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Roger Clemens throws PR a curveball

By Michael Cardello, Moritt Hock & Hamroff

Crisis PR has long been performed behind the "cover" of attorney-client privilege. Two recent incidents raise serious questions about how far that cover extends and what the implications may be for PR firms operating in such environments.

The recent ruling by the courts in the Roger Clemens lawsuit with his former trainer on whether information exchanged between a law firm and PR firm, during the representation of a common client, must be produced in a lawsuit should provide real concern to PR professionals. Adding to this concern is the attempt by Major League Baseball to get Alex Rodriguez's PR representative to testify at the recent arbitration hearing that resulted in A-Rod being suspended for 162 games.

The attorney-client privilege specifically protects from disclosure confidential information that is shared between an attorney and a client that pertains to legal advice. Work product protection, by contrast, protects from disclosure the work product of an attorney, such as an attorney's mental impressions and notes. These legal doctrines, aimed at safeguarding information from one's adversary in a legal dispute, are not ordinarily applicable when the client or attorney divulges such information to a third party.

Recognizing, however, that it may be necessary in certain situations for an attorney to utilize the skills of a professional, non-lawyer to properly represent a client, courts have carved out an exception to permit an attorney and non-lawyer professional, in certain instances, to exchange information freely, without it being subject to disclosure.

Between 2000 and 2003, several decisions were issued by federal judges in New York that focused on what types of information exchanged between lawyers and public relations firms may be deemed confidential and not subject to disclosure in a lawsuit. In a Calvin Klein lawsuit, the court refused to protect information shared between the plaintiff's counsel and its public relations firm, where the information failed to contain legal advice, but rather focused on the expected reaction by the market place to litigation related decisions and how to address them. The court deemed this information as ordinary public relations advice. The court did, however, invoke the work product protection to shield certain limited information, which was necessary for plaintiff's law firm to draft the complaint.

In Viacom v. Sumitomo, a public relations firm was hired by a law firm, which was defending a foreign client without a significant US presence in a copper trading scandal. The public relations firm helped the law firm prepare statements to the press, prepare internal documents designed to inform the defendant's employees about what could and could not be said about the scandal, and assist the defendant's counsel in preparing drafts of legal documents. The court in Viacom held that such information was privileged, and did not have to be disclosed, because the public relations firm was assisting the law firm in its legal representation of the mutual client.

Despite the dearth of jurisprudence in New York on the privileged nature of information exchanged between law firms and PR firm during the past 10 years, the time was ripe to revisit this issue in light of the recent attention by the media on athletes. These include Lance

Armstrong, Alex Rodriguez, and Roger Clemens, and the PR blitz used by those sports figures to counteract the allegations. On September 17, 2013, Magistrate Judge Cheryl Pollak issued a decision, which further defines the contours surrounding what information exchanged between law firms and public relations firms will be protected from disclosure.

In the Clemens lawsuit, Brian McNamee, Clemen's trainer, alleged that Clemens waged a PR campaign against McNamee in order to brand McNamee a liar, in retaliation for testimony given by McNamee to Congress that McNamee injected Clemens with PEDs. In discovery, McNamee demanded that Clemens produce all communications he had with his PR strategist, Joe Householder, and Householder's firm, Public Strategies.

Clemens sought to shield that information from discovery, arguing that Householder was a member of the legal team and that Public Strategies had been hired to assist Clemens' legal team in devising legal strategy. However, the judge refused to adopt Clemens' arguments, holding that the vast majority of documents, which the former pitcher sought to protect from discovery, reflected standard PR and media services aimed at protecting Clemens' public image and reputation in the face of allegations that he used PEDs.

It is important for PR firms and lawyers to understand that unless information relates to legal advice -- not ordinary PR advice -- the information may very well be subject to disclosure in a lawsuit.

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