2017 PA Super 66

GEORGE R. BOUSAMRA, M.D. v. EXCELA HEALTH, A CORPORATION; WESTMORELAND REGIONAL HOSPITAL, DOING BUSINESS AS EXCELA WESTMORELAND HOSPITAL, A CORPORATION; ROBERT ROGALSKI; JEROME E. GRANATO, M.D., LATROBE CARDIOLOGY ASSOCIATES, INC., A CORPORATION; ROBERT N. STAFFEN, M.D.; MERCER HEALTH & BENEFITS, LLC; AND AMERICAN MEDICAL FOUNDATION FOR PEER REVIEW AND EDUCATION, INC., A CORPORATION. APPEAL OF: EXCELA HEALTH, WESTMORELAND REGIONAL HOSPITAL, ROBERT ROGALSKI, JEROME E. GRANATO, M.D., AND LATROBE CARDIOLOGY ASSOCIATES, INC.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1637 WDA 2015

Appeal from the Order Dated October 6, 2015
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D. No. 12-003929

BEFORE: BOWES, STABILE AND MUSMANNO, JJ.

OPINION BY BOWES, J.: **FILED MARCH 13, 2017**

Appellants, Excela Health, a corporation ("Excela"); Westmoreland Regional Hospital, doing business as Excela Westmoreland Hospital, a corporation ("Westmoreland Hospital"); Robert Rogalski; Jerome E. Granato,

M.D.; Latrobe Cardiology Associates, Inc., a corporation; Robert N. Staffen, M.D.; Mercer Health & Benefits, LLC ("Mercer"); and American Medical Foundation For Peer Review And Education, Inc., a corporation ("American"), challenge the propriety of a discovery order compelling them to produce a document. Appellants assert that the document in question is protected by the attorney-client and work-product privileges. We affirm.

On March 1, 2012, Appellee George R. BouSamra, M.D., instituted this action against Appellants. Ehab Morcos, M.D. instituted a separate action that was consolidated with this lawsuit for purposes of discovery. Excela operates Westmoreland Hospital, which is an acute care hospital in Greensburg, Pennsylvania. In 2010, Mr. Rogalski became Excela's chief executive officer. Appellee and Dr. Morcos were members of Westmoreland County Cardiology, and had staff privileges as interventional cardiologists at Excela. Interventional cardiology is a subspecialty of cardiology wherein practitioners utilize intravascular catheter-based techniques to treat, *inter alia*, coronary artery disease. These specialists employ catheterization and angiography to measure the amount of blood flow through a patient's coronary arteries in order to ascertain if there is blockage, also known as narrowing, which restricts the blood movement through a patient's coronary arteries. If the blockage is severe enough, interventional cardiologists implant a stent in the artery, and that device increases blood current through the affected artery.

Appellee and Dr. Morcos practiced interventional cardiology at Excela's Westmoreland Hospital. The two lawsuits arose after Excela publicly accused Appellee and Dr. Morcos of conducting stent implantations that were medically unnecessary in that the blockage in the patients at issue was so minimal that stents were not appropriate.

According to the allegations by the two doctors, the following occurred with respect to these accusations against them. Mr. Rogalski became CEO of Excela and reportedly heard from other physicians that interventional cardiologists were implanting medically-unnecessary stents at Excela. To ascertain the veracity of these complaints, in June 2010, Mr. Rogalski hired Mercer, an outside peer review organization, to evaluate the quality, efficiency, and medical necessity of stent utilization by physicians in interventional cardiology.

Mercer generated purportedly random samples of cases to review, and it contracted with specialists in interventional cardiology from across the country to evaluate the cases. Those specialists submitted their findings to Mercer. In December 2010, Mercer issued preliminary reports to Excela that were critical of the care provided to some patients. Specifically, Mercer indicated that Appellee and Dr. Morcos had performed unnecessary stent implantations at Excela's facilities.

On January 12, 2011, after they became aware that Excela planned to suspend their staff privileges, Appellee and Dr. Morcos voluntarily resigned

to avoid a suspension, which would have impaired their ability to obtain privileges at other facilities. Mercer issued its final report to Excela on February 3, 2011. On February 9, 2011, Excela hired American, another outside peer review corporation, to conduct a review of all of Appellee's and Dr. Morcos' cases for purposes of determining if any of the procedures that they performed at Excela were not medically necessary. American engaged expert cardiologists to examine the files of those patients to determine the propriety of the interventional cardiology procedures performed.

On February 23, 2011, American issued a report to Excela that indicated that the practice of Appellee and Dr. Morcos was to overestimate arterial blockage and to inappropriately treat mild narrowing with stents. On March 2, 2011, Excela publicly announced that its experts had concluded that Appellee and Dr. Morcos performed medically unnecessary stent procedures in 2010. Excela notified the affected patients and offered follow-up care.

Appellee and Dr. Morcos instituted lawsuits averring that the two peer review proceedings were pretextual and conducted in bad faith and in an improper manner. According to the two doctors, Excela had unsuccessfully attempted to acquire their practice. After Appellee and Dr. Morcos opposed the sale, Excela deliberately decided to undermine and destroy their practice so that they could not compete with Excela cardiologists. Appellee and Dr. Morcos contended that, in order to eliminate them as competitors in

interventional cardiology, Excela hired Mercer and American to conduct reviews that were specifically intended to disparage their medical practices. They also claimed that Excela, in furtherance of its campaign of preventing Appellee and Dr. Morcos from competing with it, publicly announced the unsupported findings from the two peer reviews that Appellee and Dr. Morcos implanted stents that were not medically necessary. The claims in the two actions include intentional interference with existing and potential contractual relationships and defamation.

The present appeal pertains to discovery, and the following facts are pertinent in that respect. Excela engaged outside counsel, Hope Foster, Esquire, to advise it regarding the propriety of publicly naming Appellee and Dr. Morcos and accusing them of improperly implanting stents. On February 26, 2011, Ms. Foster authored an opinion letter on the subject and emailed it to Timothy Fedele, Esquire, who was Excela's Senior Vice-President and General Counsel. Before it publicly announced that Appellee and Dr. Morcos were performing medically-unnecessary stent implants, Excela hired an independent public relations firm, Jarrard, Phillips, Cate, & Hancock ("Jarrard"), which is located in Nashville, Tennessee, to create a media plan to implement the public announcement about the alleged stenting issues. Molly Cate was the principal at Jarrard who worked on the Excela media plan, and her team also included Tim Fox, Alan Taylor, and Magi Curtis.

Mr. Fedele forwarded to the four members of Jarrard's team a copy of Ms. Foster's February 26, 2011 email containing her legal analysis regarding whether Appellee and Dr. Morcos could be publicly named during the media announcement. Mr. Fedele's email, in turn, generated further email discussions among the members of the Jarrard team as well as Excela employees.

On May 29, 2013, Appellee served interrogatories and a request for production of documents on Appellants, including a request for the following: "Documents related to or revealing any information related to your thoughts, suggestions, reasons, intentions, or plan disclose to the media the conclusions of Mercer and [American], or any information supplied to you by Mercer or [American] from their reviews, or any implications or conclusions you drew from the conclusions of Mercer or [American]." Interrogatories and Request for Production of Documents, 5/29/13, at 98. Appellants objected to the request, claiming, *inter alia*, that the attorney-client privilege covered any documents relating to its plan to publicly disclose the results of the peer reviews conducted by Mercer and American.

In June 2014, Excela provided notice that it intended to depose Ms. Cate, and on June 18, 2014, Appellee and Dr. Morcos served her with a subpoena *duces tecum* asking her to produce any document that related to, among other things, the public announcement of the results of cardiology audits or services at Excela. Jarrard did not object to the subpoena, and Ms.

Cate was deposed in Nashville, Tennessee on June 26, 2014. She was questioned about information that she was given regarding publicly naming Appellee and Dr. Morcos at the media event planned by Excela.

Ms. Cate's deposition demonstrates that Jarrard questioned Excela about whether the physicians who purportedly implanted medically-unnecessary stents were to be named at the media event that Jarrard was to plan. Specifically, Ms. Cate testified that she asked whether Appellee and Dr. Morcos were to be named publicly and, on February 25, 2011, Excela informed her that legal issues prevented them from announcing their names. Then, on February 28, 2011, Mr. Rogalski, Excela's CEO, informed Ms. Cate that Excela had changed its decision in that respect and told her that the names were to be used. Ms. Cate did not reveal that Excela, through Mr. Fedele, had sent her the February 26, 2011 opinion letter authored by Ms. Foster.

During his two depositions, Mr. Fedele never indicated that he had any legal discussions with any member of the Jarrard team or that he sought any type of input from Jarrard on legal matters. His depositions also clarified that Jarrard was hired as an outside media consulting firm by Excela and that its sole function was to orchestrate the public announcement regarding the alleged misdeeds of Appellee and Dr. Morcos.

In March 2015, Appellee became aware of the February 26, 2011 opinion letter authored by Ms. Foster when it was listed in a privilege log

created by Excela. At that time, Appellee also realized that the letter in question had been forwarded to Jarrard by Excela.

The trial court overseeing the two lawsuits had assigned discovery matters to a special master, Attorney Rosslyn Littman. Following the receipt of the privilege log, Appellee presented a motion to compel before the special discovery master demanding that he be given a copy of Ms. Foster's letter and the email discussion that it generated following its dissemination to Jarrard. Excela claimed these communications were protected by the attorney-client privilege and work product privileges. The master conducted an *in camera* review of the documents in question and concluded that they were subject to the attorney-client privilege. She did not rule on whether it was subject to the work product privilege.

Appellee filed exceptions to the master's determination. The matter was briefed, and the trial court concluded that Excela waived the attorney-client privilege because it had disseminated the February 26, 2011 email to a third party, Jarrard. The trial court reasoned as follows:

> A communication between counsel and a third party is not protected by the attorney-client privilege. Also, the privilege is lost when a protected communication is shared with a third person. There is exception where a third party acting as an agent of a lawyer is facilitating the lawyer's representation. See Restatement of the Law Governing Lawyers § 70 (2000), which reads as follows:
>
> Privileged persons within meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of

> either who facilitate communications between them, and agents of the lawyer who facilitate representation.
>
> This exception does not apply because persons with Jarrard Phillips Cate & Hancock were not agents of defendants' counsel facilitating the representation. They were retained by Excela to assist Excela in public relations matters.
>
> It was not the role of defendants' counsel to make decisions regarding communications with the public. At the most, a lawyer will give advice to a client asking the lawyer to advise it regarding legal issues with respect to communications with the public. The presence of Jarrard would not in any way assist counsel in giving such legal advice.

Trial Court Opinion, 10/6/15, at 1-2.

Appellants filed the present appeal from the October 6, 2015 order. They advance these issues for our review.

> 1. Does attorney-privilege apply to a company's email with its media consultants, if the emails contain the advice of outside counsel and seek feedback so that in-house counsel may give legal advice the company CEO on the appropriate course of action?
>
> 2. Does the work product doctrine protect the mental impressions of outside counsel contained in the email?

Appellants' brief at 9.

Initially, we note that we have jurisdiction over this appeal under Pa.R.A.P. 313,[1] which embodies the collateral order doctrine. Herein, the

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[1] That rule of appellate procedure embodies the collateral order doctrine and provides:

(Footnote Continued Next Page)

order in question compelled discovery of materials that Appellants assert are privileged under the attorney-client and work-product privileges. When a discovery order requires the production of materials that the appealing party has asserted are privileged, Pa.R.A.P. 313 applies, and we will accept jurisdiction. ***See e.g.***, ***Yocabet v. UPMC Presbyterian****,* 119 A.3d 1012, 1016 n.1 (Pa.Super. 2015) (emphasis added) (holding that discovery order was appealable since the appealing party asserted that order required it to reveal documents purportedly protected under the peer-review and attorney-client privileges and ruling that if "a party is ordered to produce materials purportedly subject to a privilege, we have jurisdiction under Pa.R.A.P. 313[.]"); ***Red Vision Sys., Inc. v. Nat'l Real Estate Info. Servs., L.P.***, 108 A.3d 54, 59 (Pa.Super. 2015) (citation omitted) "Appellate review is appropriate when a colorable claim of privilege is asserted."). As to the applicable standard of review, our Supreme Court articulated in ***In re Thirty–Third Statewide Investigating Grand Jury****,* 86 A.3d 204, 215

(Footnote Continued) ———————————

> (a) General Rule. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
>
> (b) Definition. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313.

(Pa. 2014), "Whether the attorney-client privilege or the work product doctrine protects a communication from disclosure is a question of law." Thus, our standard of review is plenary. ***Id***.

We first examine whether the attorney-client privilege applies. The privilege in question was derived from the common law, ***id***., and was codified at 42 Pa.C.S. § 5928, which states: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, **unless in either case this privilege is waived** upon the trial **by the client**." (Emphases added). We also note that

> Evidentiary privileges are not favored. Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth. Thus, courts should accept testimonial privileges only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.

Red Vision Sys., Inc., ***supra*** at 61 (citation omitted). To invoke the attorney-client privilege, a party must establish these four elements:

> 1) The asserted holder of the privilege is or sought to become a client.
>
> 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
>
> 3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or

> assistance in a legal matter, and not for the purpose of committing a crime or tort.
>
> 4) **The privilege** has been claimed and **is not waived by the client**.

Id. at 62–63 (emphases added; citation omitted).

As articulated by the trial court and in ***Carbis Walker, LLP v. Hill, Barth & King, LLC***, 930 A.2d 573, 578–79 (Pa.Super. 2007), the attorney-client privilege is waived, *inter alia*, "when the communication is made in the presence of or communicated to a third party[.]" Herein, Excela sent the communication to a third party, Jarrard, and thus waived the privilege.

In asserting that it did not waive the privilege, Excela first relies upon a series of federal cases which stand for the proposition that, if a communication protected by the attorney-client privilege is disseminated to members of a team involved in offering legal advice to the client, the privilege is not waived. Principally, Excela relies upon ***United States v. Kovel***, 296 F.2d 918 (2nd Cir. 1961), which it refers to as the landmark case setting for the seminal legal reasoning upon which Excela relies. In ***Kovel***, a law firm specializing in tax law hired a former Internal Revenue Service agent with accounting skills to help it give legal advice to a client. The issue was whether communications between the client and accountant were subject to the attorney client privilege. In concluding that the privilege applied, the Second Circuit recognized that communications between a client and a third party are privileged if the third party was employed to facilitate

the legal advice rendered by the lawyer. It analogized the matter to the scenario where an interpreter is needed by a lawyer to translate a client's language, where the privilege would undoubtedly apply:

> This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist . . . of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege[.]

Id. at 922 (footnote omitted)

Thus, the presence of the third party, under the rationale of the courts, must be necessary or, at the very least, useful, for purposes of the lawyer's dissemination of legal advice. There is a fatal flaw in Exela's attempt to invoke the pertinent case law. Excela decidedly failed to establish the facts necessary for application of these cases. Other than a vague affidavit contradicted by deposition testimony, Excela produced no facts to establish that Ms. Foster or Excela hired Jarrad to aid in rendering the legal advice, *i.e.,* whether the doctors could be named.

Ms. Cates' deposition clearly establishes that she was not consulted about whether the doctors at issue would be named during the media event. She testified that on February 25, 2011, she was instructed that it was a legal matter and that the doctors would not be named. Ms. Cates continued that, three days later, she was thereafter informed that they would be. The opinion letter from outside counsel was generated on February 26, 2011. Appellants wholly failed to establish, by reference to any deposition of any member of the Jarrard team or Ms. Foster's deposition, that Jarrard was involved in the legal discussions about whether Appellee and Dr. Morcos would be publically named.

Mr. Fedele did not indicate that he consulted with Jarrard about the legal implications of using the doctors' names. Rather, he had sought that advice from outside counsel, as evidenced by his request for an opinion letter on the subject from Ms. Foster. During his deposition, Mr. Fedele stated that he did not recall have **any** dialogue "with Jarrard, Cate, Phillips between the 25th of February to the 28th of [February] eliminating the question regarding the legal issues preventing publicly identifying the physicians[.]" Deposition of Timothy Fedele, 7/23/14, at 191. He did not recall having legal discussions with Jarrard about any other matter. ***Id***. at 195. Jarrard was hired by Excela to handle the media event and was not consulted to aid in the legal discussion. Jarrard's presence was not

necessary or even highly useful to the question of whether to publicly name the doctors.

Excela's position, at its essence, is that it did not waive the privilege because the disclosure was made to "an agent assisting the attorney in giving legal advice to the client." Appellant's brief at 23 (citation omitted). We disagree. Jarrard was not an agent of the attorney, Ms. Foster. Ms. Foster did not seek advice or help from Jarrard in rendering her legal opinion. Jarrard was a separate legal entity, a media consulting firm, hired by Excela. Excela simply fails to establish, by reference to deposition testimony of Ms. Cates, Ms. Foster, or of any other member of the Jarrard team that Jarrard was involved in the process of the Ms. Foster's tender of legal advice.

Indeed, the position that Jarrard participated in Excela's legal decision to name the two doctors is contrary to the facts. The legal advisability of identifying Appellee and Dr. Morcos by name was obtained from outside counsel, Ms. Foster, who gave Excela an opinion letter on the subject on February 26, 2011. Jarrard was hired to orchestrate the media event. Jarrard was instructed to name the two doctors and given the opinion letter.

We find it most significant that there was no proof of any communication between Ms. Foster and Jarrard on the subject matter so that Ms. Foster did not seek Jarrard's input, to any extent, in forming her legal opinion. Likewise, Excela did not ask Jarrard's team for any feedback

or response to Ms. Foster's previously-formed legal opinion. Excela does not refer to any place in the record establishing that Jarrard was involved, as a member of a team, with either Excela or Ms. Foster in connection with outside counsel's legal judgment on the matter. Thus, Excela does not support its factual position that Jarrard was in some way a participant into the question of the legal advisability of naming the two doctors during the public announcement. Its reliance upon the case law in question is therefore misguided.

We also reject Excela's implication that Jarrard was part of its operation rather than a third party. Excela does not reference anything in the record establishing that Jarrard was more than a separate organization that had no common ownership interest with Excela. Ms. Cate clearly articulated that Excela was merely one of Jarrard's clients. Deposition of Molly Cate, 6/26/14, at 15. Jarrard was an independent contractor hired, in this instance, to aid Excela in making a public announcement about the purported stenting issues and doctors involved. The issue of the legal ramifications of naming Appellee and Dr. Morcos was already a decided matter when Jarrard was engaged.

Excela next asserts the work product privilege in the February 26, 2011 opinion letter generated by outside counsel.[2] As the Court noted in ***In re Thirty–Third Statewide Investigating Grand Jury***, ***supra***, the work product privilege is embodied in Pa.R.C.P. 4003.3. That rule states:

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. No. 4003.3.

We analyzed the privilege in ***Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity***, 32 A.3d 800, 812 (Pa.Super. 2011), *aff'd by and equally divided court sub nom.* ***Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity***, 91 A.3d 680 (Pa. 2014), setting forth:

> According to the explanatory comment accompanying Pa.R.C.P. 4003.3, "[t]he Rule is carefully drawn and means exactly what it says." ***Id.,*** Explanatory Comment at ¶ 3. "The underlying purpose of the work-product doctrine is to shield the

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[2] The trial court herein did not address Excela's position that the email was not discoverable because it was work product. In the interest of judicial economy, we will nevertheless review the issue since application of the work product privilege, as noted in the text *supra*, is a question of law.

> mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to **prepare cases** without fear that their work product will be used against their clients." ***T.M. v. Elwyn, Inc.,*** 950 A.2d 1050, 1062 (Pa.Super. 2008), ***quoting Gocial v. Independence Blue Cross,*** 827 A.2d 1216, 1222 (Pa.Super. 2003) (citations and quotation marks omitted). Thus, Pa.R.C.P. 4003.3 specifically "immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." ***Id.,*** Explanatory Comment at ¶ 3.

Accord Commonwealth v. Sandusky, 70 A.3d 886, 898 (Pa.Super. 2013) ("The underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case.").

The party invoking the work product privilege must initially delineate the facts showing that the privilege has been properly invoked; once that party does so, the burden shifts to the party seeking disclosure to establish that revealing the information will not violate the privilege because the privilege has been waived or because some exception applies. ***T.M. v. Elwyn, Inc.***, 950 A.2d 1050, 1063 (Pa.Super. 2008)

Appellee insists that the letter cannot be considered work product because there was no pending litigation and it thus was not prepared in anticipation of litigation. In this respect, we find the reasoning of our sister court's decision in ***Bagwell v. Pennsylvania Dep't of Educ.***, 103 A.3d 409 (Pa.Commw. 2014), persuasive. Bagwell sought information from the Pennsylvania Department of Education under the Right-to-Know Law.

Bagwell wanted a variety of correspondence sent to the Secretary of Education while he was acting as an *ex officio* member of the Board of Trustees of Pennsylvania State University ("Penn State"). The records were sent to the Secretary in his role as co-chairperson of an investigatory task force created by the Board of Trustees to probe allegations of child abuse leveled against former Penn State football coach Jerry Sandusky and the actions of high-level Penn State officials in connection with those allegations.

Penn State asserted that the materials were protected under the attorney-client privilege and the work-product doctrine, and it submitted the materials to the Office of Open Record (the "Office") for a determination as to whether the two privileges applied. Penn State identified various lawyers, who were both in-house and employed by outside firms, who were hired to investigate legal matters or to provide legal advice about the Sandusky matter. Independent investigator, Louis Freeh, was engaged as counsel to the task force, and the law firm of Reed Smith was hired as special counsel to advise the Board as to various matters arising out of the accusations by Penn State administration and Sandusky. After *in camera* examination, the Office upheld Penn State's invocation of the privileges as to a majority of the records, deciding that certain material qualified as work-product as reflecting attorney opinions or mental impressions.

On appeal, Bagwell again claimed the work product privilege was being applied too broadly, maintaining that the documents concerning Freeh's

investigation were compiled to cooperate with an external investigation and completion of a public report. He continued that, since they were not prepared in anticipation of litigation, the documents did not fall within the work product privilege. The Commonwealth Court rejected his position. It noted that the work product privilege was broader than the attorney-client privilege since confidential communications are covered by attorney-client privilege whereas the work product privilege encompasses any records that are the work-product of an attorney. It observed that work product at issue in the case was created by a law firm engaged to investigate allegations that subsequently became the subject of lawsuits.

The ***Bagwell*** Court noted that Penn State's Board of Trustees, given the nature of the allegations against Sandusky and its concerns about what high ranking officials at Penn State knew about and did in connection with those allegations, clearly anticipated that there would be litigation in the future in connection with the Sandusky matter. It applied the privilege even though no litigation had been commenced, holding that, since litigation was on the horizon, there was "no dispute that an attorney's mental impressions are protected work product." ***Id***. at 417.

In this case, Ms. Foster was consulted in anticipation of a public announcement of the so-called stenting issues. Excela, undoubtedly fearing litigation, obtained this advance advice regarding the legal ramifications of naming Appellee and Dr. Morcos as performing medically unnecessary stents

and publicly discrediting them. We assume that the letter, which is not in the record, must have set forth Ms. Foster's legal conclusions, thoughts, and opinions about the matter. We therefore believe that the opinion letter did fall within the penumbra of the work product privilege.

However, this conclusion only brings us to the secondary question of whether the work product privilege was waived for the same reasons elucidated *supra*. We conclude that waiver applies herein. As noted by our Supreme Court in ***Lepley v. Lycoming Cty. Court of Common Pleas***, 393 A.2d 306, 310 (Pa. 1978), the work product privilege is not protected against compelled disclosure by the U.S. Constitution, any statute, or any common-law privilege. The work product protection "shelters the mental processes of the attorney" so that the lawyer can "analyze and prepare his client's case." ***Id***. It is an "intensely practical" privilege and not all written materials prepared by counsel with litigation in mind are free from discovery. ***Id***.

In ***Commonwealth v. Harris***, 32 A.3d 243 (Pa. 2011), our High Court held specifically that a defendant, by his actions, waived application of the work product privilege. Therein, the defendant asserted application of the psychologist-client privilege, the attorney-client privilege, and the work product privilege, but our Supreme Court held "that the lower court correctly determined that, by challenging [an expert witness's] and trial counsel's

performances, Appellant waived **any privilege** to material necessary for the prosecution to refute those challenges." ***Id***. at 252 (emphasis added).

Moreover, in ***T.M. v. Elwyn, Inc.***, ***supra***, we analyzed the attorney client and work product privileges coextensively under the same legal rubric and suggested that the work product privilege was subject to waiver under the same principles as those applied in the context of the attorney-client privilege. ***See also Gillard v. AIG Ins. Co.***, 15 A.3d 44, 59 n.16 (Pa. 2011) (acknowledging that the two privileges, although distinct, are closely related); ***LaValle v. Office of Gen. Counsel of Com.***, 769 A.2d 449, 460 (Pa. 2001) (indicating waiver principles could be applied to work product privilege but finding that document was not subject to access by public under Right to Know Act so that work product privilege was not implicated).

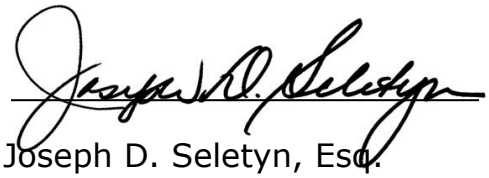
In analyzing the waiver position, we once again find guidance in ***Bagwell***, ***supra***, wherein Bagwell also argued that Penn State waived the work product privilege by disclosing parts of its lawyers' findings and conclusions to third parties, including the public and the Office of the Attorney General. Therein, the Commonwealth Court first noted that, if attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived. It concluded that the work product privilege could be waived under the same circumstances, by revealing the work product to a third party. In that case, however, the materials at issue had not been disclosed to any third party. Thus, our sister court indicated

that the work-product privilege could be waived, just as the attorney-client privilege, if the materials in question were disclosed by the client to a third party.

Herein, we therefore hold that the work product privilege, like the attorney client privilege, was waived through Excela's dissemination of Ms. Foster's email to an outside party, Jarrard.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/13/2017