

## Alert | Litigation



July 2019

### ***BouSamra* Provides Guidance on Scope of Work-Product Doctrine in Pennsylvania**

When does disclosure of attorney work product to a third party constitute waiver of the work-product doctrine? The Pennsylvania Supreme Court addressed that previously unanswered question in *BouSamra v. Excelsa Health*, No. 5 WAP 2018 (Pa. June 18, 2019), where it held that disclosure does not amount to waiver unless the work product was (1) disclosed to an adversary, or (2) disclosed in a manner that significantly increases the likelihood that an adversary or anticipated adversary will obtain it.

Excelsa Health hired a public relations consultant, anticipating negative publicity from an investigation concluding that certain doctors at one of its hospitals performed medically unnecessary procedures. In anticipation of a press conference at which Excelsa would acknowledge the results of the investigation, Excelsa's outside counsel sent an email containing legal advice and attorney work product to Excelsa's general counsel, who then forwarded it to the public relations consultant.

The press conference prompted a doctor to sue for defamation and other claims. Excelsa asserted that the email was shielded from discovery under both the attorney-client privilege and work-product doctrine.

The Supreme Court held that Excelsa waived the attorney-client privilege by disclosing the email containing its outside counsel's legal advice to the consultant, noting that disclosure of an attorney-client communication to a third party generally amounts to waiver. Although the court acknowledged that disclosure to an agent assisting the attorney in providing advice does not constitute waiver, this exception

did not apply because the consultant received the email after counsel had already given the advice, thus the consultant could not have facilitated counsel's ability to provide the advice.

Waiver of the work-product doctrine, however, requires a different analysis. The court found that while disclosure to a third party generally waives the attorney-client privilege, "the same cannot be said for application of the work product doctrine because disclosure does not always undermine its purpose," which "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."

Disclosure to a third party, then, does not necessarily waive the protection for attorney work product, but does so only where the disclosure is likely to find its way to an adversary. The waiver analysis requires courts to consider whether "the disclosure was inconsistent with the maintenance of secrecy from the disclosing party's adversary," including whether there was a "reasonable basis" for the "disclosing party to believe that the recipient would keep the disclosed material confidential." This level of confidentiality is less rigorous than that applicable to the attorney-client privilege, because while attorney-client communications are to be kept confidential from all those outside the attorney-client relationship, attorney work product need be kept confidential only from the adversary. The court remanded that question to the trial court to apply "this newly articulated waiver analysis."

For in-house attorneys, *BouSamra* offers important guidance on the scope of the work-product doctrine in Pennsylvania. It permits them to share attorney work product with consultants and other third parties without waiver so long as reasonable steps are taken to keep it from an adversary. To stay within the scope of protection announced in *BouSamra*, in-house attorneys should consider expressly instructing third-party recipients of work product that the disclosed material is confidential attorney work product that should not be disseminated to others. The work-product protection permits disclosure to some, but not all, third parties. Waiver arises, however, where the manner of disclosure "significantly increases" the likelihood that an adversary will obtain it. In-house attorneys can protect against waiver by taking proactive steps to make it unlikely that work product disclosed to a third party ends up in the hands of an adversary.

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