

PENNSYLVANIA SUPREME COURT BROADENS APPLICATION OF WORK-PRODUCT DOCTRINE, NARROWS WAIVER

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The Pennsylvania Supreme Court has clarified the work-product immunity in a way that broadens what can be protected and narrows how the immunity may be waived.

In *BouSamra v. Excelsa Health*, [1] the Court considered whether the work-product doctrine applied—and whether it was waived—in a defamation suit by George BouSamra, a physician, against Excelsa Health, the corporate owner of a hospital with which Dr. BouSamra had been affiliated.

Excelsa received the results of a peer review that alleged that Dr. BouSamra, an interventional cardiologist, had overstated patients' medical needs and performed unnecessary stent implantations. While the peer review was underway, Excelsa had engaged an outside public-relations firm. When it received the results of the peer review, Excelsa informed its contact at the PR firm that legal concerns prevented Excelsa from publicly naming Dr. BouSamra as someone who had performed unnecessary procedures. A day later, Excelsa's outside legal counsel sent an e-mail message with legal advice to Excelsa's general counsel, and he forwarded it to other Excelsa employees and to the contact at the PR firm. That contact, in turn, shared the message with other employees of the PR firm. Excelsa ultimately determined that it would, in fact, name Dr. BouSamra, and it did so in a press conference that spawned the defamation lawsuit at issue before the Pennsylvania Supreme Court.

The Supreme Court considered a number of issues, including whether the outside counsel's e-mail message was protected by the work-product doctrine and whether the client's forwarding of that message to the PR agency waived that protection.

The familiar, federal formulation of the work-product immunity arises from Federal Rule of Civil Procedure 26 and requires that the work to be shielded have been created during or in anticipation of litigation. [2] Some Pennsylvania state cases had assumed that this element of the federal test applied in state court as well. [3]

In *BouSamra*, the Pennsylvania Supreme Court made clear that there is no such requirement in state practice. In the majority opinion, Justice Sallie Mundy wrote that the work-product immunity has its basis in Pennsylvania Rule of Civil Procedure 4003.3 and that nothing in the rule limits application to materials prepared during or in anticipation of litigation. In a partial dissent, Justice Christine Donohue wrote that the majority should not have reached that issue since it was not within the scope of the grant of review and that, in any event, she was not yet prepared to agree that the work-product doctrine should apply outside the litigation context.

The majority then considered whether Excelsa's disclosure of counsel's message to the PR firm waived the protection of the work-product immunity. The Court held that, while disclosure to a third party generally waives the

attorney-client privilege, the same does not hold for the work-product immunity. The Court explained that, while one purpose of the attorney-client privilege is to maintain confidentiality of attorney-client communication from any outside party, the work-product protection is narrower and aims to preclude an adversary from learning a lawyer's theories and strategies. Accordingly, the Court joined a number of other courts across the country in essentially adopting Section 91(4) of the Restatement (Third) of the Law Governing Lawyers and holding that the work-product immunity 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." [4] Because it could not determine if there had been waiver under the new test, the Court remanded the case to the trial court for relevant factual findings.

The holdings in *BouSamra* are not earth-shattering in light of earlier cases that suggested that the work-product doctrine did not only shield materials produced in anticipation of litigation and that the work-product protection was not as easily waived as is the attorney-client privilege. But the *BouSamra* holdings are important because they clarify an area of law in which there have been sometimes conflicting decisions and in which Pennsylvania practice differs from federal practice.

NOTES

[1] No. 5 WAP 2018 (June 18, 2019).

[2] See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir.1991).

[3] See, e.g., *Lepley v. Lycoming Co. Court of Common Pleas*, 393 A.2d 306, 310 (Pa. 1978).

[4] *BouSamra*, No. 5 WAP 2018, at Typeset 16. The Court also considered whether the attorney-client privilege might shield the e-mail message and concluded that it had been waived in light of the privilege's broader confidentiality requirement. *Id.* at 27.

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