

Advocate's VIEW

The limits of the attorney-client privilege and the work product doctrine — the consequences of sharing otherwise privileged communications with outsiders

With greater frequency, clients expect, request and sometimes insist that non-lawyers, such as public relations firms, participate in the litigation process. Responding to and managing these client expectations requires that the attorney be well-versed in the ways in which involvement of non-lawyers result in waivers of the attorney-client privilege and the work product doctrine. Instructive in this regard is the recent decision *Universal Standard Inc. v Target Corporation*, ___ F.R.D. ___, 2019 WL 1983944 (S.D.N.Y. May 6, 2019).

Target involves trademark infringement and unfair competition claims asserted by Universal, a start-up clothing company. Soon after the case was commenced on July 3, 2018, a discovery dispute arose about a deposition of plaintiff's Chief of Staff and in-house counsel. The witness was asked about emails sent in June 2018 among Universal Standard, its attorneys and Brandlink, Universal's public relations firm, involving discussions of the public relations strategy concerning the filing of the lawsuit and the possible issuance of a press release. Universal's counsel halted the deposition based on attorney-client privilege, which led to review of Universal's privilege log.

The privilege log failed to disclose the names of Brandlink employees who had



By **MARY JO KORONA**
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been included in the emails, thereby frustrating Target's ability to evaluate possible waivers of the attorney-client privilege. Target became enlightened because it had served a subpoena on Brandlink and thereby discovered that emails claimed to have been privileged, included communications and documents shared with and/or even authored by employees of Brandlink.

The *Target* decision is instructive on the possible consequences of submitting a privilege log that fails to comply with Local Rule 26.2 and the limitations of the work product doctrine in the circumstances before the Court, but the real value of the pro-*Target* decision rests upon the Court's consideration and analysis of the four exceptions to the rule that calls for a waiver of the privilege because of the involvement of third parties and the practical limitations of the exceptions.

The common interest or joint defense privilege, the exception most commonly relied upon, was clearly inapplicable to the emails involving a public relations firm. Thus, Universal could only rely upon exceptions recognized in

circumstances in which (1) the third party is deemed "essential" to allow communication between the attorney and the client, such as an interpreter or accountant; (2) cases involving communications between a third party and a corporation's attorney where the third party is deemed the "functional equivalent" of a corporate employee; and (3) cases involving consultants used by lawyers to assist in performing certain tasks that go beyond advising a client as to the law, such as tasks that promote broader public interests in the observance of law and the administration of justice.

In ruling that the *Target* was entitled to the emails and related documents, the Court addressed in detail the facts about the nature of the relationship between Universal and Brandlink that led to the conclusions that Universal did not need Brandlink to communicate with its attorneys, Brandlink was not an employee or the functional equivalent of a Universal employee, and Universal retained Brandlink solely for business purposes.

The *Target* decision rises to the level of a legal primer worthy of periodic review by all litigation attorneys because it provides substantive guidance on the limitations of the attorney client privilege and highlights one of many critical duties the litigation attorney must

undertake upon engagement as litigation counsel — namely, the duty to take steps to preserve the client’s confidential information.

Performance of this duty may be challenged by a client who is distracted by the perceived value of press releases and other non-legal measures often

considered when litigation is threatened or commenced; however, the litigation attorney must be prepared to advise on such matters upon engagement and develop effective strategies that recognize the client’s objectives and protect against disclosure of confidential information.

Mary Jo S. Korona is senior counsel to Leclair Korona Cole LLP, a litigation firm she helped form in 2007. Her litigation practice concentrates on business, warranty and employment disputes arising in cases filed in state and federal courts and the defense of Article 78 proceedings brought against municipalities.