

Rejection of Improper “Attorneys’ Eyes Only” Disclosure Process Relating to Attorney-Client Privilege Challenges

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The attorney-client privilege is one of “the most revered” privileges established to protect certain communications. The Pennsylvania Superior Court recently held that it was improper for a trial court to order the disclosure of information, which a party claimed was privileged work product, on an “attorneys’ eyes only” basis to counsel for the opposing party.

Background

In *CLL Academy, Inc. v. Academy House Council*, No. 446 EDA 2019, 2020 WL 1671586 (Pa. Super. Ct. Apr. 6, 2020), a dispute arose regarding redacted information that the plaintiff argued was not entitled to work-product protection. A Discovery Master reviewed unredacted versions of the documents in camera and recommended that the defendant be compelled to modify certain redactions. After this recommendation was adopted by the trial court, the defendant sought reconsideration and requested ex parte argument to provide context for the court to evaluate the claimed privilege. The plaintiff objected and suggested that its counsel be permitted to participate in the argument and to receive the unredacted documents on an “attorneys’ eyes only” basis. The trial court agreed to hear argument and ordered the defendant to produce the documents in unredacted form.

Improper Disclosure for “Attorneys’ Eyes Only”

On appeal, the Superior Court rejected outright the use of the “attorneys’ eyes only” process to resolve the dispute. As explained by the court, a privilege log “is the primary source for determining whether attorney-client privilege or work-product privileges apply,” and when such a log is insufficient, a court may conduct an in camera review. The court also aptly noted that, “[h]ad the documents been disclosed to [plaintiff’s] counsel as ordered, the confidentiality of the communications would have effectively been destroyed.” The court concluded that “the ‘attorneys’ eyes only’ procedure [is] wholly inconsistent with the in camera review sanctioned by our rules of civil procedure for evaluating claims of privilege” and “the disclosure of confidential commercial information to attorneys who are not in a position to use it to achieve a competitive edge is quite different from the disclosure of an attorney’s mental impressions and strategies to opposing counsel

in ongoing litigation.” The court recognized the “essential purpose” of the work-product doctrine “is to keep the files of counsel free from examination by the opponent.”

The Superior Court further clarified that “the attorney-client privilege does not end when representation ceases. Where, as here, there are two ongoing lawsuits between [the parties], attorney-client privileged communications made in relation to one lawsuit do not lose their vitality in the other.”

Based on this reasoning, the Superior Court vacated the trial court’s decision to disclose the un-redacted documents to plaintiff’s counsel and remanded the matter for further proceedings consistent with its decision. The decision gave the trial court permission, in its discretion, to permit the defendant to provide context for its privilege claims ex parte, and included a statement that the plaintiff “has no right to participate in in camera review.”

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