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Managing and Defending Catastrophic Claims in the Face of Adverse Media Exposure

A catastrophic claim comes in, and you send it to outside counsel. Late the next day, the insured's general counsel calls you to let you know that earlier that morning a reporter called a lower-level employee of the insured to "get their side of the story" about the incident. Should your insured respond? Should your insured direct the reporter to outside counsel? Would your outside counsel be constrained by your guidelines to issue a terse "no comment" to the media? If your outside counsel is permitted to speak with the media, would he or she even know what to say? Would a statement from your outside counsel help defuse the story, or would it simply fan the flames and lead to the incident being reported on the nightly news? These are all critical questions that are, unfortunately, nearly impossible to answer in the heat of the moment (while a reporter is ninety minutes away from a deadline). A crisis or unexpected event that focuses media attention on your insured can be disruptive to your insured's business operations, and can also have a significant impact upon how a claim should be handled, your insured's potential exposure, and your ability to work productively with your insured to resolve a claim. Rarely, however, do insurers, their insureds, and outside counsel plan for (or even contemplate) these issues, at least not until the story has already hit the airwaves.

Crisis Communications Plans

Proactively dealing with the media in the face of possible negative exposure requires the preparation of a crisis communications plan before a story begins to develop (and ideally, before a claim even occurs). When a media crisis unfolds, a detailed crisis communications plan helps all involved evaluate the scope and level of a crisis, while employing a uniform communications system, as well as procedures and protocols to help deal effectively with an unexpected emergency situation. In any crisis communications plan, the goal is to provide accurate, consistent information – to the press, employees, clients, partners – in an effort to protect and preserve the insured's image and reputation. Without a crisis communications plan in place before an incident happens, there will be uncertainty as to what information (if any) is provided to the media. Furthermore, if the only information provided to the media comes from the claimants (or claimants' counsel), the story that is ultimately reported can be shaped by the claimants' viewpoint alone – and that story will almost certainly not be one that helps the insured.

A crisis communications plan should outline who to alert, how to develop and implement your firm's response to the crisis, and provide staff with the tools they need to handle the situation. Whether you hire someone to develop a crisis communications plan for you or handle it in-house, you should have a crisis communications plan in place *before* a crisis affects your company. The crisis response team is

responsible for handling all aspects of a crisis situation. This team should include your president, director of marketing, legal counsel, and when necessary your carrier. One person should be assigned the role of point person. This is the person to whom all press calls will be routed in the event of a crisis, and their information should be posted on your website as the media contact.

Create a crisis response team contact sheet with the contact information for each member of this team so you know how to reach everyone in the event of a crisis. This information should be included in the crisis communications plan and distributed to everyone on the crisis response team. Be sure to give a copy to your receptionist, as he or she may be the first one to field a call from the press regarding a crisis. The crisis communications plan should be updated on a regular basis.

Defense counsel should always be considered a critical member of the crisis response team. Defense counsel, claims professionals, and clients need to understand the impact of the media on the defense strategy. Besides being able to offer insight and input on the message that should be conveyed to the public, clients, and any potential claimants, involving defense counsel in the strategy from the outset provides the best possible chance to ensure that communications between the insured and public relations professionals are protected from disclosure during discovery, should the claim enter litigation.

Protecting Crisis Communications from Discovery

The insured and its counsel (whether in-house counsel, or retained by the insurer), must proceed with caution when involving public relations consultants in communications. Pre-suit communications between insureds and public relations consultants often present a tempting target for claimants' counsel, who often operate under the assumption that if an insured is communicating with a public relations consultant following an incident, a "smoking gun" will be found within those communications. Accordingly, every effort must be taken to protect communications between an insured and public relations consultants from discovery.

Unfortunately, the protections afforded to communications between an insured and public relations consultants are not nearly as strong as the protections afforded to communications between counsel and the client, or an insurer and its insured, when made in contemplation of litigation, and adequately protecting such communications often requires implementing a detailed strategy – from the outset – to involve defense counsel in any public relations strategy. If such a strategy is poorly executed (or not developed in the first place), communications between an insured and public relations consultants could be open to discovery (which could then result in the creation of a completely new story, one which focuses not on the incident itself, but on the insured's efforts to "handle" the situation), and as the media has learned, the "cover up" is always more interesting than the "crime."

Courts across the country are far from uniform on the issue of whether communications with public relations consultants are protected from discovery. Three distinct theories have been developed, however, which operate to protect such communications from discovery: (1) the "translator" theory; (2) the "employee" theory; and (3) the ordinary doctrine of work product protection. While courts have given these theories different names, all three theories are essentially similar – all advance the argument that confidential communications between a client and that client's public relations consultant, made for the purpose of dealing with the client's legal exposure, should be shielded from discovery.

The "Translator" Theory

One theory often advanced to protect communications with public relations consultants is the "translator" theory, first advanced by the Second Circuit in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). In *Kovel*, the Second Circuit held that communications between a corporation and an accountant employed by a law firm, made during the course of the accountant's work in assisting the law firm's

representation of the corporation, were protected under the attorney-client privilege. In its decision, the court analogized the accountant with an interpreter and reasoned that if communications with the third party are helpful to interpretation so that the lawyer may give legal advice, then the attorney-client privilege will extend to such communications (hence the name "translator" theory).

In 2003, the Second Circuit's reasoning in *Kovel* was extended to protect communications with public relations consultants. *See In re Grand Jury Subpoenas,* 265 F. Supp. 2d 321 (S.D.N.Y. 2003). In *In re Grand Jury Subpoenas*, counsel for Martha Stewart (who, at the time, was facing possible charges for obstruction of justice, in an investigation widely reported in the media) retained a public relations firm, with the goal of advising them as to how to quell the effects of extensive news coverage, which they argued had the effect of increasing the "risk" that prosecutors would "feel pressure" to bring criminal charges. After prosecutors subpoenaed Stewart's public relations firm, Stewart's attorneys argued that communications with the public relations firm were protected under the attorney-client privilege. The court agreed, holding that attorneys must be able to depend upon public relations consultants to help them advise their clients as to the legal risks of speaking publicly and the legal impact of possible alternative expressions, and to seek to avoid or narrow charges against their clients. Because, as a practical matter, these discussions with public relations consultants could not take place without sharing certain non-public facts and legal defense strategies, the court extended the attorney-client privilege to communications with a client's public relations consultants. The court noted, however, that the protection afforded to such communications only extend to communications between public relations consultants retained by an attorney, and as to communications that were directed to "handling the client's legal problems."

Over a decade after it was decided, the Southern District of New York's reasoning in *In Re Grand Jury Subpoenas* remains a popular path to asserting the attorney-client privilege in an effort to protect communications with public relations consultants. Its holding, however, has been kept narrow, and courts have repeatedly rejected attempts to extend the attorney-client privilege to communications with public relations consultant in the absence of a demonstrated link between the work performed by the public relations consultant and the actual legal advice provided to the client — in other words, when the public relations consultant merely performs typical public relations services aimed at improving the client's public image, those communications will likely not be protected in discovery.

The "Employee" Theory

The second theory often advanced to protect communications with public relations consultants is the "employee" theory, in which the party seeking to protect those communications argues that the public relations consultant is, for all intents and purposes, its functional "employee." *See, e.g.*, *Schaeffer v. Gregory Village Partners LP*, 78 F.Supp.3d 1198 (N.D. Cal. 2015). In *Schaeffer*, a public relations consultant was hired by the client, participated in public regulatory meetings and went door-to-door in neighborhoods potentially affected by contamination to meet neighbors and secure access agreements for environmental sampling by the client. Although the court acknowledged that the public relations consultant's responsibilities were not nearly as extensive as in certain other cases, the court nevertheless determined that the attorney-client privilege extended "where a consultant performs work that is substantially intertwined with the subject matter of a corporation's legal concerns, and the consultant provides information to the corporation's attorney to aid the attorney in advising the corporate client."

Similar to when a public relations consultant is hired by defense counsel, a client seeking to protect communications with its own public relations consultant via the attorney-client privilege should ensure the public relations consultant is acting on behalf of the client, and that such communications are actually related to the litigation – communications that seek or provide general "advice" in dealing with the media or salvaging the client's image will often not be protected from disclosure.

Work Product Protection

The final theory often advanced to protect communications with public relations consultants is the doctrine of work product, which originated in the seminal United States Supreme Court case of *Hickman v. Taylor*, 329 U.S. 495 (1947). The work product doctrine which protects materials prepared in anticipation of litigation from discovery, as well as documents containing the mental impressions and legal opinions" of an attorney performing work in defense of a client.

Several courts have held that communications with a public relations firm to constitute protected work product, and have shielded such communications from disclosure in discovery. *See, e.g.*, *Pemberton v. Republic Services Inc,* 308 F.R.D. 195, 202 (E.D. Mo. 2015); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (2001). In *Pemberton*, protection under the work product doctrine extended to certain defense documents in which "counsel, their clients and [the public relations consultants] worked closely together in discussing the information to be provided to the public" in order to impact future litigation. "All of the materials in question," determined the court, "were created in an effort to foster a public environment that was less likely to lead to further litigation involving the landfill." All of the materials were created at the direction of counsel in anticipation of litigation.

Of course, while communications with public relations consultants that are directly related to a client's exposure in actual litigation may be protected, courts often reject attempts to extend the doctrine to communications relating to tangential issues. As a result, communications that do not deal directly with litigation strategy, but rather deal with a client's "overall" public relations strategy, may not be protected. Several other courts, however, have declined to recognize communications with a public relations consultant as protected work product. *See, e.g.*, *Behunin v. Superior Court*, 9 Cal.App.5th 833 (2017); *Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg*, 171 F.Supp.3d 136 (2016); *Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (2013); *In re Long Branch Manufactured Gas Plant*, 388 N.J. Super. 254 (2005); *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661 (2001); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (2000). In much of cases where courts have declined to extend work product protection to communications with a public relations consultant, they have done so under the argument that such communications were not specifically to defending a client in litigation, advising a client as to potential litigation, or required the involvement of a public relations consultant in developing a client's legal strategy. Rather, such communications were discoverable, because they were made as part of "ordinary" public relations strategy, or the public relations consultant's participation was not "necessary" for the attorney to effectively advise the client.

The Many Stages of a Public Relations Crisis

Handling a public relations crisis requires a unified, team-oriented effort by the insured, defense counsel, claims professional, and any retained public relations consultants. Often, the ability to successfully manage a public relations crisis will often turn on the team's ability to identify milestones (whether the claim is pre-suit, or is in litigation) that are likely to incite media interest. Milestones such as a claimant's release from the hospital, the filing of a complaint, or the filing of a dispositive motion, for example, are likely to trigger the media to report on the event, and in doing so, seek comment. The crisis management team should identify these milestones well in advance, and in anticipation of reaching those milestones, have comments for the media ready in advance. At the outset, defense counsel should inform the entire team as to the likely timeline, so that relevant milestones can be identified, and any relevant documents shared and explained to the team prior to filing.

At times, in an effort to create or resurrect a story, the media will seize upon apparently innocuous statements buried within a filing. For example, many answers filed in response to a complaint will include several (if not dozens) of affirmative defenses, most of which are asserted solely out of an abundance of caution, so that a defense is not inadvertently waived at trial, and not out of the belief that any particular affirmative defense will constitute the "crux" of the defense. Additionally, many of

these affirmative defenses have both technical and non-technical definitions. It is, however, the common, non-technical definition that will invariably be picked up by the media, and made into a story. One defense that is nearly always asserted in any answer (and without fail triggers a call from a reporter) is the affirmative defense of comparative negligence – the allegation that the plaintiff's own actions or inactions contributed to his or her injuries. While the public at large generally has no understanding that this is a typical, "boilerplate" affirmative defense alleged in every answer (and that defense counsel is not actually "blaming" the plaintiff for his or her injuries), the media is often all too eager to take such an innocuous affirmative defense and use it to shape the narrative in such a way that inflames the public (and effectively "creates" a story out of nothing).

Defense counsel, the claims professional, and the insured must be prepared to anticipate and effectively respond to the opinions and commentary that will flow from the public discovery of this defense. When faced with an inquiry about a technical aspect of the litigation (such as an affirmative defense alleged in the answer), a motion to dismiss on a subtle point of law, or a motion for summary judgment, it is simply not enough to employ a "canned" response that identifies all of the facts supporting your strategy – from the media's perspective, such a response is little different than a terse "no comment," and will not help shape the narrative in an effective way.

When faced with inquiries from the media, insurance carriers and defense counsel are almost always most comfortable with simply "sticking to the facts." Every attorney, when preparing a witness for a deposition, has repeatedly reminded his or her witness to "answer only the question that is asked," "don't volunteer information," and "don't try to be helpful!" While this advice is almost always appropriate for a witness preparing for a deposition, such a strategy simply will not work when dealing with the media – defense counsel must understand and recognize the need to volunteer some facts and insight, to help the media tell the whole story. Defense counsel, the claims professional, and the insured must work together to ensure that everyone understands the narrative that will be told, how the facts underlying that narrative will be provided to the media, and the expectations as to how proactively dealing with the media will blunt the initial effect of negative exposure. In the end, if the media has picked up on a story, that story will be told (with or without input from the defense). By working with the media in a proactive and productive manner, the crisis management team can help shape the story in such a way that does not inflame the situation, and turn public opinion against the insured.

To that end, the insured, defense counsel, and claims professional must determine – in advance – not only what is to be said, but who will do the talking, and when. Staying "camera ready" is critical component to an effective defense media strategy, and the insured must be prepared for dealing with the media in same way he or she would be prepared for a deposition. Dealing with the media has significant potential for effecting the public's perception of an incident, but can backfire significantly if not done properly.

Many insurance carriers have policies that discourage or prohibit comment on ongoing matters in the media. Generally, such a policy is for the benefit of the insurance carrier, not the insured, but ultimately, adverse publicity of a catastrophic accident will impact the insurance carrier. Accordingly, the claims professional should understand the importance of managing the public relations aspect of a claim, and be kept in the loop as to the strategy for dealing with the media. While retaining a public relations consultant will, of course, add to the insurance carrier's costs, there may be provisions in the policy or a sublimit available to defray some of those costs.

Conclusion

Catastrophic claims often give rise to media involvement, and unless a plan is in place at the outset to deal with the media and help shape the story, media exposure is likely to focus on the negative, inflame the public opinion, and ultimately increase an insured's exposure. By creating a plan – before an incident occurs – to proactively deal with the media, the narrative can be shaped more favorably, and negative exposure contained. Creation (and execution) of a crisis management plan should involve the insured, defense counsel, the claims professional, and public relations consultants, so that all involved can proactively contain the situation, and work to prevent negative media attention from grossly inflating the value of a claim.