

Pennsylvania Expands Attorney Work-Product Protection for Disclosures to Third Parties

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The Pennsylvania Supreme Court has adopted a new, expanded standard for preserving the protections of the attorney work-product doctrine, codified at Pennsylvania Rule of Civil Procedure 4003.3. This decision has implications for Pennsylvania companies and others employing nonlawyer consultants — including public relations experts — to help manage crises.

In *BouSamra v. Excelsa Health*, No. 5 WAP 2018 (Pa. June 18, 2019), the Court's majority held that the attorney work-product doctrine is not waived by disclosure to a third party "unless the alleged work product is disclosed to an adversary or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it." The decision partially reversed the Pennsylvania Superior Court, which had found that work-product protections were waived when information from an attorney was forwarded to an outside public relations consultant.

Background

The dispute grew out of a defamation lawsuit filed by Dr. George BouSamra, a cardiologist, against his former employer, a Westmoreland County hospital owned by Excelsa. The hospital had hired a peer-review consultant to determine whether any cardiology procedures performed there were medically unnecessary. Excelsa then hired a public relations consultant to manage anticipated negative publicity.

While the review was ongoing, Excelsa's outside counsel sent legal advice to Excelsa's senior vice president and general counsel, who then forwarded the email to the public relations consultant. Excelsa decided to publicly disclose the results of the peer review during a press conference on the matter, naming BouSamra as one of two doctors who allegedly performed medically unnecessary procedures. BouSamra filed his defamation suit the following year and, during discovery, sought information provided to the public relations consultant.

The lower courts held that the information was not protected, reasoning that Excelsa waived its right to prevent disclosure of the email in question when it was forwarded to an outside PR consultant who was not a hospital employee.

Supreme Court's Decision

The Pennsylvania Supreme Court agreed with the lower courts' decisions regarding waiver of attorney-client privilege. In affirming that decision, the Court reasoned that the attorney-client privilege is meant to protect confidential communications between an attorney and client, and that this privilege is generally waived when those communications are shared with a third party. The PR consultant in *BouSamra* was an employee of a third-party firm, and, as such, attorney-client privilege was waived when the communication was shared outside of Excelsa.

In contrast, the Pennsylvania Supreme Court reasoned that the attorney work-product doctrine is not founded on the type of enhanced confidentiality considerations implicated by the attorney-client privilege. Instead, the work-product doctrine aims to protect "the mental impressions and processes of an attorney acting on behalf of a client." The Court also stressed that work-product protections belong to the attorney, not to the client, and that the doctrine applies to an attorney's work "regardless of whether the work product was prepared in anticipation of litigation."

That latter point was based on differences between how Pennsylvania has codified work-product protections versus the work-product doctrine as defined in the Federal Rules of Civil Procedure. The majority explained that Pennsylvania Rule of Civil Procedure 4003.3 includes documents prepared "in anticipation of litigation" as an example of material that may be protected by the work-product doctrine, but that such materials are not automatically protected, and other materials not prepared in anticipation of litigation may also be protected. The majority went on to explain that Federal Rule of Civil Procedure 26(b)(3)(A), which codifies the version of the work-product doctrine applicable in federal court, uses different language that generally protects "documents and tangible things prepared in anticipation of litigation or for trial."

After analyzing the purpose of the work-product doctrine, the Court reasoned that attorney work product can sometimes be disclosed to third parties without waiving the doctrine's protections. It held that work product protections would be waived when the material is shared with an opponent, or shared in a way that "significantly increases the likelihood" that an opponent or a potential opponent would discover the information.

The Court noted that this new rule has a "fact intensive structure [that] requires evaluation on a case-by-case basis." In making such a determination, it said, courts should consider "whether the disclosure was inconsistent with the maintenance of secrecy from the disclosing party's adversary." (Citation and internal quotation marks omitted.) However, that standard "should not be conflated with the heightened level of confidentiality required under the attorney-client privilege." In other words, the majority reasoned, attorney work product must "be kept confidential only from the adversary," not necessarily from all third parties.

The Court went on to find that the factual record had not been developed sufficiently to determine whether Excelsa waived the protections of the work-product doctrine. It remanded the case to the trial court for factual findings involving the work-product considerations laid out by the majority opinion.

Two concurring opinions agreed with the majority's ultimate decision, but stressed factors that should be considered when a court rules on potential waiver of work-product protections.

Justice Donohue wrote that the trial court should look at whether the disclosing party "took any or all of the necessary and available precautions to reduce or eliminate the likelihood that the information could be obtained" by an adversary. Justice Wecht cited persuasive authority from the D.C. Circuit that suggested courts should

evaluate “whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential.” For example, he reasoned that work product protections may be maintained when the disclosing party has a formal confidentiality agreement with the party to whom the information is disclosed.

Implications

While the *BouSamra* decision expands the zone of protection afforded by Pennsylvania’s version of the attorney work-product doctrine, subsequent decisions evaluating different factual scenarios will be needed to flesh out how far that protection now extends. That said, the case does provide guidance for companies and individuals wishing to maximize attorney work-product protections. To prevent a finding that those protections have been waived, the party disclosing attorney work product should take explicit, demonstrable steps to maintain the secrecy of that information, such as:

- entering into a formal confidentiality agreement or similar written pact with the third party receiving the information
- explicitly stating when transmitting the information that it is confidential and should not be shared
- writing “Confidential Attorney Work Product” or some similar disclaimer on the information being disclosed.

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