

PENNSYLVANIA SUPERIOR COURT HOLDS THAT A COURT CANNOT COMPEL PRODUCTION OF ALLEGEDLY PRIVILEGED MATERIALS FOR "ATTORNEYS' EYES ONLY"

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U.S. Appellate Alert

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Last week, the Superior Court of Pennsylvania issued a decision that strengthens the work-product and attorney-client privileges in Pennsylvania. In *CLL Academy, Inc. v. Academy House Council*,¹ the Superior Court vacated a lower court's order and held that a party could not be required to turn over potentially privileged documents for "attorneys' eyes only" in a discovery dispute over the applicability of the privileges.

The owner of a parking garage brought this action against owners of condominium units above the garage, condominium council members and others. During discovery in the Court of Common Pleas of Philadelphia County, the parking garage owner sought documents from the condominium defendants. Those defendants asserted that the documents contained privileged communications, including mental impressions and legal advice related to an earlier lawsuit between the parties. They produced redacted copies of the documents and a privilege log, and the garage owner filed a motion to compel in which it disputed certain assertions of work-product and attorney-client privileges.

The discovery master conducted an *in camera* review of unredacted copies of the documents. He then recommended certain redactions that, in some instances, differed from the redactions that the condominium defendants had made. The trial court adopted the discovery master's recommendations and ordered the condominium defendants to produce the documents with only the redactions that the master had recommended. The condominium defendants sought reconsideration of that order and asked to provide additional context behind the internal communications at issue and the strategy being discussed in the documents. The garage owner maintained that its counsel needed to see the unredacted documents to argue its position regarding the propriety of the redactions. The trial court granted reconsideration, in part, and ordered the condominium defendants to produce to the garage owner's counsel, on an "attorneys' eyes only" basis, the documents without the redactions that the discovery master had rejected.

The condominium defendants sought appellate review of this collateral order, and the Superior Court ultimately vacated the order, in relevant part. The Superior Court noted that the application of the work-product doctrine and attorney-client privilege involves questions of law over which it exercises a *de novo* standard of review and plenary scope of review. The court also reiterated that the attorney-client privilege does not end when the representation ends, and it quickly disposed of any suggestion that attorney-client privileged communications made in relation to one lawsuit would lose their protection in another suit.

The Superior Court agreed with the condominium defendants that the order to produce the unredacted documents for “attorneys’ eyes only” was “contradictory to the underlying policy behind the privileges, which is to prevent disclosure to the other side.” Instead, the court said, the privilege log should be the primary source for determining whether work-product or attorney-client privileges apply, and when the log does not lend itself to meaningful analysis, *in camera* review is available. The Superior Court found no authority for the proposition that a party’s counsel is entitled to see unredacted documents that are subject to claims of privilege and were given *in camera* review, as doing so would destroy their confidentiality.

The court went on to explain that the “attorneys’ eyes only” designation is appropriate for situations involving confidential business information or trade secrets; however, the disclosure of such competitively-sensitive information to attorneys, who are not in a position to use it to obtain a competitive advantage, is different from the disclosure of an attorney’s mental impressions and strategies to opposing counsel in litigation. The Superior Court therefore rejected the “attorneys’ eyes only” procedure for disputes involving work-product or attorney-client privileges. This case underscores the importance of these privileges, as well as the value of an immediate appeal of collateral orders to prevent the disclosure of potentially privileged material — a procedure that is available in Pennsylvania’s courts but not in federal courts.²

FOOTNOTES

¹ 2020 PA Super 89, -- A.3d -- (Apr. 6, 2020).

² Compare *Commonwealth v. Harris*, 32 A.3d 243 (Pa. 2011) (holding that orders overruling claims of privilege and requiring disclosure are immediately appealable in Pennsylvania courts) with *Mohawk Indus. v. Carpenter*, 558 U.S. 100 (2009) (holding that, in federal court, disclosure orders involving the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine).

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