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THINK BEFORE YOU FORWARD THAT EMAIL! THE SUPREME COURT OF PENNSYLVANIA ADDRESSES WHAT CONSTITUTES A WAIVER OF WORK-PRODUCT PROTECTION

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The Supreme Court of Pennsylvania recently articulated its view regarding waiver of attorney work-product protection in the context of a disclosure to a third party. In *Bousamra v. Excela Health*,[1] the court considered the discoverability of a pre-litigation privileged email that Excela forwarded to its public relations (PR) consultant. The court held that Excela did not *per se* waive work-product protection when it forwarded the email to its PR consultant. Instead, the court instructed that waiver could only occur where disclosure of work product to a third party "significantly increases the likelihood that an adversary or anticipated adversary will obtain it." The court held, however, that Excela did waive the attorney-client privilege with respect to the legal advice contained in the forwarded email because the PR consultant's involvement did not facilitate the provision of legal advice to Excela.

Excela, the health care system defendant, received complaints alleging that interventional cardiologists Drs. Bousamra (plaintiff) and Morcos were performing unnecessary stent implantation procedures. Excela initiated a peer review study to determine whether these allegations were true. That peer review was critical of Dr. Bousamra and found that he had performed unnecessary cardiac procedures. About a year later, Excela initiated a similar but more thorough peer review study, focusing on Dr. Bousamra specifically to determine if he had performed medically unnecessary procedures in any of Excela's hospitals.

In connection with the anticipated public fallout of the results of the peer review studies, Excela retained a PR consultant to work on a media plan. After the second peer review confirmed that Dr. Bousamra performed medically unnecessary procedures, Excela's outside counsel sent legal advice by email to Excela's General Counsel, who then forwarded the email to Excela's PR consultant. The email outlined legal concerns about naming Dr. Bousamra in a public statement about the findings of these peer review studies. After Excela held a press conference acknowledging the results of these studies and identifying him specifically in a press release, Dr. Bousamra sued Excela for defamation and interference

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[1] No. 5 WAP 2018, 2019 Pa. LEXIS 3277, at *1 (Pa. June 18, 2019).

with prospective and actual contractual relations. During the discovery phase of the litigation, Dr. Bousamra filed a motion to compel the discovery of the email that Excela's General Counsel forwarded to the PR consultant.

A Special Master issued a report and proposed order recommending that the trial court deny Dr. Bousamra's motion. After Dr. Bousamra filed exceptions to the Special Master's report and proposed order, the trial court held that Excela waived the attorney-client privilege when its in-house counsel shared outside counsel's legal advice with the PR consultant. The court noted that the privilege is lost when a protected communication is shared with a third party who does not facilitate the provision of legal advice. Neither the Special Master nor the trial court addressed the applicability of the attorney work-product doctrine. On appeal to the Superior Court, however, Excela asserted that both the attorney work-product doctrine and the attorney-client privilege protected discovery of the email in question.

On appeal, the Superior Court recognized that the work-product doctrine bars discovery of documents revealing the mental impressions, conclusions, or legal opinions of counsel but found that Excela did not provide a factual basis to support that it was properly invoking work-product protections. The Superior Court also held that the attorney-client privilege could not protect the forwarded email because the PR consultant was not assisting Excela's counsel in the provision of legal advice.

On appeal to the Supreme Court, Excela argued that the attorney work-product doctrine barred disclosure of the email because Excela did not disclose the email to an adversary and the disclosure did not increase the likelihood that an adversary would obtain it. In support of its position, Excela contended that the purpose of the doctrine was to prevent disclosure to an adversary, rather than disclosure to all others outside the attorney-client confidential relationship.

On the other hand, Dr. Bousamra argued that the work-product doctrine did not apply or that Excela waived the protections of that doctrine by disclosure of the email to its PR consultant. Dr. Bousamra contended that because he was seeking production of the email from the PR consultant, and not Excela's attorney, the email could not constitute protected work product. Even if the email constituted work product, Dr. Bousamra argued, among other things, that Excela's disclosure increased the likelihood that an adversary would obtain the email, and therefore, Excela waived work-product protections.

Appellants identified the two issues before the Supreme Court as follows:

"(1) Did the Superior Court commit an error of law when holding that a client waives the work-product protection of its counsel's pre-litigation email by forwarding the e-mail to its public relations consultant?

(2) Did the Superior Court commit an error of law when holding that, to qualify as a privileged person within the attorney-client privilege, a third party must provide legal advice and have the lawyer or client control its work?"

The Supreme Court recognized that it had not yet articulated the proper analysis for waiver of the work-product doctrine in any of its prior decisions. In doing so now, the court noted that other courts tasked with

defining a waiver analysis, properly considered the purpose of the attorney work-product doctrine first. The court also noted that evidentiary privileges are not favored and that such a privilege only applies where it is necessary to achieve its purpose.

The court instructed that the purpose of the work-product doctrine is to "protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." This doctrine enables attorneys to prepare clients' cases absent fear that their clients' adversaries can use attorney work product against them. Unlike the attorney-client privilege, the court noted that confidentiality is not a cornerstone of the work-product doctrine. The work-product doctrine does not protect the confidential relationship of an attorney and his client. In contrast, the court stated that because the attorney-client privilege specifically protects attorney-client confidences, any disclosures outside these confidences are generally inconsistent with that privilege with limited exceptions. Exceptions include instances where disclosure of privileged information aids the attorney's ability to provide legal advice to a client.

Considering the purpose of the work-product protections, the court held that "the attorney work product doctrine is not waived by disclosure 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 court noted that this waiver analysis is consistent with the prevailing view among the country's state and federal courts and is fact-intensive. Accordingly, noting that the factual record was insufficient for it to determine if Excela had waived work-product protections, the court remanded the waiver issue to the trial court with directions to engage in fact finding and to make a determination consistent with the court's waiver rule.

Next, the court moved on to address whether the attorney-client privilege protected the email after Excela sent it to its PR consultant. The court recognized that the purpose of the attorney-client privilege is "to foster the free and open exchange of relevant information between the lawyer and client." Once a confidential attorney-client communication is shared with a third party, the privilege is waived. The only exception to this general rule is when the third party is "indispensable" to the attorney providing legal advice or it "facilitated" an attorney's ability to provide legal advice.

Distinguishing cases involving a tax accountant and an accident reconstruction expert where these third parties aided an attorney's ability to provide legal advice, the court determined that when Excela forwarded the privileged email, Excela was not seeking advice or input from its PR consultant that would have facilitated the giving of legal advice. Indeed, the email already contained the legal advice of Excela's outside counsel and that counsel did not send the email to the PR consultant. As a result, the court affirmed the Superior Court's holding that Excela had waived the attorney-client privilege.

While the justices were unanimous in the result, several offered their observations and concerns about the court's ruling in two concurring opinions. Justice Christine Donohue, joined by Justices Kevin Dougherty and Debra Todd, wrote a separate concurring opinion emphasizing the

importance of the "manner" in which the work product was disclosed when assessing waiver. In applying the court's work-product waiver analysis, these three justices advised the trial court to focus on whether Excela's general counsel "took any or all of the necessary and available" precautions to safeguard the information forwarded to the PR consultant.

Additionally, Justice David Wecht wrote a concurring opinion, which commented on the implications of the court's ruling on work-product waiver for future litigation. While he agreed with the waiver analysis adopted by the court, Justice Wecht expressed concern about the uncertainty of a fact-intensive analysis that offers no bright-line rules. He cautioned that a strict approach in future applications of the court's waiver analysis might have a "chilling effect" on an attorney's ability to disclose work product to third parties for purposes of effective legal representation of a client.

The waiver analysis adopted by the Supreme Court of Pennsylvania provides attorneys and clients with better, but not necessarily clear, parameters for protecting work product. Any disclosure to a third party will be deemed a waiver where that disclosure "significantly increased the likelihood" that an adversary or potential adversary will obtain it. The court did not address what meets this standard and it did not conduct a fact analysis in the case before it. This uncertainty creates risk for those who dare to share work product with third parties, particularly where there is no applicable joint representation or confidentiality agreement. Erring on the side of caution here is the advisable path until subsequent court decisions provide more guidance.

As for avoiding waiver of the attorney-client privilege, attorneys and clients have more clarity. If the third party does not facilitate the attorney's provision of legal advice, the privilege is waived upon disclosure of the confidential information. Moreover, where a third party's input is needed to aid in the provision of legal advice, the attorney is advised to seek that input directly, prior to or at the time of disclosure. Allowing the client to make the disclosure places the privileged information at risk.