IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 145 MAP 2014

REDACTED,

Appellant,

v.

REDACTED,

Appellees.

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF APPELLEES

Amar D. Sarwal
Wendy E. Ackerman
ASSOCIATION OF CORPORATE COUNSEL
1025 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036-5425
Telephone No.: 202.293.4103
Facsimile No.: 202.293.4701

Counsel for Amicus Curiae Association of Corporate Counsel

Burt M. Rublin, Pa I.D. #32444
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599
Telephone No.: 215.864.8116
Facsimile No.: 215.864.9783

Counsel for Amicus Curiae Association of Corporate Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

ISSUE ON APPEAL

As stated by this Court, this appeal presents the following issue: "When counsel for a nonprofit corporation believes that charitable assets are being unlawfully diverted, may counsel disclose this information to the Attorney General's office, as *parens patriae* for the public to whom the charity and its counsel owe a fiduciary duty?" Order Granting Petition for Permission to Appeal (Dec. 30, 2014).

INTRODUCTION AND STATEMENT OF INTEREST

It is beyond dispute that one of the most critical relationships in our society is that of client and attorney. This appeal presents an issue that goes to the core of that relationship: the ability of clients to trust their attorneys. *See Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 585, 506 A.2d 872, 878 (1986) ("[t]he heart of the attorney-client relationship is trust and confidence"). Specifically, this appeal raises the question whether counsel for non-profit corporations organized for charitable purposes may reveal information about their clients without their clients' consent to the Office of the Pennsylvania Attorney General ("AG"). The Commonwealth Court wisely answered this question in the negative and this Court should do the same.

To protect the trust and confidence that is the cornerstone of the attorney-client relationship, Pennsylvania's professional ethics rules flatly prohibit counsel from revealing information about their clients except in narrow circumstances not present in this case. Those rules apply to counsel for non-profit organizations as fully as they do to counsel for for-profit organizations. Permitting attorneys for non-profit organizations – whether organized for charitable or other public purposes – to disclose information about their clients at will would violate the fundamental duty of loyalty owed by counsel, thereby eroding the attorney-client relationship that is integral to the administration of justice in our society.

The Association of Corporate Counsel ("ACC") and its three chapters serving members in Pennsylvania, namely, the Greater Philadelphia/Delaware Valley Chapter, the Central Pennsylvania Chapter and the Western Pennsylvania Chapter, have a strong interest in this case.[1]

[1] The Greater Philadelphia/Delaware Valley Chapter serves the Greater Philadelphia region, the Lehigh Valley, Southern New Jersey and Delaware. The chapter represents the professional and business interests of over 1,400 members, who practice in the legal departments of more than 400 organizations. The Central Pennsylvania Chapter's members work for entities throughout the Central Pennsylvania region, including the cities of Harrisburg, Lancaster and York. The Western Pennsylvania Chapter primarily serves the Pittsburgh region. Through a wide range of chapter-sponsored events, these three chapters provide programming, professional development and networking opportunities for in-house attorneys located in Pennsylvania.

ACC itself is a non-profit corporation that represents the interests of the in-house counsel bar. It has over 35,000 members who are in-house lawyers employed by more than 10,000 organizations throughout the United States and in other countries. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include non-profits, public and private corporations, public entities, partnerships, trusts, and other types of organizations. ACC has over 1,600 members located in the Commonwealth, almost all of whom are represented by one of ACC's three chapters in the region. In addition, of special relevance to this case, ACC has a Nonprofit Organizations Committee whose mission is to act as the voice for the practice of law in the non-profit sector. This Committee represents a broad range of non-profit organizations, including charitable organizations, public interest entities, educational institutions, and professional associations (like ACC itself).

For more than 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role and importance of in-house counsel. In particular, ACC has worked hard to ensure confidentiality of communications between organizations and their in-house counsel. Toward that end, ACC has

appeared as *amicus curiae* to support the duty of confidentiality in many cases in the federal and state courts, including the Pennsylvania courts.

In ACC's view, the Commonwealth Court correctly refused to grant counsel for non-profit corporations a special exemption from the general confidentiality rules and obligations governing attorneys in this Commonwealth. Just like for-profit corporations, non-profit corporations need to be able to trust and rely on their attorneys in order to comply with the array of complex laws and regulations governing their actions. Permitting counsel for non-profit corporations to unilaterally expose their clients' confidences and secrets to the government would significantly undermine the attorney-client relationship and jeopardize the ability of counsel – both in-house and outside – to provide the legal advice necessary to guide their clients' behavior and promote compliance with the law.

Accordingly, ACC respectfully urges this Court to affirm the decision below and make clear that counsel for non-profit corporations are subject to the same non-disclosure rules and obligations as counsel for other organizational clients in the Commonwealth.

ARGUMENT

I. THE COMMONWEALTH COURT CORRECTLY HELD THAT COUNSEL FOR NON-PROFIT CORPORATIONS WHO BELIEVE CHARITABLE ASSETS ARE BEING UNLAWFULLY DIVERTED ARE PROHIBITED FROM REVEALING THAT INFORMATION TO THE AG

A. The Duty of Confidentiality Precludes Counsel From Disclosing Information Relating To Their Clients Except In The Narrow Circumstances Set Forth In Rule 1.6 Of The Pennsylvania Rules Of Professional Conduct

It is well settled that "[t]he attorney/client relationship is one that is highly valued by society and protected in the law. The relationship between lawyer and client is as sensitive a relationship as can exist and demands absolute confidence on the part of the client in order to thrive." *Nesselrotte v. Allegheny Energy, Inc.*, 2008 WL 2858401, at *1 (W.D. Pa. Jul. 22, 2008) (quoting *Klages v. Sperry Corp.*, Civ. A. No. 83–3295, 1984 WL 49135 (E.D. Pa. 1984)). Toward that end, this Court has recognized that attorneys owe a fiduciary duty to their client, which includes a duty of "undivided loyalty." *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 252, 602 A.2d 1277, 1283 (1992); *accord Com. v. Tedford*, 598 Pa. 639, 728, 960 A.2d 1, 54 (2008).

The duty of loyalty owed by attorneys to their clients is reflected in numerous provisions of the professional ethics rules governing the conduct of attorneys in the Commonwealth, *i.e.*, the Pennsylvania Rules of

Professional Conduct. Thus, those Rules specifically require that attorneys act zealously in support of their clients' interests. *See* Pa. R. Prof. Conduct 1.3, cmt 1 (a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"). In addition, they instruct that attorneys should avoid conflicts of interest. *See* Pa. R. Prof. Conduct 1.7, cmt 1 (lawyers have a duty to avoid conflicts of interest that "arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests"). And the duty of loyalty provides the basis for the fundamental obligation to maintain client confidentiality contained in Rules 1.6 and 1.13.

1. Rule 1.6 of the Pennsylvania Rules of Professional Conduct. Rule 1.6 of the Pennsylvania Rules of Professional Conduct imposes a general mandate on attorneys to maintain the confidentiality of client information. *See* Pa. R. Prof. Conduct 1.6(a) ("[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent"); *see also* Pa. R. Prof. Conduct 1.6, cmt 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.").

The duty of lawyer-client confidentiality "is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics." Pa. R. Prof. Conduct 1.6 cmt 3. Importantly, however, the scope of Rule 1.6 is broader than the attorney-client privilege, applying "not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Pa. R. Prof. Conduct 1.6, cmt 3.

Although "the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to *limited* exceptions." Pa. R. Prof. Conduct 1.6, cmt 7 (emphasis added). The main exceptions permit disclosure when necessary "to prevent reasonably certain death or substantial bodily harm" (Rule 1.6(c)(1)); "to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another" (Rule 1.6(c)(2)); and "to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services

are being or had been used." (Rule 1.6(c)(3)).[2] None of the exceptions contain an exception based on a fiduciary relationship.

As the comments to Rule 1.6 make clear, the rule of lawyer-client confidentiality serves important public policy interests. Specifically, the rule promotes attorney fealty to clients that is necessary to ensure effective legal representation and compliance with the law. Thus, Rule 1.6 "contributes to the trust that is the hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the[ir] lawyer even as to embarrassing or legally damaging subject matter." Pa. R. Prof. Conduct 1.6, cmt 2. Attorneys "need[] this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." *Id*.; *see also* Pa. R. Prof. Conduct Preamble (8) ("So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more

[2] The Rule provides a few more exceptions for permissive disclosure, none of which is relevant here. *See, e.g.,* Rule 1.6(c)(4) (" to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client"); Rule 1.6(c)(5) ("to secure legal advice about the lawyer's compliance with these Rules"); and Rule 1.6(c)(1) ("to effectuate the sale of a law practice").

likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private").[3]

2. Rule 1.13 of the Pennsylvania Rules of Professional Conduct. Rule 1.13 makes clear that counsel for organizations are subject to the same obligation of confidentiality as counsel for individuals. Thus, the Rule provides that lawyers "employed or retained by an organization represent[] the organization" as the "client," as opposed to its constituents. Pa. R. Prof. Conduct 1.13(a). As a result, attorneys retained by an organization owe the *organization* a duty of confidentiality under Rule 1.6. *See* Pa. R. Prof.

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[3] The attorney-client privilege serves similar purposes. Thus, the privilege is deemed necessary to enable clients to obtain effective legal representation. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation") (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); *In re Search Warrant B–21778*, 513 Pa. 429, 441, 521 A.2d 422, 428 (1987) (same); *National Railroad Passenger Corp. v. Fowler*, 788 A.2d 1053, 1064 (Pa. Cmwlth. 2001) (same). The privilege also serves the public interest by helping "corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392; *see also Sandra T.E. v. S. Berwyn Sch. Dist. 100,* 600 F.3d 612, 621 (7th Cir. 2009) ("Confidential legal advising promotes the public interest 'by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.'") (citation omitted); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir.1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.").

Conduct 1.13, cmt 2 ("lawyer[s] may not disclose . . . information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6").

The duty of confidentiality governing counsel for organizational clients in the Commonwealth is significantly stricter than that set forth in the ABA Model Rules of Professional Conduct. The Pennsylvania Rules of Professional Conduct and the ABA Model Rules both enable an attorney to take measures, including reporting-up-the-ladder, when he or she knows that the organization may be substantially injured by an action of a constituent that is in violation of law. *See* Pa. R. Prof. Conduct 1.13(b); ABA Model R. Prof. Conduct 1.13(b). Where those measures fail, the ABA allows for permissive disclosure as a last resort. *See* ABA Model R. Prof. Conduct 1.13(c) (providing that if other measures fail, "the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization").

By contrast, Pennsylvania Rule 1.13 does not authorize any additional disclosure not permitted by Rule 1.6. To the contrary, the Rule warns that "[a]ny measures taken shall be designed to minimize disruption of the

organization and *the risk of revealing information relating to the representation to persons outside the organization*." Pa. R. Prof. Conduct 1.13(b) (emphasis added). "If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may *resign* in accordance with Rule 1.16." Pa. R. Prof. Conduct 1.13(c) (emphasis added). Thus, where other measures fail, only resignation – not disclosure – is permissible under Pennsylvania Rule 1.13.

This Court's refusal to adopt the ABA's Rule 1.13(c) permissive disclosure option underscores the importance of the duty of confidentiality for counsel of organizations operating in this Commonwealth. Unless one of the narrow exceptions set forth in Rule 1.6 is met, counsel for organizations – whether public, private, for-profit or non-profit – are required by the duties of loyalty and confidentiality to maintain the confidences and secrets of their clients.

B. There Is No "Fiduciary Exception" To The Pennsylvania Rules Of Professional Conduct

As explained above, Rules 1.6 and 1.13 of the Pennsylvania Rules of Professional Conduct require lawyers to maintain the confidentiality of information obtained from their clients – including organizational clients –

except in certain limited circumstances. Under the AG's position, however, counsel for non-profit organizations may reveal their clients' confidences and secrets even if none of those narrow exceptions is met.

Specifically, the AG contends that counsel for non-profit corporations organized for charitable purposes may freely disclose information relating to their clients to the AG under the so-called "fiduciary exception," which obliges fiduciaries "to provide complete and accurate information to beneficiaries concerning the management of the trust, 'including the opinions of counsel.'" Brief of Appellant at 18-19 (citing *Follansbee v. Gerlach*, 56 Pa.D.&C.4th 483, 486-88, 491 (Allegheny C.P. 2002)). According to the AG, because the "the beneficiary of a charitable trust is the general public" and because the AG represents the public at large as *parens patriae*, counsel for non-profit corporations are "permitted, if not obligated, to disclose [client] information to the Attorney General." Brief of Appellant at 19, 22. The AG's position is contrary to both law and policy.

1. From a technical legal perspective, a "fiduciary" exception would not authorize counsel's disclosure of confidential information to the AG. Even if a fiduciary relationship exists between non-profit corporations and the AG (and we are highly skeptical that it does), the fiduciary exception would not authorize *counsel* to disclose confidential information to the AG

(or any other third party). The fiduciary exception is an exception to the attorney-client privilege. It has no bearing on the broader professional ethics rules prohibiting counsel from disclosing their client's confidences. As explained, those carefully calibrated ethics rules flatly forbid attorneys for organizational clients from disclosing information relating to their clients (including, but not limited to, privileged communications) except in narrow circumstances not present here. They do not allow lawyers to reveal confidential client information merely because they think it is in the public interest to do so. Importantly, and alarmingly, the AG's position does not specify or limit the circumstances under which counsel for non-profit organizations would be permitted, much less obligated, to reveal client information.

Nor can the AG justify the disclosure at issue in this case on the theory that she is the "client" for purposes of the professional ethics rules. Under Rule 1.13(a), it is clear that when attorneys are retained by organizations, the organization alone is the client for purposes of the ethics rules. Accordingly, even if a *non-profit corporation* owes a fiduciary duty to the AG, its *lawyers* owe a fiduciary duty to the *organization*, not the AG.[4]

[4] We note that in *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 218-24 (Pa. 2014), this Court found that a state commission, as "a constituent part of the Commonwealth," was not entitled to invoke privilege

Indeed, treating the AG as the "real client" of attorneys for non-profit corporations would lead to a number of absurd results. The professional ethics rules impose numerous duties on attorneys toward their clients, including the duty to act zealously, the duty to avoid conflicts of interest and the duty to keep clients informed. If the AG were considered a "client" of counsel for non-profit corporations, counsel would owe all of these obligations to the AG as well as their corporate client.

Accordingly, the AG's "fiduciary exception" argument directly contravenes the Pennsylvania professional ethics rules, which expressly prohibit counsel for any organizational client – whether non-profit or for-profit – from revealing their clients' secrets and confidences to any third party except in the narrow circumstances set forth in Rule 1.6. If and to the extent the Pennsylvania Bar and this Court believe that a more expansive disclosure rule is justified, they can and must address that issue through the normal rule amendment process.

2. *The interests of public policy weigh against the establishment of a "fiduciary" exception applicable to counsel for non-profits.* Allowing

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in order to avoid disclosure to the AG of communications with its lawyers. That case has no bearing here, because non-profit corporations are not part of the government and thus cannot in any way be said to be the same client as the AG.

attorneys for non-profit corporations to reveal information about their clients without their clients' consent would severely undermine the important public interests served by the Pennsylvania professional ethics rules. To begin with, enabling counsel to unilaterally disclose information to the AG would significantly impair the trust and confidence between non-profit organizations and their counsel that is the foundation of the attorney-client relationship. Requiring lawyers to serve the AG as well as their non-profit client would obviously weaken the allegiance and ties that attorneys do and should have to their first and primary client.

Imbuing counsel with the discretion to reveal information about their clients to the AG would also hinder the ability of non-profit corporations to obtain effective legal representation. As explained earlier, a strict duty of confidentiality is necessary to encourage full and frank communication between clients and their lawyers. If clients know that their attorneys may freely disclose information gleaned during the representation to the AG, they will clearly be reluctant to disclose the facts necessary for their counsel to provide informed legal advice. As a result, the benefits of the attorney-client relationship will be greatly impaired. *Cf. Gillard v. AIG Ins. Co.*, 609 Pa. 65, 86, 15 A.3d 44, 57 (2011) ("we believe it would be imprudent to establish a general rule to 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 to remain private").

Last, but not least, the AG's position would harm the public interest by reducing the ability of non-profit corporations to comply with the law. A rigorous duty of confidentiality is necessary to ensure that non-profit organizations are able to obtain informed advice on the laws and regulations governing their behavior. As the U.S. Supreme Court has explained, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,'… particularly since compliance with the law in this area is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (citation omitted). Allowing counsel to reveal confidential information about their non-profit clients would not only "make[] it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id*.

Notably, the ability of attorneys to provide effective legal assistance and promote organizational compliance with the law is just as important for non-profit organizations as for-profit entities. Non-profit corporations may be organized for myriad public purposes and include charitable

organizations, religious institutions, public interest groups, educational institutions, hospitals, humanitarian organizations, labor unions and professional associations, etc. Like for-profit corporations, non-profit organizations are subject to an ever-increasing array of legal requirements, including criminal, tax, labor, financial, health care, environmental, trade and other laws and regulations. Many of these regulations are extremely complex and present difficult compliance challenges. In order to comply with this panoply of regulations, employees of non-profit organizations must be able to communicate fully and candidly with counsel. Thus, acceptance of the AG's position would damage the ability of non-profit corporations to engage in the open communication necessary to comply the law, thereby harming society at large.

Treating the AG as a client of attorneys for non-profit entities is particularly unwarranted given the AG's frequent adversarial posture vis-à-vis non-profit corporations. If the AG is the client, counsel would not only be permitted, but obligated, to disclose confidential information relating to his or her representation of a non-profit corporation. That would create significant risk for non-profit organizations if the AG has a political agenda that runs against the purpose of the non-profit. In addition, if the AG is treated as the client, an in-house lawyer may be required to recuse herself in

any action against the organization by the AG's Office. In fact, it would be functionally impossible for in-house lawyers at non-profit corporations to manage any litigation with or investigation by the AG's Office.

To be sure, the AG possesses *parens patriae* authority to investigate the administration of non-profit organizations. It can and must, however, obtain relevant information through the normal discovery channels. The AG is not and should not be permitted to go behind the back of organizations – whether for-profit or non-profit – and obtain information from counsel in breach of the strict duty of confidentiality imposed by the professional ethics rules. Clearly, this is not the letter or spirit of the Pennsylvania Rules of Professional Conduct.

In sum, there is no basis in law or policy for this Court to create an exception to the confidentiality rules governing counsel for non-profit corporations. Nothing in the professional ethics rules allows for such an exception, and treating the AG as the "real client in interest" would place counsel in an untenable position. Determining when and how their ethical duties apply vis-à-vis the AG would be extremely difficult and attorneys would understandably fear that breach of these duties could hurt their career or even result in liability. Requiring counsel to operate in this uncertain state of affairs would be fundamentally unfair and severely diminish the ability of

attorneys for non-profit organizations to protect their clients' interests with the same vigor and loyalty expected of all lawyers.

CONCLUSION

For all the foregoing reasons, ACC respectfully urges this Court to affirm the decision below.

Respectfully submitted,

April 29, 2015

/s/ Burt M. Rublin

Burt M. Rublin
Pa I.D. #32444
BALLARD SPAHR LLP
1735 Market Street
Philadelphia, Pennsylvania 19103-7599
Telephone No.: 215.864.8116
Facsimile No.: 215.864.9783
rublin@ballardspahr.com

Counsel for Amicus Curiae
Association of Corporate Counsel

Amar D. Sarwal
Wendy E. Ackerman
Association of Corporate Counsel
1025 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036-5425
Telephone No.: 202.293.4103
Facsimile No.: 202.293.4701
sarwal@acc.com
w.ackerman@acc.com

Counsel for Amicus Curiae
Association of Corporate Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App.P. 2135(d), I hereby certify that the foregoing Brief complies with the 14,000 word limit prescribed by Pa.R.App.P. 2135(a)(1).

/s/ Burt M. Rublin
Burt M. Rublin