The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2018
PHILADELPHIA, TUESDAY, FEBRUARY 27, 2018 VOL 257 • NO. 39 An ALM Publication

LITIGATION

Attorney-Client, Work-Product Protections With Respect to Outside Consultants

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Special to the Legal

Nearly every lawyer shares one fear in common: the inadvertent waiver of the attorney-client privilege. Last summer, in *BouSamra v. Excela Health*, 167 A.3d 728 (Pa. Super. Ct. 2017), the Superior Court of Pennsylvania held that a company waived the attorney-client privilege when it forwarded an email containing legal advice to one of its consultants, a public relations firm. On Jan. 30, the Supreme Court granted an interlocutory appeal in the case to address the question of waiver, specifically to what extent does the attorney-client privilege and work-product protection extend to an outside consultant? The Supreme Court's decision could transform the way Pennsylvania lawyers interact with clients and their consultants, particularly if the Supreme Court were to affirm the order of the Superior Court and uphold the waiver.

The underlying case concerns a dispute between two cardiology practices, one of which was owned by Excela Health. In the lawsuit, the plaintiff, Dr. George BouSamra, contends that Excela and other parties spread false rumors about his cardiology practice by, among other things, announcing at a press conference the results of a peer review study that concluded that BouSamra had performed unnecessary procedures on patients.

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In discovery, a privilege dispute arose relating to Excela's communications with its public relations firm, Jarrard, Phillips, Cate, & Hancock. Excela had retained Jarrard to develop a media plan to implement the public announcement over the unnecessary procedures. In the days leading up to the press conference, Excela's outside counsel—a defamation lawyer—offered Excela's in-house counsel, Timothy Fedele, legal advice regarding the press conference. Fedele forwarded outside counsel's email communication to Molly Cate, a principal at Jarrard. Fedele also forwarded the email to Excela management. Excela withheld the forwarded communication as privileged during discovery.

In the Superior Court's view, there was no question that the email from outside counsel to Excela's in-house counsel was privileged. Rather, the sole issue, the same one that will be before the Supreme Court, was "whether Excela waived the privilege by disseminating it to Jarrard." The Superior Court held that, "by sending outside counsel's email to Jarrard, a third party, Excela waived the attorney-client privilege."

The Superior Court began its analysis by noting that, generally, the attorney-client privilege is waived "when the communication is made in the presence of or communicated to a third party." Still, the Superior Court acknowledged that most courts recognize a significant exception to this rule for when an outside agent is "necessary, or at least highly useful, for the effective consultation between the client and lawyer," based on the seminal decision *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

But the Superior Court turned its analysis away from *Kovel*, to which federal courts and the majority of states

adhere, noting that the question of whether the privilege encompasses a client's outside agent has not been addressed in Pennsylvania. To answer this question, the Superior Court analyzed Pennsylvania decisions that had addressed who within a corporation is subject to and controls the attorney-client privilege when a corporation receives privileged advice. Based on this line of cases, the Superior Court concluded that the attorney-client privilege could extend narrowly to "corporate-decision makers" such as "managers, officers, and directors," and outside agents who were the "functional equivalent of employees."

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The Superior Court held that Jarrard did not meet this stringent standard because Jarrard had been retained only intermittently by Excela, and in each instance Jarrard retained control as to how it completed tasks for Excela.

The Superior Court also held that *Kovel* and its progeny were inapplicable to the present case because this was not a situation in which an outside consultant was being used by counsel to "assist in providing legal advice" to the client. The court found significance in the fact that Excela, as opposed to its outside counsel, retained and communicated directly with Jarrard. Further, Excela's in-house counsel did not forward the email containing legal advice to Jarrard to solicit its input on the advice given. Thus, the attorney-client privilege was waived.

Finally, the court briefly addressed Excela's argument that the forwarded email communication was protected from discovery by the work-product doctrine. The court explained that outside counsel offered legal advice in connection with a press conference, not anticipated or pending litigation. Therefore, the email was not protected from disclosure by the work-product doctrine.

The Superior Court's holding and analysis calls into question whether the attorney-client privilege and work-product protections could realistically extend to any outside consultant that is not retained by and acting at the explicit direction of counsel. If the Supreme Court were to uphold the Superior Court's analysis, it would likely make Pennsylvania one of the more conservative states relative to the scope of the attorney-client privilege.

The Supreme Court, therefore, will likely closely scrutinize the "agency test" that the Superior Court relied on for its holding. The agency test, which focuses on whether the outside consultant is the "functional equivalent" of an employee, is a difficult standard for an outside consultant to meet. In most circumstances, outside consultants, whether they are public relations firms, environmental consultants, or financial advisers, are technically "independent contractors" under the law in the respect that they often maintain control as to how to complete tasks for a client.

Indeed, there is a question as to whether the agency test is the appropriate test for determining the scope of privilege. In focusing on the question of agency, the Superior Court did not address whether Excela's management had a reasonable expectation of confidentiality when Fedele forwarded the privileged email to Jarrard. The very fact that Fedele forwarded the email only to Excela's "management-level decision makers" and Jarrard suggests that the communication was intended to be confidential. Along the same lines, the Superior Court noted that Jarrard is typically retained by companies in times of "significant challenge or transformation or change." Yet, under the agency test articulated by the Superior Court, a low-level company employee like a janitor would fall within the scope of the attorney-client privilege, but not an outside public relations firm that is working directly with company management and in-house counsel on a major public announcement.

In sum, it is likely that the Supreme Court's decision will provide meaningful commentary on the purpose and scope of the attorney-client privilege in Pennsylvania. Its decision on the question of waiver is one that every lawyer, particularly those who work frequently with consultants, will want to monitor. •

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