Attorney Must Testify About Talks With Experts
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Jennifer Batchelor, The Legal Intelligencer
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An attorney may be compelled to testify at deposition or trial about conversations that took place between the attorney and expert witnesses interviewed on behalf of a client, the Pennsylvania Superior Court has ruled.

In Re: Estate of Catherine Wood, a three-judge panel led by Phyllis W. Beck determined that such information was not protected by the attorney-client privilege, the work-product doctrine or a lawyer's duty of confidentiality to clients.

According to Beck's opinion, the question arose when two daughters engaged in litigation over their mother's estate. Their mother, Catherine Wood, died in June 1995.

The court noted the presence of two wills: one dated February 1987 and providing for equal division of all assets between the two daughters, and one dated May 1991, which indicated that Wood's entire estate would go to one of her daughters, with the other receiving nothing.

Throughout 1990 to early 1995, Beck wrote, Wood suffered from physical and mental difficulties. Attorney Joseph M. Cosgrove represented Wood during guardianship proceedings instituted in 1993, the opinion states. Ultimately, Cosgrove was named temporary guardian of Wood, and one of Wood's daughters became temporary guardian of Wood's estate.

The same daughter -- Bonita Walsh-Sukus -- was the beneficiary of the 1991 will, Beck said. That will was offered for probate three months after Wood's death.

Wood's other daughter, Patricia Zabroski, challenged the 1991 will. In the lawsuit, she alleged that undue influence by her sister prompted the will and asked the court to reinstate the 1987 will, Beck wrote. Zabroski, the opinion states, insisted that her mother suffered from a weakened intellect and did not possess the testamentary capacity to execute the 1991 will.

At trial, Zabroski presented the testimony of Dr. Mark Novitsky, a psychiatrist and neurologist who had examined Wood in 1994. The doctor, the opinion states, testified that on the basis of his review of Wood's medical records, Wood had suffered from a weakened intellect, was susceptible to influence, and was without testamentary capacity at the time she signed the 1991 will.

Walsh-Sukus presented her own expert testimony, Beck reported. Among the witnesses, Walsh-Sukus called two physicians who had treated Wood in 1991.

According to the opinion, the trial court found for Walsh-Sukus. But in the appeal, a Superior Court panel reversed the judgment and granted Zabroski a new trial because her sister had not provided to her the expert reports of the aforementioned physicians.

In the remand, Beck wrote, Walsh-Sukus sought to depose Cosgrove to find out what the attorney had learned from Novitsky and others interviewed during the guardianship proceedings. Cosgrove refused, and the trial judge granted a motion to compel, entering an order stating that Cosgrove would have to testify either at deposition or trial.

However, the trial judge limited the required testimony, the opinion states. The permissible areas of inquiry, Beck said, included the following: "The names and addresses of all physicians with whom Cosgrove met and discussed Wood's medical treatment or conditions, the date upon which said meeting occurred, the substance of any and all discussions held at each appointment with each physician, the number of reports obtained from each physician and copies of all such reports; and the identity (names, addresses and telephone numbers) of any person, other than physicians with whom Cosgrove met, having knowledge of any discoverable matter with reference

to any claim or defense of any party to the action."

The court also said in a footnote that Walsh-Sukus apparently intended to utilize the requested information to impeach Novitsky at retrial.

In the appeal, Cosgrove asserted the attorney-client privilege, the work-product doctrine and the duty of confidentiality, Beck wrote.

The Superior Court panel began its determination by examining attorney-client privilege.

"The relevant provision," the opinion states, "directs [that] '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.'"

A number of requirements must be satisfied in order to trigger the protections of that rule, Beck said.

"In this case," the judge wrote, "none of the information sought by Walsh-Sukus constitutes confidential communications made by Wood to Cosgrove in the context of legal discussion. Rather, the information requested consists of comments made and reports given by Wood's physicians to Cosgrove. The attorney-client privilege simply does not apply to such statements or documents."

The panel next turned to work product. Set out in the Rules of Civil Procedure, the opinion states, the attorney work-product doctrine appears as an exception to general discovery rules.

The doctrine provides that, subject to certain exceptions, a party may obtain discovery of any matter available pursuant to Rule 4003.1, even if it was prepared in anticipation of litigation or trial by or for a party's attorney. But such discovery may 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, Beck wrote.

And with respect to the representative of a party who was not the party's attorney, the opinion states, discovery may 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.

"None of the items listed in the trial court's order appear to involve attorney Cosgrove's own 'conclusions, opinions, memoranda, notes or summaries, legal research or legal theories,'" Beck said, "with the exception, perhaps, of that portion of the order calling for disclosure of the 'substance of all discussions/meetings.'"

But the opinion states that Walsh-Sukus requested only information that the physicians stated in the form of verbal or written communications, or in a formal report. Accordingly, the Superior Court instructed the trial court on remand to limit its interpretation of the order to the language set out in Walsh-Sukus' brief.

The court further provided that "in the event Cosgrove is uncertain regarding what is discoverable under the order, we instruct the trial judge to review the material in camera to determine if protection under the work product doctrine is warranted."

On the subject of an attorney's duty of confidentiality, Beck said that while the explanatory note to Rule of Professional Conduct 1.6 states that it "'applies not merely to matters communicated in confidence by the client but also to all information relating to the representation,'" the rules are not substantive law.

"Rather," the judge wrote, "they address the bases for disciplinary proceedings against an attorney. They do not govern or affect judicial application of either the attorney-client or work

product privilege.

"Because none of the reasons proffered by Cosgrove afford him the opportunity to shield the information sought, we find that the trial court correctly entered the order at issue in this case."

Arthur Piccone and Jennifer Rogers Littzi of Kingston, Pa.-based Hourigan, Kluger & Quinn were listed as counsel for Walsh-Sukus. Cosgrove was listed as representing himself on appeal.

Judges Correale F. Stevens and Peter Paul Olszewski rounded out the panel.