

## Pennsylvania Supreme Court Establishes Analysis for the Waiver of the Attorney Work Product Doctrine

In a recent case, the Pennsylvania Supreme Court set forth for the first time the proper analysis for the waiver of the attorney work product doctrine. In the same case, the Pennsylvania Supreme Court held that the forwarding of privileged information by general counsel to a third party public relations consultant without seeking input, advice or opinion is a waiver of the attorney-client privilege.

In *BouSamra v. Excelsa Health, et al.*, 2019 WL 2509384, Defendant Excelsa Health determined that Plaintiff BouSamra had performed medically unnecessary interventional cardiology procedures. Excelsa Health retained a third party public relations consultant to assist it in dealing with the anticipated publicity that was expected. At first, Excelsa Health informed the public relations consultant that due to legal concerns it would not publicly name BouSamra. Shortly thereafter, outside counsel for Excelsa Health emailed legal advice to Excelsa Health's general counsel who forwarded the email to the public relations consultant. A few days later, Excelsa Health reversed its position and publically identified BouSamra.

BouSamra filed suit against Excelsa Health and others seeking damages based on defamation among other things. During discovery, BouSamra requested the forwarded email. Excelsa Health refused to provide it based on the attorney-client privilege and the attorney work product doctrine. BouSamra contended that both privileges were waived when the general counsel forwarded the email to the third party public relations consultant.

Regarding attorney-client privilege, the Pennsylvania Supreme Court reiterated that the attorney-client privilege is waived when a confidential communication is shared with a third party. Excelsa Health had taken the position that the third party public relations consultant was an agent of Excelsa Health that was facilitating the general counsel's ability to provide legal advice. However, the Pennsylvania Supreme Court ruled that discovery of the email was appropriate and the attorney-client privilege was waived because neither the original email from outside counsel or the forwarded email from the general counsel to the public relations firm solicited input, advice or opinion from the public relations firm that would facilitate or improve the attorneys' ability to provide legal advice.

Regarding the attorney work product doctrine, it was noted that the Pennsylvania Supreme Court had not previously set forth the proper analysis for the waiver of the attorney work product doctrine. After confirming the purpose of the attorney work product doctrine is to protect the mental impressions and process of an attorney from the knowledge of opposing counsel and his client as opposed to the outside world, the Pennsylvania Supreme Court held that the attorney work product doctrine is waived when the work product is shared with an adversary or disclosed in a manner which "significantly increases the likelihood that an adversary or anticipated adversary will obtain it." As there needs to be a fact intensive analysis of the manner in which the forwarded email was disclosed, this issue was remanded to the trial court for factual findings and application of the new waiver analysis.

**Comment:** Even though *BouSamra* has been remanded to apply the new attorney work product doctrine waiver analysis, both outside counsel and in house counsel should continue to be particularly careful communicating with third party consultants and consider the ramifications should the communications have to be disclosed. Any communications with third parties should be certain to be made with the purpose of soliciting input, advice or assistance that would assist with an attorneys' ability to provide legal advice. While it may be clear when communicating with traditional third party litigation expert consultants, as the Pennsylvania Supreme Court notes in *BouSamra*, the modern practice of law may involve media relations

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and that involvement does not always permit the disclosure of confidential or protected information to a media consultant.

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