close the door on finding public relations consultants encompassed by the attorney-client privilege. However, this case demonstrates a privilege should not be assumed, and communications must be carefully managed to preserve confidentiality.