

**YES, MARTHA STEWART CAN EVEN TEACH US ABOUT THE
CONSTITUTION: WHY CONSTITUTIONAL CONSIDERATIONS
WARRANT AN EXTENSION OF THE ATTORNEY-CLIENT
PRIVILEGE IN HIGH-PROFILE CRIMINAL CASES**

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INTRODUCTION

When Martha Stewart sold her shares of ImClone stock,¹ little did she know that she would become the subject of one of the most publicized criminal investigations in U.S. history.²

By 2002, the high-profile criminal case was certainly not a new concept,³ but Ms. Stewart's legal problems evidenced the evolving relationship between the legal system and an increasingly aggressive media. The investigation of insider-trading allegations against Stewart was so extensively covered by the press that finding an impartial jury became a nearly impossible task.⁴ The case, of course, eventually went to trial and Stewart was convicted of four counts of obstruction of justice, lying to federal investigators, and conspiracy.⁵

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1 See *SEC Staff Reportedly Recommending Civil Charges Against Martha Stewart*, SEATTLE TIMES, Oct. 22, 2002, at C5 ("Stewart sold nearly 4,000 shares of ImClone on Dec. 27 one day before the Food and Drug Administration announced it had rejected the biotech company's application for Erbitux, its promising cancer drug.").

2 See Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023, 2023 (2005) ("The trial and its aftermath generated a media storm second only to that of O.J. Simpson.").

3 See Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816–19 (1995) (documenting the history of high-profile criminal proceedings, beginning with Aaron Burr's 1807 treason trial).

4 See Constance L. Hays, *Selecting Stewart Jury: How Much Publicity Is Too Much?*, N.Y. TIMES, Jan. 23, 2004, at C5 (describing the difficulties associated with the jury selection process in Ms. Stewart's trial).

5 Schroeder, *supra* note 2, at 2023.

Interestingly, one of the most controversial legal issues of the Stewart investigation arose not from her conviction or out of anything that happened during the trial. Rather, it arose out of a decision Stewart's lawyers made before any charges were filed against her. Fearing that excessive media coverage of the criminal investigation would put public pressure on prosecutors and regulators to file criminal charges, Stewart's attorneys decided to hire a public relations firm to attempt to neutralize the negative perception the public had of their client.⁶ This was not a newly minted strategy, as high-profile litigants had been hiring public relations consultants since the early 1990s. This was the time when the media began feeding off the growing public infatuation with criminal matters, from celebrity trials (Mike Tyson, O.J. Simpson, etc.) to heinous crimes that invoked strong public reaction (Jeffrey Dahmer). The intensifying media scrutiny of high-profile criminal matters created a need among attorneys for assistance with advocacy in the court of public opinion. The creation of firms specializing in "Litigation Public Relations" was the inevitable result.⁷

Stewart's attorneys hired one such litigation public relations firm to aid in their extrajudicial legal strategy. This decision proved costly when, during grand jury proceedings, government prosecutors sought to discover documents and obtain testimony regarding confidential communications between Stewart, her attorneys, and the public relations firm.⁸ In *In re Grand Jury Subpoenas Dated March 24, 2003*, a case heard before the U.S. District Court for the Southern District of New York, Stewart's counsel argued that the communications made between Stewart, the public relations firm, and the attorneys were protected by the attorney-client privilege.⁹ In a somewhat unprecedented decision, the court found that the public relations firm fell within the scope of the privilege, and that most of the communications were in fact protected.¹⁰ The decision was—and continues to

6 See *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003) ("[The public relations firm]'s primary responsibility was defensive—to communicate with the media in a way that would help restore balance and accuracy to the press coverage." (internal quotation marks omitted)).

7 See Susanne A. Roschwalb & Richard A. Stack, LITIGATION PUBLIC RELATIONS: COURTING PUBLIC OPINION, at xi–xiv (Susanne A. Roschwalb & Richard A. Stack eds., 1995) (defining and discussing the advent of litigation public relations). Roschwalb and Stack are credited with originating the phrase "litigation public relations."

8 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 322–23.

9 *Id.*

10 *Id.* at 332.

be—controversial because rarely has the attorney-client privilege been extended so broadly.

Although the court's holding was limited to the specific factual scenario presented by Stewart's case, litigation public relations firms quickly (and predictably) disseminated news of the decision.¹¹ Legal scholars have not been quite as elated. Expressing concerns that the decision amounts to an unwarranted liberalization of the attorney-client privilege, several authors have ultimately determined that *In re Grand Jury Subpoenas* was decided incorrectly.¹² These authors, however, often fail to appreciate the unique nature of a high-profile criminal case and the legal issues thereby implicated. They also fail to consider that the attorney-client privilege has a strong foundation built upon protections afforded by the Constitution. Such a foundation cannot be ignored when analyzing an extension of the privilege to public relations consultants, especially in the criminal context.

This Comment will address the constitutional considerations which are at the forefront of any high-profile criminal investigation and their relationship to the privilege extension issue. I argue that in order to protect fair-trial and due-process rights, attorneys must become advocates for their clients in the court of public opinion. Because of the complex nature of contemporary media, attorneys should not be forced to conduct such extrajudicial advocacy on their own. Rather, they should have the ability to engage litigation public relations consultants with the confidence that communications with these consultants regarding legal strategy will not be subject to government discovery. The court's reasoning in *In re Grand Jury Subpoenas*, despite not expressly considering constitutional implications, gives such an ability to defense lawyers and, accordingly, the court's opinion is correct in its conclusion. Courts should not hesitate to follow the decision's reasoning in the future.

Part I of this Comment will address whether the Constitution supports the attorney-client privilege and imparts a responsibility on at-

11 See Ann M. Murphy, *Spin Control and the High-Profile Client—Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 563 (2005) (noting public relations firms' treatment of the decision).

12 See *id.* at 590 (arguing that the justifications behind the privilege weigh against extending it to public relations consultants); see also Jonathan M. Linas, Note, *Make Me Well-Liked: In re Grand Jury and the Extension of the Attorney-Client Privilege to Public Relations Consultants in High Profile Criminal Cases*, 19 WASH. U. J.L. & POL'Y 397, 419–20 (2005) (arguing that the *In re Grand Jury Subpoenas* decision amounted to an improper extension of the privilege).

torneys to perform extrajudicial advocacy services for their clients.¹³ Part II examines, in depth, *In re Grand Jury Subpoenas*, to supply a framework for applying constitutional principles to the issue of privilege extension to public relations consultants. Finally, Part III addresses the criticisms regarding the reasoning used in the *In re Grand Jury Subpoenas* decision and provides a constitutional justification for why courts should not be hesitant to extend the privilege in a similar manner in future high-profile criminal cases.

I. ATTORNEY-CLIENT PRIVILEGE AND LITIGATION PUBLIC RELATIONS: THE CONSTITUTIONAL BASIS

Before determining whether constitutional considerations buttress arguments to extend the attorney-client privilege to public relations consultants in high-profile criminal matters, it is first necessary to determine what, if anything, the Constitution has to say about the privilege and extrajudicial public relations activities.

A. *Constitutional Protection of the Attorney-Client Privilege*

The attorney-client privilege, a creature of the common law,¹⁴ is recognized in some form in every jurisdiction in the United States.¹⁵

13 This Comment will not address any constitutional arguments for the existence of the work-product doctrine, which is somewhat related to the attorney-client relationship. The work-product doctrine protects from discovery certain documents prepared in anticipation of litigation. Its basic rules are codified in the Federal Rules of Civil Procedure, Rule 26(b)(3):

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But . . . those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

FED. R. CIV. P. 26(b)(3). The attorney-client privilege and work-product doctrine may share justifications, but for the purposes of this Comment, only the former will be discussed.

14 The Federal Rules of Evidence provide that "[e]xcept as otherwise required . . . , the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. State law go-

Although defined or applied differently depending on the Circuit or state, many courts follow Wigmore's classic formulation of the privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.¹⁶

As the "oldest of the testimonial privileges protecting confidential communications,"¹⁷ the attorney-client privilege obviously predates the Constitution.¹⁸ Nevertheless, both commentators and courts have found constitutional support for the privilege, particularly under the Fifth¹⁹ and Sixth²⁰ Amendments.²¹

verns the privilege in a civil action or proceeding "with respect to an element of a claim or defense as to which State law supplies the rule of decision." *Id.*

15 GRAHAM C. LILLY, *PRINCIPLES OF EVIDENCE* 325 (4th ed. 2006).

16 *See, e.g.*, *United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005); *Banner v. City of Flint*, 99 F. App'x 29, 36 (6th Cir. 2004); *United States v. Martin*, 278 F.3d 988 (9th Cir. 2002); *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997); *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992); *Ex parte City of Leeds*, 677 So. 2d 1171, 1173 (Ala. 1996); *Sapp v. Wong*, 609 P.2d 137, 140 (Haw. 1980); *In re Himmel*, 533 N.E.2d 790, 794 (Ill. 1988). Several of these cases cite 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2292, at 554 (McNaughton rev. ed. 1961).

A Federal Rule of Evidence defining the privilege was proposed, but ultimately rejected. *See* LILLY, *supra* note 15, at 327 (discussing the proposed Rule 503(b) and noting its broad definition of the privilege).

17 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 2 (4th ed. 2001).

18 *See, e.g.*, Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) (explaining that the privilege originated in the Elizabethan period in England). Interestingly, Hazard also explains that recognition of the privilege, in its modern form, did not begin to develop even in England until after 1800. *Id.* Hazard's historical analysis may suggest that the attorney-client privilege was developed in America under the same philosophical framework used to aid early interpretation of the Constitution. This is (thankfully) beyond the scope of this Comment.

19 The Fifth Amendment provides, in relevant part, that "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

20 The Sixth Amendment provides, in relevant part, that "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

21 *See* Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 17 (2003) ("Today the attorney-client privilege invokes several constitutional principles, including the Sixth Amendment right to counsel . . . , the Fifth Amendment right to have due process of law, which includes the right of . . . the effective and substantial aid of counsel, and the right against self-incrimination . . ."); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 68 (2002) ("Modern commentators have contended that the privilege is necessary to pre-

On its face, the Fifth Amendment offers perhaps the clearest support for the attorney-client privilege. One author has noted that “[e]arly American criminal courts and legal scholars viewed the [attorney-client] privilege as an outgrowth of the Fifth Amendment privilege against self-incrimination.”²² The link is clear. The benefits associated with the attorney-client privilege arise from its ability to facilitate open attorney-client communications.²³ These benefits would cease to exist if a client’s preexisting Fifth Amendment rights were forfeited merely because he or she divulged incriminating information to counsel.²⁴ Some scholars have even gone so far as to argue

serve a criminal defendant’s Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel.” (footnotes omitted)); Norman K. Thompson & Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 34 (2000) (“Several state courts note while the attorney-client privilege is not per se of constitutional origin, the privilege nonetheless has important constitutional implications.”). *But see* Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 269 (1992) (“Although often associated with constitutional rights and certainly protected at its core by at least the Sixth Amendment, most of the breadth and sweep of the attorney-client privilege is without constitutional protection.”); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 881 (1998) (“[T]he attorney-client privilege is not a constitutionally guaranteed right.”).

22 Thompson & Kastenberg, *supra* note 21, at 4.

23 See Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 GEO. WASH. L. REV. 307, 314 (1991) (noting that the benefits of the attorney-client privilege are “said to flow” from its ability to enhance open communication between attorneys and their clients); *see also* Vincent S. Walkowiak, *An Overview of the Attorney-Client Privilege When the Client Is a Corporation*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 2 (Vincent S. Walkowiak ed., 3d ed. 2004) (arguing that a broad interpretation of the privilege is necessary because disclosure by clients to their attorneys will be chilled if the disclosed information is made available to those with adverse legal interests).

24 The attorney-client privilege preserves a client’s Fifth Amendment rights when he or she discloses incriminating information to his or her counsel, ultimately resulting in increased attorney-client communications. *See* Hazard, *supra* note 18, at 1061 (“[T]he advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good.”); *see also* David E. Seidelson, *The Attorney-Client Privilege and Client’s Constitutional Rights*, 6 HOFSTRA L. REV. 693, 726–27 (1978). Seidelson’s article examines *Fisher v. United States*, 425 U.S. 391 (1976), in which the Supreme Court determined that a subpoena against taxpayers’ attorneys requiring disclosure of incriminating documents did not violate the taxpayers’ Fifth Amendment rights, even though those rights would have been violated if the documents were still in the hands of the taxpayers. However, the Court also determined that if the documents could not have been obtained by subpoena from the taxpayers due to Fifth Amendment considerations, and they were disclosed to the attorneys in order to obtain legal advice, the attorney-client privilege would prevent disclosure of the documents by the attorneys. *Id.* at 405. Seidelson argues that “if client’s [F]ifth [A]mendment right is not to be vitiated simply because he retains counsel and transfers possession of the documents to counsel . . . , it would seem that the attorney-

that the federal government's growing attempts to circumvent the attorney-client privilege²⁵ may lead to the evisceration of Fifth Amendment rights.²⁶

Additionally, the Fifth Amendment supports a constitutional attorney-client privilege for reasons beyond self-incrimination issues. For example, courts have suggested that the due process component²⁷ of the Fifth Amendment "includes the right of one accused of crime to have the effective and substantial aid of counsel."²⁸ The attorney-client privilege is necessary to give this right substance because it would be impossible for a lawyer to counsel a client effectively or substantially without the level of frank and open communications ensured by the privilege.²⁹ This relationship between the due process requirement and the attorney-client privilege coincides with one widely accepted justification for the attorney-client privilege: it should result in the client sharing more information with the attorney, who, in turn, gives more informed and effective advice to the client.³⁰ Although the privilege may ultimately prevent full discovery in

client privilege is simply the verbalization utilized by the Court to preserve client's preexisting [F]ifth [A]mendment right." Seidelson, *supra*, at 726–27.

- 25 These attempts include a Bureau of Prisons Rule promulgated shortly after September 11th, which authorizes the review of communications made between inmates and their attorneys, Prevention of Acts of Violence and Terrorism, 66 FED. REG. 55,062 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500–501), as well as the recent prosecutorial practice of requiring waiver of the attorney-client privilege as a condition of accepting a global settlement agreement, Jared Edward Mitchem, Comment, *Parallel Proceedings: Concurrent Qui Tam and Grand Jury Litigation*, 51 ALA. L. REV. 391, 405–06 (1999).
- 26 See, e.g., PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, *THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND BUREAUCRATS ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE* 105–07 (2000) (arguing that government prosecutors have jeopardized the self-incrimination safeguards of the Constitution by eroding the attorney-client privilege).
- 27 See *supra* note 19 and accompanying text.
- 28 *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951) (citing *Neufield v. United States*, 118 F.2d 375, 383 (D.C. Cir. 1941)). The due process rights within the Fifth Amendment may also include "a fair opportunity [for an accused] to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932).
- 29 For this reason, the due process rights afforded by the Fourteenth Amendment are also intertwined with the attorney-client privilege. See Eric D. McArthur, Comment, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729, 736 (2005) ("Courts have also recognized that government invasions of the attorney-client privilege can deprive an individual of due process under the Fifth and Fourteenth Amendments."). Because the Fourteenth Amendment is not limited to criminal cases, it may create a right to effective counsel in civil cases. See Jennifer Cunningham, Note, *Eliminating "Backdoor" Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992, 1003 n.65 (1990).
- 30 See Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1729–30 (1988) ("The client will speak freely with his attorney when assured that

a criminal matter, it promotes due process by fostering better-informed counsel, more efficient judicial processes, and greater obedience to the law.³¹

The Fifth Amendment rights implicated by the attorney-client privilege feed off of the assistance of counsel right provided by the Sixth Amendment. Unless a citizen had a right to the assistance of counsel, there would be no need to preserve his or her Fifth Amendment rights in the face of consultations with counsel.³² While scholars may debate whether the Fifth Amendment alone provides a constitutional basis for the attorney-client privilege,³³ few dispute that the Sixth

his revelations will not be disclosed without his consent; in turn, this communication allows the attorney to provide informed advice and to function effectively in the adversary legal system." (footnote omitted)).

- 31 See Goode, *supra* note 23, at 315–16. Goode argues that the privilege creates judicial efficiency in a variety of ways. To begin, it allows lawyers to raise valid defenses that they might not otherwise employ. Also, when a defendant's lawyer is well informed, the likelihood of ambush at trial is decreased. Moreover, fewer cases will actually go to trial when the attorney is accurately informed about the merits of a case. Goode further argues that a client will be more likely to reveal a plan to engage in illegal activity to his attorney with the knowledge that the communications are protected. This allows the attorney to counsel the client adequately and to discourage him or her from proceeding further, perhaps successfully.

These arguments generally provide the basis for the "utilitarian" justification for the privilege. See, e.g., David A. Nelson, Comment, *Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?*, 86 NW. U. L. REV. 368, 383–84 (1992). Nelson explains that:

Although created to protect the attorney from forced violation of his oath of secrecy to the client, it is now well established that the purpose behind the privilege is to promote full and open communication between the attorney and client. As a result of this communication, an attorney will be better able to represent his client in a competent manner. The attorney-client privilege also promotes "broader public interests in the observance of law and administration of justice" by providing the attorney and client with a confidential forum in which to communicate and resolve the client's problem. While the privilege may suppress important evidence, it has been determined that the need to allow the attorney to provide sound legal advice generally outweighs any disadvantage of withholding evidence in a particular case. For these reasons, the attorney-client privilege is one of the cornerstones of our judicial system.

Id. (footnotes omitted).

- 32 See Seidelson, *supra* note 24, at 713. Jeffrey A. DeLand explains that the "constitutional policy underlying the existence of the privilege is self-evident: to afford a client the freedom from fear of compulsory disclosure of information divulged in consultation with counsel so that the client will feel free to impart all relevant information essential to effective legal counselling [sic]." Jeffrey A. DeLand, Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 437, 442 (1982) (footnote omitted).
- 33 See Deborah Stavile Bartel, *Drawing Negative Inferences upon a Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1361 (1995) ("To the extent the attorney-client privilege is thought to have a constitutional basis in current American law, it appears to be grounded in the [S]ixth [A]mendment right to counsel—not in the [F]ifth [A]mendment right against self-incrimination."); see also *In re Shargel*, 742 F.2d 61, 63 (2d

Amendment right to counsel would have little meaning without the privilege.³⁴ Indeed, some authors have referred to the privilege as the “cornerstone of the Sixth Amendment right to counsel.”³⁵

By contrast, the Supreme Court has not had much occasion to pontificate on the correlation between the Sixth Amendment and the privilege,³⁶ though former Chief Justice Rehnquist observed on one occasion that “the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attor-

Cir. 1984) (“While the attorney-client privilege historically arose at the same time as the privilege against self-incrimination, it was early established that the privileges had distinct policies and that the ‘point of honor’—the attorney’s reluctance to incriminate his client—was not a valid reason to invoke the attorney-client privilege.”).

- 34 There is an abundance of scholarly work noting the relationship between the Sixth Amendment’s guarantee of the assistance of counsel and the attorney-client privilege. See, e.g., Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1240 (2003) (arguing that the Sixth Amendment necessitates the protection of confidential attorney-client communications); Thompson & Kastenber, *supra* note 21, at 34–38 (arguing that an accused person’s Sixth Amendment rights are violated when they are denied the full extent of the attorney-client privilege); Fred C. Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351, 357 (1989) (explaining that the privilege has constitutional support because it helps sustain criminal defendants’ trust and aids effective representation); Joshua T. Friedman, Note, *The Sixth Amendment, Attorney-Client Relationship and Government Intrusions: Who Bears the Unbearable Burden of Proving Prejudice?*, 40 *WASH. U. J. URB. & CONTEMP. L.* 109, 123 (1991) (finding difficulty in imagining an effective right to counsel without the existence of the attorney-client privilege); Nelson, *supra* note 31, at 414–15 (positing that the Sixth Amendment creates a constitutional guarantee of the attorney-client privilege); see also Bartel, *supra* note 33, at 1391–92 (arguing that the practice of certain courts, allowing a negative inference when a defendant invokes the attorney-client privilege, may be a violation of the Sixth Amendment).
- 35 David S. Krakoff & Christopher F. Regan, *The Hidden Cost to Corporate Settlements of Environmental Prosecutions—Is It Worth the Price?*, SD19 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 103, 110 (1998).
- 36 See Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 *GEO. J. LEGAL ETHICS* 145, 158 (2003) (pointing out that the Supreme Court has never expressly held that attorney-client confidentiality is guaranteed by the Sixth Amendment); Shawn P. Bailey, Comment, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 *B.Y.U. L. REV.* 489, 522 (noting the lack of Supreme Court guidance regarding the constitutional dimensions of the privilege).

In *Moran v. Burbine*, the Supreme Court addressed the Sixth Amendment-privilege relationship in analyzing when the constitutional right to counsel is first triggered. The Court held that the mere existence of an attorney-client relationship does not trigger Sixth Amendment protections prior to a formal interrogation, reasoning that “The Sixth Amendment’s intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor.” 475 U.S. 412, 430 (1986). It appears that the issue addressed by the Court in *Moran* was whether an attorney-client relationship triggers Sixth Amendment rights, rather than whether the Sixth Amendment supports the existence of an attorney-client privilege.

ney.”³⁷ Other courts have weighed in on the matter, finding that Sixth Amendment rights are ensured by the privilege. For example, the Third Circuit, in *United States v. Levy*, explained:

The fundamental justification for the [S]ixth [A]mendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the [S]ixth [A]mendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself.³⁸

Other circuits have also expressly found a Sixth Amendment foundation for the attorney-client privilege.³⁹ Accordingly, while it is not entirely settled, there appears to be ample support for the notion that the attorney-client privilege is indispensable to the right to effective counsel.

Regardless of their implications when considered apart, the Fifth and Sixth Amendments, considered together, all but mandate the existence of the attorney-client privilege.⁴⁰ Without the effect of the privilege, the Amendments would operate “mutually exclusive” to one another in criminal proceedings.⁴¹ In an oft-cited Note, the Harvard Law Review described this argument:

[W]hen the [F]ifth and [S]ixth amendments are considered together, the individual accused of crime does seem to have a right to attorney-client privilege. Without a right to privilege, the exercise of either constitutional right would require a waiver of the other. To preserve his right against self-incrimination, the defendant would have to forgo communicating with an attorney, lest the communication be subpoenaed [sic].

37 *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting).

38 577 F.2d 200, 209 (3d Cir. 1978).

39 *See, e.g.*, *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13, 19 (1st Cir. 1988) (“The [S]ixth [A]mendment provides a shield for the attorney-client privilege . . . in criminal proceedings . . .”).

40 *See* Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1806 (1988) (“Several commentators have suggested that the [S]ixth [A]mendment right to counsel, when taken together with the [F]ifth [A]mendment’s protection against forced self-incrimination, makes the attorney-client privilege a constitutional imperative.”); Joel D. Whitley, Comment, *Protecting State Interests: Recognition of the State Government Attorney-Client Privilege*, 72 U. CHI. L. REV. 1533, 1556 n.138 (2005) (noting that the combination of rights afforded by the Fifth and Sixth Amendments provides a constitutional basis for the attorney-client privilege in criminal trials).

41 *See* Michel Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client’s SEC Disclosure Obligations*, 33 HASTINGS L.J. 495, 511 (1982) (“[T]he attorney-client privilege is necessary if the right against self-incrimination and the right to counsel are not to become mutually exclusive.”).

Similarly, to enjoy even the most minimal use of his right to an attorney, the defendant would have to surrender his testimony to the court. Yet, neither of these restrictions can be permitted.⁴²

Thus, outside of any theoretical justification—and there are many of those, to be sure—a plain reading of the two Amendments appears to provide an implicit guarantee of the attorney-client privilege.⁴³ Such a rationale is what is known as the “non-utilitarian” justification of the privilege.⁴⁴

B. *Constitutional Considerations Regarding Attorneys’ Extrajudicial Public Relations Activities*

It would be difficult to argue that the Constitution vests a person accused of a crime with the right to general public relations assistance. However, the Sixth Amendment’s guarantee of a fair trial⁴⁵ and the assistance of counsel in criminal proceedings may necessitate extrajudicial media activity by attorneys. This is because the ever-expanding scope of intense media coverage of high-profile crimes

42 Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485–86 (1977).

43 *Id.* at 480 (“[The] attorney-client privilege may be viewed as a right implicitly guaranteed by the United States Constitution through the [F]ifth [A]mendment safeguard against self-incrimination and the [S]ixth [A]mendment right to an attorney in criminal trials.”); see also Hazard, *supra* note 18, at 1062 (conceding that without the attorney-client privilege, “[d]efense counsel would become a medium of confession, a result that would substantially impair both the accused’s right to counsel and the privilege against self-incrimination”); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1573 (1986) (arguing that constitutional protections should prevent states from narrowly defining the attorney-client privilege).

44 See Thompson & Kastenberg, *supra* note 21, at 4. It is important to note this distinction. As will be discussed in Part III, *infra*, although the “utilitarian” view is the prevailing contemporary theory, see Bartel, *supra* note 33, at 1364, the “non-utilitarian” view is based upon stronger reasoning, which supports the notion that the privilege should be extended to public relations consultants in certain situations.

45 The Sixth Amendment affords a criminal defendant the right to a fair trial by explicitly guaranteeing the right to trial by an impartial jury. See Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 78 (1996) (discussing the impartiality requirement as the foundation for the guarantee of a fair trial). The right to the assistance of counsel is necessary to secure the fair trial guarantee. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (“[A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.”); Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 399 (2000) (“The most prominent value bottoming the Sixth Amendment right to counsel provision is the concern for providing fair trials for criminal defendants.”).

continually threatens to jeopardize the ability of an accused to achieve his or her right to a fair trial.⁴⁶

This threat is two-fold. On one hand, statements made to the media by prosecutors, in addition to the media coverage itself, have both the purpose and the ability to contaminate the potential jury pool. Some commentators have noted that the “concern that legal scholars and judges have identified,” regarding the right to a fair trial, “is that the public, through the jury system, will have tried and convicted a defendant before the trial has occurred.”⁴⁷ Despite ethical considerations and bar association rules, time and time again government prosecutors have made extrajudicial statements implying the guilt of high-profile defendants with impunity.⁴⁸

The other threat to the fair-trial right comes when the process works in reverse. Excessive media coverage can result in a severe amount of public pressure on prosecutors to bring initial (or additional) charges where an accused person may normally not face criminal punishment or face only low-level criminal charges.⁴⁹ Jona-

46 See Lonnie T. Brown, Jr., “*May It Please the Camera, . . . I Mean the Court*”—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 94 (2004) (“Throughout our nation’s history, the potential effect of publicity on a criminal defendant’s constitutional right to a fair trial has been the source of much concern.”); Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1746 (2002) (“In pursuit of justice, especially in high profile criminal cases, . . . defense teams . . . constantly must be vigilant about threats to the underlying fairness of the proceedings posed by excessive media coverage.”); Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendants’ Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901, 902 (2003) (“Depending on the story the media relays to the public, the intense media coverage surrounding high-profile criminal cases can . . . destroy a defendant’s chances for a fair trial . . .”).

47 Mawiyah Hooker & Elizabeth Lange, Current Development, *Limiting Extrajudicial Speech in High-Profile Cases: The Duty of the Prosecutor and Defense Attorney in Their Pre-Trial Communications with the Media*, 16 GEO. J. LEGAL ETHICS 655, 664 (2003).

48 See Brown, *supra* note 46, at 126–30 (recounting ethically questionable statements made by government prosecutors in the cases of O.J. Simpson, Scott Peterson, John Walker Lindh, and Michael Jackson).

49 See Deniza Gertsberg, Comment, *Should Public Relations Experts ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443, 1462 (2004) (arguing that strong public reaction to a crime can result in aggravated charges).

An example of this phenomenon was the Michael Vick dog-fighting investigation. See Clifton Brown, *Dogfighting Charges Filed Against Falcons’ Vick*, N.Y. TIMES, July 18, 2007, at D1 (discussing the indictment filed by prosecutors against Michael Vick). From the initial rumblings regarding Vick’s role in a dog-fighting ring, the media was absolutely flooded by stories about the investigation. Vick’s indictment on multiple charges may have been appropriate, but it is difficult to say if the investigation would have reached the same conclusion if it were not for Vick’s high-profile status. David Cornwell, a sports and entertainment lawyer who previously served as assistant general counsel to the National Football League, argued that

than Moses notes, in the corporate context, that an issue regarding fair-trial rights arises because of the “wide discretion given prosecutors in deciding whether a corporate violation is a civil or criminal matter.”⁵⁰ As such, Moses argues that “counsel need to limit public pressure on government officials in order to limit the escalation of charges.”⁵¹ In the context of an individual accused of a crime, this need is just as great.⁵²

The First Amendment makes it unlikely that the media’s access to—and coverage of—criminal investigations will be limited in the future. Ethical rules have had little effect in preventing prosecutors from making statements about defendants that will skew the public’s view of their guilt. Thus, the only remaining option to ensure a fair trial is for the accused to seek a defense in the “court” of public opinion. That requires the aid of a lawyer. The Sixth Amendment right to the assistance of counsel, in conjunction with due-process and fair-trial rights, would seem to require attorneys to actively seek to counterbalance a client’s negative public image. In high-profile cases, “the only way some lawyers can offer clients their Sixth Amendment right to a fair trial . . . is to set the record straight in the media in hopes that accurate reporting will create a neutral litigation environment.”⁵³ In other words, to assure a fair trial, public advocacy is an essential part of a defense strategy.⁵⁴

[B]oth the state prosecutors and the federal prosecutors [sic] were influenced by Michael’s celebrity in the manner in which they pursued their investigation and the ultimate indictment. Once it became a federal case, . . . the judge treated Michael as he would any other defendant. In fact, at the arraignment the judge went to great pains to guarantee Michael and the public that Michael would be treated fairly. Michael’s celebrity had more of an impact on law enforcement and the prosecutors

ESPN.com, Chat with David Cornwell, http://proxy.espn.go.com/chat/chatESPN?event_id=18435 (last visited Jan. 10, 2008).

50 Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1833 (1995).

51 *Id.*

52 It is arguable that media-fueled public pressure poses more of a threat to due process rights than to the right to a fair trial. Without delving too deeply into criminal procedure, it is clear that the number and severity of charges brought against an accused person can affect the fairness of a trial by skewing the jury’s perception of the defendant. Whether the fair-trial right or due-process rights are implicated, constitutional protections are implicated by excessive media coverage of a crime because of the discretion afforded to prosecutors. *See id.* at 1837–38.

53 Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMM LAW CONCEPTS 7, 16 (2004). It is important to note that the Sixth Amendment fair-trial right, even under its most liberal interpretation, appears only to protect the attorney’s extrajudicial activities aimed at leveling public perception to a neutral point. A defense attorney’s media campaign that is not responsive to nega-

Bar associations appear to agree. For example, ABA Model Rule of Professional Conduct 3.6(c) provides that:

[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.⁵⁵

Commentators have explained that a "criminal client's right to a fair trial and effective counsel under the Sixth Amendment is the policy basis for the 'public right of reply' that bar associations have recognized, particularly as applied to defense lawyers, in their ethics rules."⁵⁶

Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nevada*⁵⁷ seems to concur. The case addressed the propriety of sanctions imposed on an attorney by the Nevada State Bar for making extrajudicial statements in favor of his client to the press.⁵⁸ The case turned primarily on an interpretation of the governing Nevada rule and a consideration of the attorney's First Amendment rights. Justice Kennedy, however, noted that the lawyer "sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client" and, thus, held that the attorney's speech did not violate the ethical limitations imposed by the applicable rule.⁵⁹ Later in the opinion, he wrote that "in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts."⁶⁰

Viewed in this light, extrajudicial activity is necessary to preserve constitutional rights in certain situations. The attorney-client privi-

tive media coverage or prosecutorial statements probably finds no footing on the fair-trial right. Similarly, a campaign commenced by a defense attorney that negatively portrays the victim of a crime appears to be not only without a Sixth Amendment basis, but it may also seriously impinge upon the victim's rights.

54 See, e.g., Gertsberg, *supra* note 49, at 1463 and accompanying footnotes (explaining that defense attorneys have become concerned that if they do not act in the court of public opinion, they may jeopardize their clients' fair-trial rights or put their clients in the dangerous position of defending themselves in the media).

55 MODEL RULES OF PROF'L CONDUCT R. 3.6 (2003).

56 Handler et al., *supra* note 53, at 16.

57 501 U.S. 1030 (1991).

58 *Id.* at 1033 (opinion of Kennedy, J.). The lawyer was accused of violating a Nevada rule analogous to ABA Model Rule 3.6, as it then existed.

59 *Id.* at 1043.

60 *Id.* at 1058. *But cf.* Moses, *supra* note 50, at 1826 (arguing that although *Gentile* recognized the constitutional underpinnings of extrajudicial advocacy, it did not directly "decide when, if or how lawyers should advocate in the court of public opinion").

lege—vital to the protections of the Fifth and Sixth Amendments—should, therefore, apply to any communications made between attorneys and clients for the purpose of facilitating the neutralization of public perception or similar activities. Whether that privilege should further extend to consultants hired by attorneys to assist with those functions is the subject of the next two Sections.

II. EXTENDING THE PRIVILEGE TO PUBLIC RELATIONS CONSULTANTS: *IN RE GRAND JURY SUBPOENAS* AND RELATED DECISIONS

Judge Kaplan's opinion in *In re Grand Jury Subpoenas*⁶¹ offers little in the way of constitutional analysis. Nevertheless, an examination of the decision and other related cases provides a working framework to address the issue of extending the attorney-client privilege to litigation public relations consultants. This Part is not meant to be an all-encompassing survey of the relevant case law, but rather, it is meant to illuminate the unique issues and law at play when determining if an extension of the privilege is constitutionally supported.

A. *United States v. Kovel*

The grandfather of the public-relations privilege cases is undoubtedly *United States v. Kovel*,⁶² a case decided by the Second Circuit over forty years ago.⁶³ Louis Kovel, a former IRS agent, appealed a sentence for criminal contempt that he received for his refusal to answer several questions asked during grand jury proceedings.⁶⁴ He was before the grand jury to provide testimony regarding alleged tax violations by a client of his employer, a law firm.⁶⁵ After two days of continued refusal to answer any of the questions posed to him, Kovel was held in contempt, sentenced to a year in prison, and denied bail.⁶⁶

On appeal, Judge Friendly began his analysis by stating that:

Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communi-

61 265 F. Supp. 2d 321 (S.D.N.Y. 2003). The Supreme Court has not yet addressed whether public relations consultants can fall within the scope of the privilege.

62 See Linas, *supra* note 12, at 404 (“*United States v. Kovel* is the pre-eminent case granting attorney-client privilege to accountants.” (footnote omitted)).

63 296 F.2d 918 (2d Cir. 1961). This case is, for all intents and purposes, the starting point for analyzing the extension of the attorney-client privilege to third parties.

64 *Id.* at 919.

65 *Id.*

66 *Id.* at 920.

cations by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam.⁶⁷

However, he then noted that “the complexities of modern existence” made it impossible for attorneys to adequately counsel clients without the assistance of certain indispensable employees.⁶⁸ As an example, Judge Friendly noted the need for a translator in the case of a foreign-language-speaking client, and identified four manners in which the three-person communications could take place.⁶⁹ Each hypothetical communication, Judge Friendly argued, would fall within the boundaries of “Wigmore’s famous formulation” of the attorney-client privilege.⁷⁰

Drawing on the translator analogy, Judge Friendly explained that, quite often, accounting concepts might as well be a foreign language to those not in the accounting profession, including attorneys.⁷¹ Thus, whether an accountant, such as Kovel, is present during attorney-client communications regarding a complex tax issue, or whether the client first explains his story to an accountant hired by the attorney, who then interprets it to the attorney, the attorney-client privilege should not be considered waived if all communications are made with the end goal of obtaining legal advice.⁷² “If what is sought is not legal advice but only accounting service,” Judge Friendly wrote, “or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.”⁷³

The *Kovel* approach has found acceptance in nearly every federal circuit.⁷⁴ Although normally applied in cases involving an accountant, courts have routinely used the “translator” analysis to determine

67 *Id.* at 921.

68 *Id.*

69 *Id.*

70 *Id.* at 921–22. The formulation is as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id. (quoting 8 WIGMORE, *supra* note 16, at 554); *see also* EPSTEIN, *supra* note 17, at 45–46 (citing 8 WIGMORE, *supra* note 16, at 554).

71 *Kovel*, 265 F.2d at 922 (“Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases.”).

72 *Id.* (“What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal advice from the lawyer*.”).

73 *Id.*

74 *See* Joseph W. Martini & Charles F. Willson, *Defending Your Client in the Court of Public Opinion*, CHAMPION, Apr. 2004, at 20, 21 (citing decisions of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits).

extension of the privilege to other types of professionals.⁷⁵ Judge Kaplan relied heavily on *Kovel* in deciding *In re Grand Jury Subpoenas*.⁷⁶

B. *In re Grand Jury Subpoenas* Dated March 24, 2003

Upon being decided, *In re Grand Jury Subpoenas* did not send shockwaves through the federal court system, but it has been referred to as a breakthrough in some scholarly circles.⁷⁷ In the case, Judge Lewis A. Kaplan considered a motion filed by the United States Attorney's Office in relation to its grand jury investigation of a high-profile "Target."⁷⁸ The "Target," of course, was none other than Martha Stewart, who was facing a variety of charges arising from her sale of ImClone stock shortly before it was announced that the FDA would not approve the drug.⁷⁹ In relation to the charges, Stewart's attorneys had enlisted the services of 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 . . . would feel public pressure to bring some kind of charge against' her."⁸⁰ Government prosecutors subsequently served grand jury subpoenas both on the public relations firm and on an individual employee of the firm.⁸¹ The firm refused to produce the requested documents, claiming attorney-client privilege and work product protection, and the employee, while answering some questions, asserted that the attorney-client privilege prevented her from answering others.⁸² The court was

75 See, e.g., *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999) (rejecting extension of the privilege to an investment banker); *Dorf & Stanton Commc'ns, Inc. v. Molson Breweries*, 100 F.3d 919 (Fed. Cir. 1996) (analyzing extension of the privilege to a public relations firm employed by a brewery and finding that the firm failed to establish that its notes were protected); *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (analyzing extension of the privilege to an independent contractor and finding that the privilege applied to communications between the consultant and the client's lawyers); *Sunnyside Manor, Inc. v. Township of Wall*, No. 02-2902 (MLC), 2005 U.S. Dist. LEXIS 36438 (D.N.J. Dec. 23, 2005) (analyzing extension of the privilege to an engineer and finding that because he served as an interpreter for the client, the privilege was invoked).

76 265 F. Supp. 2d 321, 325-26 (S.D.N.Y. 2003).

77 See, e.g., *Hantler et al.*, *supra* note 53, at 28 (labeling *In re Grand Jury Subpoenas* as a "breakthrough case"); see also *Gertsberg*, *supra* note 49, at 1466 (characterizing the decision as "groundbreaking").

78 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 322-24.

79 For a well-constructed history of the charges, see Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1107-18 (2005).

80 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 323.

81 *Id.* at 322.

82 *Id.* at 322-23.

called upon to determine whether any of the communications at issue were protected by the privilege or constituted work product.

Judge Kaplan's opinion analyzed the problem with explicit reference to the fact that the underlying case was a "high profile matter."⁸³ It noted that the public relations firm was serving a primarily defensive purpose, with the ultimate goal of neutralizing "the [litigation] 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."⁸⁴ The actual activities of the public relations firm took several forms. On some occasions, the employee spoke or corresponded directly with Stewart, or Stewart's attorneys communicated directly with the public relations firm.⁸⁵ Other times, all three parties (Stewart, her attorneys, and employees from the public relations firm) were present.⁸⁶ Of the documents reviewed *in camera* by Judge Kaplan, some were found to contain discussions regarding defense strategies, and the court found "no reason to doubt" that the oral communications at issue contained similar subjects.⁸⁷ However, the court also noted that the activities of the public relations firm also included speaking with the media, in some cases to "find out what they knew and . . . where the information came from."⁸⁸

The court then applied the *Kovel* analysis to frame the actual issue presented by the parties.⁸⁹ The court noted that there was no suggestion that the communications would have been privileged had Stewart simply hired the public relations firm to provide general advice on how to deal with the media.⁹⁰ Rather, the court accepted the notion that the firm was hired by Stewart's lawyers to specifically serve her legal interests.⁹¹ Since few lawyers could claim to have expertise in handling the aggressive media that comes along with a high-profile celebrity criminal case,⁹² the court found that this was an area where,

83 *Id.* at 323.

84 *Id.* (internal quotation marks omitted) (quoting the testifying employee's affidavit).

85 *Id.* at 324.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at 326.

90 *Id.*

91 *Id.*

92 This is not to say that attorneys who possess some expertise in the public relations arena do not exist. However, Ms. Stewart's case involved a very particular public relations strategy: neutralizing the incredible amount of negative media coverage that increased the chances of her indictment. An attorney may be well versed in speaking before the media,

in *Kovel's* words, counsel required "outside help." Thus, the issue to be decided was "whether attorney efforts to influence public opinion in order to advance the client's legal position . . . are services, the rendition of which also should be facilitated by applying the privilege to relevant communications which have this as their object."⁹³ The court was deciding whether, in the context of this case, public relations advice was a necessary component of a legal strategy. If the answer was yes, and Stewart's attorneys could not provide this advice without the assistance of the public relations firm, then communications with the firm made for the purpose of developing the legal strategy would fall under the ambit of the privilege.

In order to determine whether an attorney's role in such a case includes public relations activities, the court first drew from Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nevada*,⁹⁴ which argued that a "defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."⁹⁵ After examining a few analogous but non-controlling cases,⁹⁶ the court explained that the question of whether extrajudicial advocacy is a service warranting extension of the privilege to public relations consultants required a consideration of the rationales underlying the attorney-client privilege.⁹⁷ "If justification is to be found for such [an extension]," the court wrote, "it must lie in the proposition that encouraging frank communication among client, lawyers, and public relations consultations enhances the administration of justice."⁹⁸ The court then explained why, under this approach, extension was appropriate:

[Stewart], like any investigatory target or criminal defendant, is confronted with the broad power of the government. Without suggesting any impropriety, the Court is well aware that the *media, prosecutors, and law enforcement personnel in cases like this often engage in activities that color*

but it is an entirely different matter to craft a public relations strategy aimed at accomplishing such a focused goal within the context of a celebrity's criminal investigation.

93 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326.

94 501 U.S. 1030 (1991).

95 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 327 (internal quotation marks omitted) (quoting *Gentile*).

96 The cases were *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), and *Calvin Klein Trademark Trust v. Wachner (Calvin Klein I)*, 198 F.R.D. 53 (S.D.N.Y. 2000). See *infra* Part II.C. The court concluded that neither case resolved the privilege problem it was evaluating. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 329.

97 *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 329.

98 *Id.* at 330.

public opinion, certainly to the detriment of the subject's general reputation but also, in the most extreme cases, to the detriment of his or her ability to obtain a fair trial. Moreover, it would be unreasonable to suppose that no prosecutor ever is influenced by an assessment of public opinion in deciding whether to bring criminal charges, as opposed to declining prosecution or leaving matters to civil enforcement proceedings, or in deciding what particular offenses to charge, decisions often of great consequence in this Sentencing Guidelines era. *Thus, in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation.*⁹⁹

Accordingly, the court held that in order to perform certain essential functions, lawyers must be able to engage in protected communications with public relations consultants.¹⁰⁰ The specific standard adopted by the court stated:

(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 are protected by the attorney-client privilege.¹⁰¹

Under this standard, the court extended the privilege to all of the communications at issue, except for two phone conversations and an email. The phone calls, between Stewart and the individual public relations consultant, discussed nothing more than the consultant's view of a specific day's media coverage and a wire service story. The email came from the public relations consultant to Stewart and regarded only the consultant's thoughts on a *Wall Street Journal* posting.¹⁰² Regardless of whether Stewart's attorneys were present when she spoke with the personnel of the public relations firm, under the *Kovel* standard, the privilege applied to all the other communications because they were made in order to obtain legal advice.¹⁰³

Interestingly, the court also explained that the privilege would not have applied if Stewart had hired the firm directly, even if she had done so to help aid her defense strategy.¹⁰⁴ Although seemingly arbitrary, Judge Kaplan explained that this requirement follows *Kovel* because of the need to draw the line between a PR-firm-client privilege

99 *Id.* (emphases added).

100 *Id.* at 330–31. These essential functions include advising the client of legal risks associated with speaking publicly and the likely impact of doing so, attempting to avoid or limit criminal charges brought by prosecutors against the client, and zealously seeking acquittal or vindication. *Id.*

101 *Id.* at 331.

102 *Id.* at 331–32.

103 *Id.*

104 *Id.* at 331.

and an extension of the attorney-client privilege to necessary “outside help.”¹⁰⁵ If the public relations firm was already employed by the client, it would be more difficult to determine whether the firm was providing advice related to the formulation of a legal strategy or simply providing general public relations advice. Thus, the bright-line rule is necessary to avoid confusion in future cases.

In re Grand Jury Subpoenas clearly presents a remarkable step in the treatment of attorney-client communications by courts because of its relatively unprecedented liberalization of the privilege. While the holding has not yet been considered outside of the Southern District of New York,¹⁰⁶ institutions besides courts have rapidly capitalized on its implications. For example, public relations firms, unsurprisingly, have publicized the decision to potential law firm clients while touting litigation-related services.¹⁰⁷ As such, this issue will no doubt resurface in the Southern District and beyond.

C. Other Cases

While *In re Grand Jury Subpoenas* provides an adequate framework, a few other cases from the Southern District of New York are worth examining to illustrate other important aspects of the privilege extension problem as it relates to public relations consultants.¹⁰⁸ These cases are often considered together with *In re Grand Jury Subpoenas* by commentators despite the fact that they all concern a civil dispute rather than a criminal trial.¹⁰⁹

105 *Id.* But see Gertsberg, *supra* note 49, at 1468 (opining that this portion of the opinion is at odds with *Kovel*).

106 And even there, it has only been considered on one occasion. See *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 Civ.7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (discussed *infra* in Part II.C).

107 See Murphy, *supra* note 11, at 563 (noting public relation firms’ treatment of the case).

108 These cases, while not exhaustive, do represent a majority of the occasions when courts have opined on the issue of privilege extension to public relations consultants. See *Martini & Willson*, *supra* note 74, at 22–23 (noting that the issue underlying *In re Grand Jury Subpoenas* has been infrequently addressed). For an additional case addressing an extension of the privilege to public relations consultants, see *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002). In *GlaxoSmithKline*, the court did not consider communications between counsel and public relations personnel; rather, it considered whether disclosure of otherwise privileged documents to a public relations consultant effected a waiver of the privilege. *Id.* at 144. As such, the case is not entirely on point to the issues addressed by this Comment because the public relations consultant clearly was not providing any type of assistance with counsel’s legal strategy.

109 As discussed in Part III, *infra*, the civil/criminal distinction should make a difference in the court’s (and the scholar’s) analysis of the privilege issue.

In 2000, the Southern District decided *Calvin Klein Trademark Trust v. Wachner*,¹¹⁰ a case involving a dispute over a series of trademark agreements.¹¹¹ Plaintiffs' counsel, in anticipation of filing suit, hired a public relations firm, Robinson Lerer & Montgomery (RLM), to consult on certain media-related matters.¹¹² After the suit commenced, defendants sought discovery of responsive documents and testimony from RLM, and plaintiffs' attorneys asserted that the communications were protected by the attorney-client privilege.¹¹³

The court's review of some of the material in question reflected the fact that the communications at issue appeared to consist of general public relations advice, such as how to put favorable spin on developments in the litigation.¹¹⁴ The court even noted that RLM's own summary of the work done for the plaintiffs evidenced that most of its duties involved general public relations activities such as reviewing media coverage, contacting media outlets to comment on the litigation, and seeking out sympathetic reporters.¹¹⁵ Not surprisingly, the court did not extend the privilege to the communications at issue.¹¹⁶ Finding that the communications between the plaintiffs and RLM were not made to seek legal advice, the court found the *Kovel* test unsatisfied.¹¹⁷ Even if RLM's consultations proved helpful to plaintiffs' attorneys, this was not enough to justify application of the privilege because RLM did not provide "functions materially different from those that any ordinary public relations firm would have performed if they had been hired directly by [the plaintiffs]."¹¹⁸

Calvin Klein can be easily distinguished from *In re Grand Jury Subpoenas*. To begin with, the former case is neither criminal in nature nor does it rise to the level of a "high-profile" case, despite plaintiffs'

110 *Calvin Klein I*, 198 F.R.D. 53 (S.D.N.Y. 2000).

111 *See Calvin Klein Trademark Trust v. Wachner (Calvin Klein II)*, 123 F. Supp. 2d 731, 733 (S.D.N.Y. 2000).

112 *Calvin Klein I*, 198 F.R.D. at 54.

113 *Id.* at 54. Plaintiffs' attorneys also claimed that some of the documents at issue were protected by the work-product doctrine. The work-product issue was analyzed separately and does not bear on the discussion of the attorney-client privilege. *See id.* at 55–56 (analyzing the work-product issue).

114 *Id.*

115 *Id.*

116 *Id.* at 54–55.

117 *Id.* at 54.

118 *Id.* at 55. The court noted, "It may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but *nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status.*" *Id.* (emphasis added).

argument that a “media crisis . . . would ensue.”¹¹⁹ Furthermore, as Judge Kaplan pointed out, the public relations firm in *Calvin Klein* had a preexisting relationship with the plaintiffs, which made it rather difficult to see how its advice was related to the litigation.¹²⁰ Accordingly, *Calvin Klein* has only a limited relationship to *In re Grand Jury Subpoenas* in that they both addressed extending the privilege to public relations consultants. The procedural posture and the factual contexts of the cases are entirely at odds.

Similarly, in the case of *In re Copper Market Antitrust Litigation*,¹²¹ the court addressed the privilege issue in a factual scenario that bears only a surface similarity to *In re Grand Jury Subpoenas*. In *In re Copper Market*, Sumitomo Corporation, a Japanese company, hired an American public relations firm¹²² to handle media-related issues arising from a copper-trading scandal.¹²³ Plaintiffs sought documents relating to the firm’s public relations work done for Sumitomo’s benefit.¹²⁴

Rather than employing the *Kovel* analysis, the court found that that the public relations firm served as the “functional equivalent of a Sumitomo employee.”¹²⁵ Sumitomo had no experience dealing with western media or high-profile litigation, and Sumitomo’s Corporate Communications Department, which normally would conduct its public relations services, had a very limited mastery of the English language.¹²⁶ Relying on the principles set forth in *Upjohn Co. v. United States*,¹²⁷ the court held that there was no reason to distinguish a consultant hired by the corporation from a paid employee if they both act for the benefit of the corporation and aid attorneys in providing

119 *Id.* at 54. Perhaps among certain fashion and business circles, an internal dispute at Calvin Klein would cause a media stir. Few could argue, however, that this would create the type of media frenzy surrounding a celebrity criminal case or a particularly heinous crime.

120 *In re Grand Jury Subpoenas* Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003).

121 200 F.R.D. 213 (S.D.N.Y. 2001).

122 That firm, interestingly enough, was RLM, the same one hired in *Calvin Klein I.* *Id.* at 215.

123 *Id.*

124 *Id.*

125 *Id.* at 220.

126 *Id.* at 215.

127 449 U.S. 383 (1981). *Upjohn* is one of the seminal federal cases regarding issues that arise when the attorney-client privilege is sought by a corporation. See NORMAN KRIVOSHA & DAVID M. WILLIAMS, *THE ATTORNEY-CLIENT PRIVILEGE AND THE CORPORATION* 9–11 (George C. Landrith, III, ed., 1998) (explaining *Upjohn*’s relevance to attorney-client privilege issues where corporations are concerned).

legal advice.¹²⁸ Accordingly, the attorney-client privilege would extend to the public relations firm as it would to a Sumitomo employee involved in the litigation.¹²⁹

While the court did choose to extend the privilege, as it later did in *In re Grand Jury Subpoenas*, the reasoning underlying each decision was entirely different.¹³⁰ It obviously would be impossible for an individual defendant facing criminal charges to make the same assertion as Sumitomo. Furthermore, the *In re Copper Market* court never addressed how the communications made by and to the public relations firm aided Sumitomo's counsel in providing legal advice. Nevertheless, the case helps identify when the privilege issue potentially will arise and may have future implications where a corporation faces criminal sanctions.

The final case worth considering, *Haugh v. Schroder Investment Management North America Inc.*,¹³¹ was decided by the Southern District of New York less than two months after *In re Grand Jury Proceedings*.¹³² The underlying case concerned a civil suit for age discrimination.¹³³ Plaintiff's counsel retained Laura J. Murray, a public relations consultant, to provide advice regarding media-related matters.¹³⁴ Accord-

128 See *In re Copper Market*, 200 F.R.D. at 219 (applying the *Upjohn* principles to determine that the consultant at issue was no different from a person on the payroll of the company).

129 *Id.*

130 Judge Kaplan distinguished *In re Copper Market*, noting that Stewart made no assertion similar to Sumitomo's. *In re Grand Jury Subpoenas* Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003).

131 No. 02 Civ.7955 DLC, 2003 WL 21998674 (S.D.N.Y. Aug 25, 2003).

132 *NXIVM Corp. v. O'Hara*, a civil case recently decided by the Northern District of New York, also touches on the issue of extending the attorney-client privilege to a litigation public relations firm. 241 F.R.D. 109 (N.D.N.Y. 2007). In that case, the plaintiff, NXIVM Corp., sought to protect certain communications between it, the defendant O'Hara, and a public relations firm, Sitrick Company. The court found that the hiring of Sitrick was a facade and not for the purpose of helping O'Hara provide legal advice to NXIVM but to give cover to communications between NXIVM, [a private investigator], and Sitrick. O'Hara never used Sitrick's services and as far as the record reveals neither did any other law firm working on behalf of NXIVM.

Id. at 140. The court further referred to O'Hara and his firm as "a mule" and stated that "O'Hara's involvement was nothing more than a tool to achieve secrecy, not to give legal advice." *Id.*

As such, it is clear that Sitrick was not aiding any lawyer in developing a legal strategy. Instead, the court found that, like the public relations firm in *Calvin Klein I*, Sitrick "provided ordinary public relations advice." *Id.* at 141. Still, the court found it necessary to address NXIVM's misplaced reliance on *In re Grand Jury Subpoenas* in dicta. The court noted Judge Kaplan's "cogent reasoning that incorporates modern realities and intentions," but was ultimately "not prepared to make [the] same deviation from the narrowly tailored test of *Kovel*." *Id.*

133 *Haugh*, 2003 WL 21998674, at *1.

134 *Id.*

ing to counsel, Murray was hired “to help defend [plaintiff] from further attacks in the media which he anticipated would occur once she filed her lawsuit.”¹³⁵

After the lawsuit commenced, defendants sought discovery of sixteen documents, fifteen of which were sent to Murray and one of which was sent by Murray to counsel.¹³⁶ Predictably, the plaintiff asserted that these documents were protected by attorney-client privilege. The court wasted little paper in its opinion dismissing the privilege claim. It found that even based on the plaintiff’s description of the communications, it did not appear that Murray was doing anything other than what an “ordinary public relations’ advisor” would do.¹³⁷ Contrary to the plaintiff’s argument, the court held that *In re Grand Jury Subpoenas* did not apply.¹³⁸ The court noted that the plaintiff had failed to identify any legal objective that necessitated Murray’s involvement, such as Martha Stewart’s claim that her public relations consultant was helping to create a neutral legal environment.¹³⁹ “Some attorneys may feel it is desirable at times to conduct a media campaign,” the court wrote, “but that decision does not transform their coordination of a campaign into legal advice.”¹⁴⁰

The *Haugh* court, while quickly disposing of the privilege-extension question, did identify an important issue. By distinguishing *In re Grand Jury Subpoenas*, the court implicitly, but nonetheless clearly, observed that there were different considerations concerning the availability of the attorney-client privilege depending on whether the underlying case was criminal or civil in nature.¹⁴¹ This distinction plays an essential role in determining whether the Constitution provides any support for extending the attorney-client privilege to public relations consultants in high-profile criminal cases.

135 *Id.*

136 *Id.*

137 *Id.* at *3.

138 *Id.*

139 *Id.*

140 *Id.*

141 The *Haugh* court noted, “There is no need here to determine whether *In re Grand Jury Subpoenas* was correctly decided.” *Id.* At least one commentator has interpreted this as the *Haugh* court questioning the *In re Grand Jury Subpoenas* decision. See Martini & Willson, *supra* note 74, at 23 n.57. Other commentators generally (and correctly) agree that the *Haugh* court simply did not see *In re Grand Jury Subpoenas* as having any relevance to the assertion of the privilege at issue. See, e.g., Gertsberg, *supra* note 49, at 1471. I would argue that the *Haugh* court, whether recognizing it or not, was alluding to the different considerations that arise in criminal, as opposed to civil, cases.

III. WHY JUDGE KAPLAN GOT IT RIGHT: MISPLACED CRITICISM, CONSTITUTIONAL RESPONSES, AND ADDITIONAL CONSIDERATIONS

That the attorney-client privilege should be extended in all cases where a public relations consultant aids with a litigation matter is not a winning argument. Indeed, the idea's most forceful expression in *In re Grand Jury Subpoenas* did not hold as such, but rather, held that the privilege should extend when the public relations consultant is hired by counsel to assist for one specific purpose: neutralizing excessive media coverage in the court of public opinion. Although even Judge Kaplan may not have realized it when writing the court's opinion, such a result ensures that the constitutional rights of a person accused in a high-profile criminal matter remain protected. Nevertheless, in the five years since *In re Grand Jury Subpoenas* was decided, a growing body of work has criticized the court's opinion for improperly liberalizing the attorney-client privilege. A majority of this criticism is misguided, as it often fails to consider the procedural posture of the case as well as the continually evolving nature of mass media.

For example, one common criticism is that the court's holding is contrary to controlling precedent. Ann M. Murphy argues that an extension of the privilege to public relations consultants is at odds with *Kovel*.¹⁴² "[U]nderstanding public relations issues," she writes, "is not comparable to understanding the complex Internal Revenue Code, as was the case in *Kovel*."¹⁴³ Murphy's statement, on its face, is illogical. An attorney has a much better educational background for understanding tax law and the tax code than he does for understanding the intricacies of an effective litigation public relations strategy.¹⁴⁴ The exorbitant number of media outlets available today, as well as the

¹⁴² See Murphy, *supra* note 11, at 586.

¹⁴³ *Id.* See also Linas, *supra* note 12, at 420 (arguing that the assistance of public relations consultants does not rise to the same level as the accountant's advice in *Kovel*).

¹⁴⁴ Furthermore, in practice, Murphy's logic would make a court's treatment of the attorney-client privilege under *Kovel* dependent on the court's somewhat arbitrary finding of what constitutes "complex" subject matter. This is severely problematic. The determination by the court of whether the subject "translated" by the third party was sufficiently complex as to warrant an extension of the privilege would come only after the attorney had presumably decided that he did in fact need outside help and disclosed confidential material to that third party. Such an environment would chill the likelihood that defense attorneys in criminal matters would consult necessary third parties, resulting in a loss of the constitutionally protected right of due process, the right to effective and substantial counsel, and the right to a fair trial. The attorney is in a better position to determine when he or she needs outside help than a judge is who is likely unfamiliar with the client and the case, especially during the discovery stage.

development of myriad public relations theories and techniques, plainly demonstrates that effective, and necessary, litigation public relations services demand more than the average attorney is prepared to offer.¹⁴⁵ As Steven Hantler and his colleagues explain, “What makes litigation communications specialists ‘experts’ is that, in addition to being fluent in media relations, they have an understanding of the legal world. This skill requires the ability to understand and translate legalese into simple terms and concepts the public can comprehend.”¹⁴⁶ I sincerely doubt that many lawyers would dispute the difficulty in translating legal concepts to the layperson despite it being a regular activity of the profession.

Thus, when an accused client’s Fifth and Sixth Amendment rights are threatened by excessive media coverage—as they often are in high-profile criminal cases—an attorney needs a public relations consultant to help him understand how to effectively neutralize the threat. Bringing the public perception of a high-profile manner to a neutral point requires a carefully constructed and executed plan. Leaving it in the hands of attorneys creates a much more likely chance that their extrajudicial activity will cross the ethical boundary and become materially prejudicial to a case, or worse, that such activity will violate the constitutional rights of the victim or the general public.

Beyond *Kovel*, other authors have argued that *In re Grand Jury Subpoenas* also cannot be squared with other cases where the question of extending the attorney-client privilege to public relations consultants has been considered.¹⁴⁷ Cases like *Calvin Klein* and *In re Copper Market*, while seeming to address the same issues, *should* be distinguished from *In re Grand Jury Proceedings*. Both of these cases involved relatively low-key disputes of a civil nature. In contrast, the high-profile criminal context of *In re Grand Jury Subpoenas* necessitated that Ms. Stewart’s attorneys engage in extrajudicial advocacy in order to preserve her Sixth Amendment rights.¹⁴⁸ Judge Kaplan, while not citing the Constitution for support, noted in the *In re Grand Jury Subpoenas* opinion that fair-trial rights are implicated in high-profile cases because they often involve activities by “the media, prosecutors, and law

145 See generally LITIGATION PUBLIC RELATIONS: COURTING PUBLIC OPINION (Susanne A. Roschwalb & Richard A. Stack eds., 1995).

146 Hantler et al., *supra* note 53, at 21 (footnote omitted).

147 See, e.g., Linas, *supra* note 12, at 421–22 (“*In re Grand Jury* is . . . difficult to reconcile with other cases that have extended the privilege to public relations consultants.”).

148 See Hooker & Lange, *supra* note 47, at 664–65 (noting the unique concerns regarding extrajudicial activity in high-profile criminal cases).

enforcement personnel” that “color public opinion.”¹⁴⁹ Along those lines, confidentiality concerns vary tremendously depending on whether a case is civil or criminal in nature. As Fred C. Zacharias notes, “The relationship between criminal lawyers and their clients is unique. To the extent secrecy helps maintain criminal defendants’ trust and contributes to quality representation, the Constitution seems to give confidentiality its blessing.”¹⁵⁰

Another prominent criticism of Judge Kaplan’s opinion focuses on a utilitarian view of the privilege,¹⁵¹ arguing that *In re Grand Jury Subpoenas* creates a result contrary to the privilege’s historical justifications.¹⁵² Because extension to public relations consultants does not further any of these “historical justifications,” such an extension is an improper liberalization of evidentiary privileges. Deborah Bartel has explained the basis of the utilitarian justification:

Wigmore formulated the classic utilitarian balancing test to justify preserving the confidentiality of client communications to lawyers: the injury to the attorney-client relationship by the disclosure of the communication must be greater than the benefit that would be gained thereby for the correct disposal of the litigation. Utilitarians maintain the attorney-client privilege exists to protect a relationship that is a mainstay of our system of justice: lawyer and client. The privilege is vital to encouraging full and frank communication between clients and legal advisors and to promoting the efficient administration of justice.¹⁵³

Those in opposition to an extension of the privilege to public relations consultants frequently argue that such an extension does not satisfy the Wigmore balancing test described by Bartel.¹⁵⁴ In the absence of the privilege for public relations firms, the argument goes, a client will not be any less likely to disclose all of the relevant facts and information needed by an attorney to provide effective counsel. Thus, no overwhelming benefits exist that outweigh the obstruction of the court’s search for “truth.”

This simply is not true in the context of a high-profile criminal matter. As already discussed in Part I, a high-profile defendant’s fair-

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

150 Zacharias, *supra* note 34, at 356–57 (footnote omitted).

151 This is not to be confused with the non-utilitarian view of the privilege, which is based on individual rights, sometimes focusing on those rights created by the Constitution. For an example of the non-utilitarian viewpoint, see Bartel, *supra* note 33, at 1363.

152 See Murphy, *supra* note 11, at 586–87; Linas, *supra* note 12, at 423.

153 Bartel, *supra* note 33, at 1364 (footnotes omitted).

154 See Linas, *supra* note 12, at 423 (“The extension of the privilege to a public relations firm does nothing to encourage a client’s frank disclosure of material information to his attorney.”).

trial rights make extrajudicial legal advocacy an imperative.¹⁵⁵ Public relations consultants can provide an enormous benefit to defendants by aiding their counsel in forming a focused and effective litigation public relations strategy. Furthermore, public relations consultants may understand that certain information is needed from a client for public advocacy purposes, which otherwise may not normally be disclosed to an attorney. This may prove to be beneficial to the basic legal services that the attorney provides. Thus, by preserving the confidentiality of communications made with public relations consultants, an extension of the privilege provides the benefit of ensuring effective advice from counsel, thereby coming into harmony with the utilitarian justification for the privilege.¹⁵⁶

Moreover, the version of Wigmore's balancing test adopted by privilege utilitarians may be inappropriate in the context of a criminal case for two reasons. First, the test incorrectly assumes that information relevant to the crime will be lost because of the invocation of the privilege.¹⁵⁷ Second, the balancing test is moot in a high-profile criminal case because the constitutional implications will always tip the balance in favor of confidentiality. "[A]lthough the instrumental underpinnings of the attorney-client privilege may not in every case provide an adequate rationale for protecting confidences shared between a criminal defendant and his lawyer, the [F]ifth and [S]ixth [A]mendments provide such persons with a right to privilege which cannot be balanced away."¹⁵⁸ Put another way, a criminal defendant's constitutional rights create a justification for the attorney-client privilege that trumps any of the historical justifications offered for the privilege. Courts should recognize a constitutionally grounded privilege, and by doing so, should realize that in certain situations, extension of the privilege to public relations consultants is appropriate be-

155 See Hantler et al., *supra* note 53, at 7–8 (“High-profile civil litigation is not just decided in the courts; it is also decided in the court of public opinion. . . . [I]t is within a lawyer’s role, therefore, to work with reporters on their stories to ensure accurate reporting.”).

156 See Nelson, *supra* note 31, at 384 (“While the privilege may suppress important evidence, it has been determined that the need to allow the attorney to provide sound legal advice generally outweighs any disadvantage of withholding evidence in a particular case.” (footnote omitted)).

157 See Bartel, *supra* note 33, at 1418–19 (explaining that since a client can be questioned about the underlying facts of a case regardless of a privilege claim, no relevant information is ultimately lost to the fact-finder). Bartel posits that the only time that such information would be lost to the fact-finder is when a client tells one story to his attorney and then another to the fact-finder, for example, when he is trying to strengthen a self-defense claim. *Id.* at 1419. For several different reasons, this is a rare occurrence. *Id.*

158 Note, *supra* note 42, at 487.

cause it is essential to counsel's ability to further his or her client's fair-trial rights.¹⁵⁹

One final criticism of *In re Grand Jury Subpoenas* should also be addressed. Some commentators suggest that the case was wrongly decided because it relied too heavily on the effect of public influence on prosecutorial discretion.¹⁶⁰ Since there is only a small possibility that extrajudicial advocacy can actually impact a prosecutor's decision to file charges, such efforts should not be deemed essential to effective legal counsel. Again, this argument is misplaced. While it is certainly true that there are several contributing factors in a prosecutor's decision to file initial or additional charges against a client,¹⁶¹ the effect of public opinion upon prosecutorial discretion, though incapable of proof, cannot be ignored.¹⁶² Deniza Gertsberg explains that "prosecutors and the media are intertwined where each influences the other. Objective information . . . is framed to inflame the community. Intense public reactions may influence prosecutors to bring initial or heavier charges."¹⁶³ Such an intense public reaction was certainly present in Martha Stewart's case, which seemed "wholly out of proportion, particularly when compared to the obvious corporate improprieties of 2001."¹⁶⁴

Regardless, even if public reaction is but one small factor of the many that influence a prosecutor's decision to bring charges, the se-

159 Critics of Judge Kaplan's decision typically fail to address the constitutional issues implicated by a criminal trial. For example, Ann M. Murphy only offers that "[p]rivileges 'are not favored,' even if they have constitutional roots." Murphy, *supra* note 11, at 561 (citing *Herbert v. Lando*, 441 U.S. 153, 175 (1979)). *Herbert* actually posits that "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." 441 U.S. at 175 (footnote omitted).

160 See, e.g., Linas *supra* note 12, at 423–24 ("The *In re Grand Jury* decision is . . . problematic because the court partially rests its holding on the influence that public opinion has on prosecutorial discretion.").

161 For a detailed recounting of the process that led to the charges against Martha Stewart, see Seigel & Slobogin, *supra* note 79, at 1114–17.

162 See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 688 (identifying public opinion and personal ambition as factors that may weigh heavily on prosecutorial discretion); see also Moses, *supra* note 50, at 1833 ("[An] issue for corporate counsel comes from the wide discretion given prosecutors in deciding whether a corporate violation is a civil or criminal matter."). The effect of specific factors on prosecutorial discretion lies predominantly on speculation. It is certainly difficult to imagine the existence of empirical evidence documenting the link between public opinion and prosecutorial discretion. The lack of such evidence, however, is not a reason for courts to ignore the potential effect excessive media coverage may have on such discretion since fair-trial and due-process rights are at issue.

163 Gertsberg, *supra* note 49, at 1462 (footnote omitted).

164 Schroeder, *supra* note 2, at 2025.

verity of criminal penalties, along with the rights thus implicated, demand that each such factor be adequately considered and addressed by counsel where possible. Thus, an attorney must attempt to neutralize any negative public perception that arises from excessive media coverage of a high-profile client and which may unduly influence prosecutorial discretion.¹⁶⁵ Communications made with the client in providing this legal service would undoubtedly be privileged. Assuming, *arguendo*, that such extrajudicial goals may only be accomplished with the assistance of a public relations firm, the privilege should extend to the communications with the firm that relate to those goals. This is, essentially, the holding of *In re Grand Jury Subpoenas*.

A final consideration remains. *In re Grand Jury Subpoenas* only addressed the propriety of extending the privilege where the firm was employed to neutralize public pressure on regulators and prosecutors to bring charges against Ms. Stewart. I would argue that in order to preserve the fair-trial rights of clients involved in high-profile criminal matters, the privilege should also extend to public relations firms employed by counsel with the end goal of neutralizing jury contamination caused by the media and the government.

Unlike the issue of prosecutorial discretion, there is clear evidence that jury contamination will likely result when a client is negatively portrayed by an aggressive media. For example, one study cited by Steven Hantler showed that “even modest pretrial publicity can prejudice potential jurors against a defendant.”¹⁶⁶ The study revealed that “80% of jurors exposed to prejudicial articles found against the defendant, compared with only 39% of those who were not exposed to pretrial publicity.”¹⁶⁷ Again, this study focused only on *modest* pretrial publicity. In the case of a Martha Stewart, where pretrial publicity can be nearly unfathomable, the potential impact on the jury pool will be much greater.¹⁶⁸ Jury contamination clearly presents a chal-

165 Joseph W. Martini and Charles F. Willson even argue that one “open issue is whether counsel’s failure to advocate in the media gives rise to a malpractice or ineffective assistance of counsel claim by a defendant confronted by a prosecution inspired and motivated by bad press.” Martini & Willson, *supra* note 74, at 24.

166 Hantler et al., *supra* note 53, at 13 (internal quotation marks omitted) (quoting Dirk C. Gibson & Mariposa E. Padilla, *Litigation Public Relations Problems and Limits*, 25 PUB. REL. REV. 215, 216 (1999)).

167 *Id.*

168 See, e.g., *Judge Changes Tactics for Martha Stewart Trial: Looking for Jurors Who Can Decide Case Solely on Evidence, Despite Heavy Pre-trial Publicity*, GAZETTE (Montreal), Jan. 23, 2004, at B8 (“The judge in the Martha Stewart trial appears to have given up on finding 12 people

lenge to a defendant's ability to obtain a fair trial. Any attorney seeking to properly counsel a client involved in a high-profile criminal matter must take steps to neutralize the threat. Because the attorney will not likely be skilled in dealing with such an aggressive media, he or she will need outside help in the form of a public relations firm.

It follows that in order to facilitate the formulation of a legal strategy, which includes an extrajudicial advocacy plan aimed at neutralizing jury contamination, the attorney-client privilege should apply to all communications among client, attorney, and public relations consultant that are necessary to achieve that end. Concerns that this will lead to a general PR-firm-client privilege are easily assuaged. Since the privilege would only apply to public relations activities aimed at neutralizing potential jury contamination, attorneys are likely to apply restraint in their extrajudicial efforts.¹⁶⁹ Otherwise, they would risk waiver of the privilege when the public relations activities were not legal in nature; they might even risk ethical sanctions where their extrajudicial advocacy materially prejudices the judicial process.¹⁷⁰

CONCLUSION

Unfortunately for Martha Stewart, it seems she is always being made out as an example, whether by the SEC, craft-making mothers, or by a lowly law student such as myself (I would venture to guess that she is slightly more concerned about the former two). Ms. Stewart's legal conundrum and the case of *In re Grand Jury Subpoenas* demonstrate the complex interplay between the media and the law in a high-profile criminal case. Such a case, by its nature, implicates certain constitutional protections because of the potential threats excessive media coverage pose to an accused's fair-trial and due-process rights.

completely unfamiliar with the gracious-living guru, instead zeroing in on those who say they can be fair despite the heavy pre-trial publicity.”).

169 Adding substance to this claim is the fact that attorneys may be reluctant to liberally claim the protection of the attorney-client privilege because it is traditionally perceived in a negative manner. Timothy P. Glynn explains that “the public takes a dim view of assertions of the attorney-client and other privileges by those under scrutiny in well-publicized disputes or scandals, such as the tobacco litigation and the recent Enron debacle.” Glynn, *supra* note 21, at 61.

170 The *In re Grand Jury Subpoenas* holding, which requires the attorney (rather than the client) to hire the consultants, enforces the idea that the privilege would not extend beyond the boundaries necessary to accomplish the specific goal of neutralizing public opinion. Although seemingly arbitrary, it helps to ensure that the consultant would not be providing general public relations advice rather than services necessary to effective and substantial legal counsel. See *In re Grand Jury Subpoenas* Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003).

The Constitution, however, has received little consideration in the discussion of extending the attorney-client privilege to public relations consultants. It should play a more central role. The protections afforded by the Fifth and Sixth Amendments support Judge Kaplan's decision in *In re Grand Jury Subpoenas*, and in the future, courts should not hesitate to extend the privilege in such a manner.

It must be kept in mind that *In re Grand Jury Subpoenas* is extremely limited in application, and in no way mandates that communications with public relations consultants will be subject to the attorney-client privilege in all cases. Instead, the case merely recognizes the important aspects of a high-profile criminal case and the impact that an aggressive media may have on the rights of the accused. As such, any analysis of the case or similar cases that frames the issue as whether the privilege should ever apply to public relations consultants misconceives the extent of Judge Kaplan's holding. The case, like this Comment, addresses an extension of the privilege in a very limited set of circumstances. Celebrity trials, though covered sensationally in the media, are rare occurrences and in most other high-profile cases, particularly investigations and trials involving heinous crimes, clients will not likely have the resources to employ sophisticated public relations consultants as part of their legal team. Though this problem will certainly rear its head in the near future, it will not be widespread enough to warrant fear that the law of attorney-client privilege has been turned upside down. On the rare occasion when the issue does in fact surface, courts and commentators should spend as much time considering the constitutional issues involved in criminal proceedings as they do considering Dean Wigmore's likely thoughts on the matter.