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IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 5 WAP 2018

GEORGE R. BOUSAMRA, M.D.,

Appellee,

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.

Appellants.

BRIEF FOR *AMICI CURIAE*, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, NFIB SMALL BUSINESS LEGAL CENTER, AND PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM

Appeal from the Opinion and Order of the Superior Court dated July 19, 2017, Affirming the Order Dated October 6, 2015 of the Court of Common Pleas of Allegheny County, Civil Division, at No. GD 12-003929

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

RULES OF COURT

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States, represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues. ATRA is concerned that if the Superior Court's decision is upheld, ATRA members who believe they have settled antitrust, consumer, securities, and other class actions after years of expensive litigation will find themselves subject to copycat lawsuits brought by state governments.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owner, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Pennsylvania Coalition for Civil Justice Reform is a statewide, bipartisan organization representing business, health care and other perspectives. The coalition is dedicated to improving Pennsylvania's civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), no person or entity other than the *amici curiae*, its members or counsel (i) paid in whole or in part for the preparation of the *amici curiae* brief or (ii) authored in whole or in part the amici curiae brief.

ARGUMENT

The lower court rulings in this case represent an antiquated view of lawyering that is neither consistent with modern business practices nor many recent court rulings around the country. In today's day and age, a privileged document must not lose its protections merely because a general counsel, or other lawyer for a company, shares that document with non-lawyers responsible for working with the company to navigate a multi-dimensional legal issue. This case is merely one example of when businesses, both large and small, engage with the media on legal matters, particularly when coverage of the matter can impact their legal interests or the public's interest. In other cases, courts have found that it serves the interests of justice to extend the attorney-client privilege and work product doctrine so that businesses can properly integrate the lawyering and communications aspects of high-profile litigation.

It has been nearly three decades since the Supreme Court of the United States recognized that modern litigation often requires lawyers to engage with the media. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) ("An attorney's duties do not begin inside the courtroom door" and include "the court of public opinion."). After several high profile legal matters in the 1990s, an "entire industry of legal public relations consultants" developed to help lawyers handle the media. Anita Chabria, *Litigation PR Gets a Boost in Time of Corporate Scandal*, PR Week, Nov.

25, 2002, at 3. Courts have found that the ability of lawyers to perform the "fundamental client functions" of protecting their interests in the media "would be undermined seriously if lawyers were not able to engage in frank discussions" with their communications consultants. *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm (B) Grand Jury Witness*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003). "[T]here simply is no practical way for [these discussions to occur] if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions." *Id*. at 330-331.

Here, Excela Health interacted with a communications firm that specialized in legal issue and crisis management within its industry in order to assist Excela with the public announcement of a legal matter. Excela's General Counsel shared a legal memorandum from his outside counsel only with individuals at the communications firm who had been part of a control group with Excela's executive team and outside counsel for managing the legal matter. Excela explained the purpose of this arrangement was to ensure proper vetting of legal concerns about whether and how to make a public announcement of its investigation. The General Counsel stated that it was important to share this legal memorandum with the communications firm in order to achieve this goal.

As this brief explains, this otherwise privileged memorandum must not lose its protection under the attorney-client privilege or work product doctrine simply because it was shared with a communications firm. *See Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002). The variables this case presents, including the fact that the company retained the communications firm, the general counsel shared the information, and what the specific responses from the communications firm were to this memorandum are not determinative. *Amici* respectfully urge the Court to reverse the ruling below and establish clear guidelines allowing lawyers to include communications professionals in privileged internal discussions when advancing and protecting an entity's legal interests.

I. Responsibilities of Lawyers Have Evolved to Include Advancing and Protecting the Legal Rights of Its Employer or Client in the Media

The lower courts' view of lawyering that, even in high-profile cases, lawyers do not "make decisions regarding communications with the public" and communications firms "would not in any way assist counsel" is anachronistic to a past era. In 1908, the American Bar Association wrote the first ethical guidelines against extrajudicial public statements under the belief that they interfered with the "gentlemanly" practice of law. *See* Catherine Cupp Theisen, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. Kan. L. Rev. 837, 840 (1996).

In the 1960s, this non-engagement policy started to thaw, as two events exposed the impact that media can have on a legal matter. The Warren Report

strongly denounced the wide availability in the media of significant details of President Kennedy's assassination, stating that had Lee Harvey Oswald survived, it would have been unlikely that he could have received a fair trial. *See* REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 238-40 (noting the extensive media coverage, which divulged evidence and included statements that might not have been admissible at trial, endangered Oswald's constitutional right to a trial by an impartial jury). Around the same time, the Supreme Court overturned the murder conviction of Dr. Sheppard (who later became the subject of the movie "The Fugitive") because the media created significant public prejudice against the defendant. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966).

In response to these events, the American Bar Association formed the Advisory Committee on Fair Trial and Free Press to promulgate new ABA rules on trial publicity. *See generally* ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1966). The Committee's report led to the adoption of ABA's Model Code of Professional Responsibility, Disciplinary Rule 7-107, in 1969. *See* Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1133-34 (1996). The rule, which was adopted in most states, said that, in civil actions, an attorney could make extrajudicial statements, but only if quoting from public records. MODEL CODE OF PROFESSIONAL

RESPONSIBILITY DR 7-107(g). The rule still prohibited lawyers from making any statement that related to evidence, the character or credibility of a witness or party, opinions as to the merits of a claim or defense, or any other matter that was "reasonably likely to interfere with a fair trial of the action." *Id.*

In the 1970s, courts began invalidating these rules as too restrictive on free speech. *See, e.g.*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975). In *Bauer*, the United States Court of Appeals for the Seventh Circuit found that this so-called "no-comment" rule deprived litigants of their First Amendment rights. *Id.* "Only those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." *Id.* at 259. The ABA tried to accommodate *Bauer* by adopting Model Rule of Professional Conduct 3.6 in 1978, which authorized sanctions for attorney speech that produced a "substantial likelihood of materially prejudicing an adjudicative proceeding" and prohibited attorneys from discussing information likely to be inadmissible at trial. *See* Gregg, 43 UCLA L. REV. at 1336.

The U.S. Supreme Court ruled on the propriety of extrajudicial attorney statements in the seminal 1991 case *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, a Nevada attorney held a press conference hours after his client was indicted on criminal charges. *See id*. at 1033. He determined that unless some of the weaknesses in the State's case were made public, "a potential jury venire

would be poisoned by repetition in the press of information being released by the police and prosecutors." *Id*. at 1042. He "sought only to counter publicity already deemed prejudicial." *Id*. The Nevada Bar, nonetheless, found the attorney in violation of a disciplinary rule prohibiting the dissemination of information that has a "substantial likelihood of materially prejudicing an adjudicative proceeding," and issued a reprimand. *Id*. at 1033-34. The Supreme Court struck down the rule. Justice Kennedy, delivering a portion of the opinion, stated that lawyers have a right to engage with the media on a client's behalf to seek a just legal result:

> An attorney's duties do not begin inside the courtroom door. . . . Just as an attorney may recommend a plea bargain or civil settlement to avoid adverse consequences of a possible loss after a trial, so too an attorney may take reasonable steps to defend a client's reputation . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Id. at 1043.

In 1994, the ABA revised Model Code Rule 3.6 to add a "right of reply" so that lawyers could respond to adverse publicity without fear of sanctions. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) ("[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."). The ABA also acknowledged that representing a client may extend beyond legal issues "to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES

OF PROFESSIONAL CONDUCT Rule 2.1. Thus, the ABA rules now recognize that a lawyer acts within his or her professional responsibility when engaging the media in an effort to advance and protect the administration of justice.

II. Today, Businesses Must Regularly Engage with the Media in Order to Protect Their Legal Interests in High-Profile Legal Matters

Since the 1990s, creative and aggressive lawyers have been using the media, particularly against businesses, to increase the stakes of legal matters and pressure them to settle claims for business, not legal reasons. *See* John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance New Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 89 (2002) (observing that lawyers often "attempt to generate public sympathy and apply pressure" on civil defendants in an effort to drive the defendants to settle cases). These lawyers believe that adverse coverage of an issue or public crisis can define the way people view a business and its culpability, regardless of the actual merits of the legal claims. *Id.*

Well-known lawyer John Coale explained this multi-dimensional approach to litigation: "We take these cases, such as tobacco back in 1994, and then put together a three-pronged attack, legal, media, and political. We attacked on these three fronts for five years until they folded and settled." John Coale, *The Public Policy Implications of Lawsuits Against Unpopular Defendants: Guns, Tobacco, Alcohol and What Else*, Address Before The Federalist Society on Law and Public Policy Studies (Nov. 11, 1999) (transcript on file). In cases against the HMO industry later

in the 1990s, Mississippi lawyer Dickie Scruggs explained a similar settlement strategy: "In the past, nobody has communicated directly with investors about the vulnerability of their money. . . . If HMO investors are smart, they'll lean on their companies to see if we can work something out." David Segal, *HMOs Latest to Grapple with Threat of Investor-Scaring Mega-Verdicts*, WASH. POST, Nov. 12, 1999, at A1 (quoting Aetna CEO Richard L. Huber: "In one day, more than $10 billion in American savings was vaporized just by the bark of the wolf.").

In a case targeting an international company, attorney Mikal Watts also said he purposefully worked the court of public opinion to support his litigation: "I was feeding a lot of information to European and U.S. papers. . . . It was part of my strategy to affect the stock price, which I was very successful at." Monica Langley, *Courtroom Triage: Bayer, Pressed to Settle a Flood of Suits Over Drug, Fights Back*, Wall St. J., May 3, 2004, at A1 (quoting Mr. Watts); *see also* Steven B. Hantler, *Trial By Newswire*, LITIG. MGMT., Summer 2003, at 16 (quoting a trial lawyer from a published report as saying, "A lot of what we discussed was how to talk about the [issue] to the general public. This is a war that has lots of fronts."). Since then, the 24-hour news cycle and "unprecedented speed and reach" of the Internet has "created a powerful platform for plaintiff law firms, activist groups, and others to recruit plaintiffs and influence" a business's tolerance for a lawsuit. Karen

Doyne, *Litigation PR Vital to Winning in Court of Public Opinion*, PR WEEK, Mar. 22, 2004.

Today's lawyers, therefore, have become highly attuned to the nexus between media coverage, business pressures, and legal outcomes. They have found that the reaction of key stakeholder, including customers, employees, and investors, to adverse media reports about a case, can unduly influence claims, defenses, motions, and settlement options. *See* Harlan Loeb, *In Long Run CEO's Drive to Win Suits Can Hurt Firms*, CRAIN'S CHI. BUS., Oct. 16, 2000, at 11 ("It is critical, for example, to understand the dimensions of a regular proceeding or pending case that might be troubling to investors and consumers"). While lawyers often want to pursue justice, businesses regularly make business decisions about their legal matters, sometimes regardless of the merits of a case. It is the rare company that refuses to buckle to such intense pressure to vindicate themselves in court. *See*, *e.g.*, *United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645 (5th Cir. 2017) (prevailing on appeal after a $663 million verdict and years of Plaintiff's sustained media campaign).

In a pair of well-researched and insightful law review articles, University of Miami School of Law Professor Michele DeStefano Beardslee reported on dozens of interviews with general counsels and other attorneys about how they manage the interplay between media and legal outcomes. *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of*

Corporate Attorneys, 22 Geo. J. of Legal Ethics 1259 (2009); Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 Geo. J. of Legal Ethics 1119 (2010).

The study "painted a picture that is inconsistent with the conventional depiction of the lawyer's role," which as indicated above was the basis for the lower courts' rulings in this case. DeStefano Beardslee, *Installment Two* at 1124. "Most of the interviewees in the PR Study believe that the way that a legal issue is spun in the media can significantly impact whether a civil lawsuit is filed, what charges or claims, if any, are brought against the corporate client." *Id.* "The court of public opinion is perhaps as important as a court of law to the resolution of legal controversies." *Id*. at 1133. "Therefore, corporate lawyers interact regularly with PR people on PR issues – well before a legal issue turns into a crisis. . . . The lawyers, internal communication specialists, and external PR executives work together to craft the right positioning." *Id.* at 1124. She concluded that, today, "managing legal PR is a legitimate and fundamental component of corporate legal service." *Id.*

Some scholars have even suggested that attorneys could face malpractice suits for not advocating in the media if not doing so puts the client at a negative legal position. *See* John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance New Coverage of Their Clients*, 7 COMM. L. & POL'Y 77 (2002).

III. The Court Should Join with Other Courts and Extend the Attorney Client Privilege and Work Product Doctrine to Allow Companies to Integrate Legal and Communications Functions When Needed

Given the realities of practicing law in high-profile cases, extending the attorney-client privilege and the work product doctrine to those who provide litigation communications services is appropriate and beneficial. The Court should institutionalize in Pennsylvania the right of businesses and their general counsels to prepare for and respond to legal issues in the media in order to reduce the influence of extrajudicial statements and outside pressures on the pursuit of justice. Doing so would remove one of the largest obstacles businesses face in deciding whether to retain litigation communications experts: the fear, as realized here, of inadvertently waiving privilege over legal documents and having the legal team's thought processes and work product provided to opposing counsel.

A body of case law has developed over the past twenty years addressing the very issue before this Court. *See* Steven B. Hantler, Victor E. Schwartz & Philip S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 CommLaw Conspectus 7 (2004). Courts have recognized to varying degrees that lawyers must be able to provide their communications experts with confidential information so they can provide advice in anticipation of potential media pitfalls, likely defenses and settlement strategies. *See, e.g.*, *In re Grand Jury Subpoenas,* 265 F. Supp. 2d 321 (S.D.N.Y. 2003); *In re Copper Market*

Antitrust Litigation, 200 F.R.D. 213 (S.D.N.Y. 2001); *Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002). Attorneys are not trained in public relations, and public communications in high-profile, pressurized situations is a specialized skill, just like accounting, science and other areas where lawyers are permitted to consult confidentially with experts. *See* Rebecca Flass, *Could What You Spin Be Used Against You?*, PR WEEK, Oct. 4, 1999, at 9 ("Litigation PR is not for the kids. The hazards are too great. It can re-do a company or end a company.").

Further, communications professionals need legal input so they do not say the wrong thing, unwittingly create legal exposure, or curtail a company's legal options. For example, if not worded properly a press statement expressing sympathy for a victim could be misconstrued as an admission of fault, or a legal defense could be precluded by an explanation of the incident in question if not reviewed by someone familiar with how the litigation may play out. Also, public companies are bound by securities law in how and when they discuss issues material to a company's financial standing, and statements about a business's products and procedures, even in the midst of a crisis, can be held to strict advertising standards. *See Nike, Inc. v. Kasky*, 27 Cal. 4th 939 (2002). Therefore, certain disclosures between lawyers and communications counsel are needed to protect the business's legal interests.

The lower court, in finding that Excela waived privilege over its attorney's legal memorandum, created unnecessary barriers to the attorney client privilege and

work product doctrines when engaging an outside communications firm for a legal matter. First, Excela clearly engaged the communications team to assist in a legal matter; this was a legal announcement, not a public relations campaign. Thus, the Court should not distinguish between emails where the communications firm assisted in providing legal advice from those where it was acting on the attorneys' legal advice. In *Upjohn Co. v. United States*, the U.S. Supreme Court held that the attorney client privilege exists to protect both the giving of information to lawyers and to ensure proper legal advice is given to "those who can act on it." 449 U.S. 383, 390 (1981). The work-product doctrine also is not waived because an otherwise protected document is shared with a legal communications consultant. *See Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y 2000). If the document helps ensure the communications firm acts in concert with the client's legal interests "it should be protected because there is a strong nexus between the consultation and the legal advice provided." Michele Stefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. Rev. 727, 786 (2009).

Second, there should be no distinction between in-house and outside communications professionals. The functional equivalent doctrine, which Pennsylvania and most other states follow, applies the attorney-client privilege to in-house and outside personnel alike, so long as the outside person is functionally

equivalent to a business's employee for that particular assignment. *See In re Grand Jury Investigation*, 918 F. 2d 374, 386 n. 20 (3d Cir. 1990) (The functional equivalent test protects communications to third-party consultants who "possess[] a commonality of interest with the client."); *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (There is no reason to distinguish between persons on a corporation's payroll and a consultant.). This approach is consistent with today's leaner, specialized workforce. *See* Edna Selan Epstein, THE ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE 269 (5th ed. 2007) ("Corporations increasingly conduct their business not merely through regular employees but also through a variety of independent contractors retained for specific purposes."). In many companies, the in-house communications specialists focus on traditional marketing or investor relations, making it important to retain outside legal communications specialists to protect a company's legal interests in crisis or legal situation.

In *Federal Trade Commission v. GlaxoSmithKline*, the court considered the very question at issue here. *See* 294 F.3d 141 (D.C. Cir. 2002). It concluded that the attorney-client privilege and work product doctrine extend to documents the company "shared with its public relations and government affairs consultants." *Id.* at 147. The court reasoned that these individuals were under the company's confidentiality agreements and "needed to provide input to the legal department and/or receive the advice and strategies formulated by counsel." *Id*. How much of

their time they spent on this matter was not relevant, so long as they "acted as part of a team with full-time employees regarding their particular assignments and . . . were completely intertwined with [its] litigation and legal strategies." *Id.* at 148; *see also Copper Market*, 200 F.R.D. at 219 (observing the company's "internal resources were insufficient to cover the task"); *A.H. v. Evenflo Co.*, No. 10-cv-02435-RBJKMT, 2012 WL 1957302 (The privilege is not destroyed "if the third party is the attorney's or client's agent or possesses commonality of interest with the client.").

Third, it should be of no consequence whether an outside or in-house counsel retains the firm or shares the otherwise privileged document. It is equally the role of the general counsel, as in this case, to take the professional counsel of his or her legal and communications teams to provide the company with the best, multi-dimensional legal strategy. *Cf. United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (explaining it is immaterial who hired the consultant or if the consultant had previously provided services). "Acting as the corporation's gatekeeper to the media, general counsels are uniquely situated to help ensure that corporate statements disseminated to the public (especially those around legal controversies) are accurate and truthful." DeStafano Beardslee, *Installment Two* at 1165. "Corporate attorneys should assume this role not only for the public good and dignity of the profession but also because a corporation can be tried in the court of public opinion and this

'trial' proceeds with almost no procedural safeguards and may not administer a fair resolution." *Id.* at 1175; *see also* Sara Helene Duggin, *The Pivotal Role of General Counsels in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989, 992 (2007).

This Court has cautioned against the type of "surgical separation" the lower court engaged in here when denying the attorney-client and work product privileges. *Gillard v. AIG Ins. Co*, 609 Pa. 65, 87 (2011). As the Court stated, these are "broad privilege[s]" that must not require "the disclosure of communications which likely would not exist (at least in their present form) but for the participants' understanding that the interchange was private." *Id.* The purpose of these privileges are "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. Holding that Excela waived its privileges over the legal memorandum at issue here undermines this notion of justice.

In this case, Excela engaged a communications firm to assist with a legal matter. This was not a public relations campaign. The General Counsel concluded that how Excela released the plaintiffs' names in the media could have legal implications for the company. It was his judgment that the privileged document here was valuable for the communications firm to have in order to develop and execute the company's legal strategy. "Overall issues of fairness weigh in favor of"

upholding the privilege; "[d]epriving a party of information in an otherwise privileged document is not prejudicial." *Copper Market*, 200 F.R.D. at 223.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request the Court to reverse the Order of the Superior Court and establish clear guidelines allowing lawyers to include communications professionals in privileged internal discussions when needed to advance and protect an entity's legal interests.

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CERTIFICATION OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I hereby certify that this Brief of *Amicus Curiae* complies with the word count limits of Pennsylvania Rule of Appellate Procedure 531(b)(3).

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PROOF OF SERVICE

Pursuant to Pennsylvania Rule of Appellate Procedure 121(d), I hereby certify that two (2) copies of this Brief of *Amicus Curiae* were served upon the following counsel of record via both electronic mail and U.S. Mail, first class, postage pre-paid, on this 12th day of March, 2018.

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