

PA Supreme Court Announces New Work Product Doctrine Waiver Analysis with Regard to Dissemination of Information to Third Parties

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On June 18, 2019, the Pennsylvania Supreme Court announced a new attorney work product waiver analysis in *BouSamra v. Excela Health*. The central holding of the Supreme Court's decision in *BouSamra* is 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 work product doctrine, codified in Pennsylvania Rule of Civil Procedure 4003.3, protects the disclosure of mental impressions, conclusions, opinions, notes or summaries, or legal theories of a party's attorney, respecting the value or merit of a claim or defense or respecting strategy or tactics. Considering confidentiality is not a cornerstone of this privilege, disclosure to a third-party does not always undermine the purpose of the work product protection.

Prior to *BouSamra*, the Pennsylvania Supreme Court had declined to comment on the work product doctrine waiver issue. However, in *BouSamra*, Justice Sallie Updyke Mundy, who wrote the opinion on behalf of the majority, pointed out that the work product doctrine has become confused or conflated with the standards applied to the attorney-client privilege. The Supreme Court explained that the attorney-client privilege is designed to protect confidentiality, such that any disclosure outside the attorney-client relationship is inconsistent with the privilege. By contrast, the work product protection is invoked against adversaries and does not exist to protect a confidential relationship. Accordingly, because the purposes of the attorney-client privilege and the work product doctrine are different, the waiver analysis for each rule necessarily diverges as well.

The Supreme Court observed that this new analytical framework applicable to attorney work product waiver comports with the prevailing view in state and federal courts across the country, and the rule's fact intensive structure requires evaluation on a case-by-case basis. The Supreme Court did not enumerate a list of factors to be considered; however, factors such as the maintenance of secrecy and manner of dissemination are considerations that should be taken into account.

The Supreme Court remanded the matter to the trial court for factual findings and application of the newly articulated waiver analysis.

The justices were unanimous in the result. However, in a concurring opinion, Justice Christine Donohue, joined by Justices Debra Todd and Kevin Dougherty, advocated for the trial court to focus heavily on whether precautions were taken to safeguard the information forwarded to the third-party. In a separate concurring opinion, Justice David Wecht cautioned trial courts that employing an overly-strict approach "might have a chilling effect on an attorney's ability to disclose work product to third parties, thus undermining the primary aim of the doctrine—to provide an attorney with a zone of privacy within which effectively to represent the client."

White and Williams will continue to track and report on the response of the lower courts in applying the Supreme Court's newly articulated work product waiver analysis. If you have questions or would like more information, please contact Dan Ferhat (ferhatd@whiteandwilliams.com; 215.864.6297), Laura Hutchinson (hutchinsonl@whiteandwilliams.com; 215.864.6231) or another member of the Healthcare Group.

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