

January/February/March 2000

TO: Executive Addressed

FR: James E. Lukaszewski, APR, *Fellow PRSA* Chairman

RE: The Public Relations Practitioner and Privileged Communication - the Work Product Doctrine (WPD)

Work product is created when unique information and special expertise is required as a lawyer prepares for trial. Work product can be materials, reports, notes, or data developed by the attorney, or collected, developed, or prepared by outside specialists, investigators, consultants like public relations practitioners, accountants, engineers, etc. at the direction and under the supervision of an attorney preparing for or in anticipation of litigation. Great caution is required of non-lawyers preparing information.

Attorney-client privilege protects certain confidential communication between lawyer and client from discovery in civil, criminal, or administrative proceedings and work that directly reflects the mental processes and legal strategy of the attorney. Work product protection for consultant working materials can be overcome provided the other side can show the court a compelling need for the information, and in other ways as well.

The specifics of WPD can vary from jurisdiction to jurisdiction, and you must consult an attorney for specific guidance. But here is some useful general information about WPD:

1. To obtain WPD protection, you must:
 - Work at the direction and under the supervision of an attorney;
 - Work in confidence; and
 - Have a legal purpose (usually trial preparation) that is explicitly stated and understood.
2. To preserve WPD protection, you must:
 - Set up separate "Legal Matters" files, which are usually locked.
 - Limit access and distribution only to those who are authorized by counsel.
3. To maintain protection for specific documents you prepare, you should:
 - Address or copy them to the attorney who requested the work.
 - Mark them appropriately, i.e., Privileged & Confidential, Attorney/Work Product.

Waiver of WPD protection can occur very easily. Here are just a few of the ways WPD protection can be waived:

- Give or expose documents to unauthorized third parties.
- Verbalize privileged instructions or material from protected documents to unauthorized individuals.
- Give protected material to a witness to refresh his/her memory in preparation for testimony.

- Communicate privileged material to other attorneys who are not a part of the litigation.
- Indiscriminate use of "Privileged & Confidential, Attorney/Work Product" markings on inconsequential documents, or use without specific legal direction to do so.

Virtually any unauthorized disclosure of information to parties without specific direction or authorization by counsel (ask for and follow the attorney's direction) can waive WPD protection.

There are other ways WPD can be waived. WPD is, at best, a very fragile attorney-client relationship-based process that must be absolutely maintained if it is to stand up to scrutiny or legal challenge.

This brief discussion is not legal advice. Always consult an attorney for specific legal guidance.

Copyright © 2000, James E. Lukaszewski. All rights reserved.

The Lukaszewski Group Inc. ■ Ten Bank Street, Suite 530, White Plains, NY 10606-1952
Telephone 914.681.0000 ■ Facsimile: 914.681.0047 ■ tlg@e911.com ■ www.e911.com