

RECENT DEVELOPMENTS IN ATTORNEY-CLIENT PRIVILEGE AND WORK-  
PRODUCT ISSUES FOR IN-HOUSE AND OUTSIDE CORPORATE COUNSEL

Presented by:

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*Member*

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**PRACTICE AREAS:**

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[Telephone Consumer Protection Act \(TCPA\)](#)

**STATE ADMISSIONS:**

Pennsylvania

West Virginia

**COURT ADMISSIONS:**

U.S. District Court for the  
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U.S. District Court for the Middle  
District of Pennsylvania

U.S. District Court for the  
Southern District of West Virginia

U.S. District Court for the Central  
District of Illinois

U.S. Court of Appeals for the First  
Circuit

U.S. Court of Appeals for the  
Third Circuit

U.S. Court of Appeals for the  
Federal Circuit

Supreme Court of the United  
States

**EDUCATION:**

J.D., University of Pittsburgh  
School of Law, 1995

B.A., Yale University, 1992



## Kevin P. Allen

### MEMBER

Kevin Allen concentrates his practice on commercial litigation with an emphasis on contractual disputes and business torts, as well as First Amendment and defamation disputes. In commercial cases, he represents a wide range of clients in contractual disputes, shareholder and securities cases, and matters involving alleged business torts. In defamation cases, Kevin's experience includes the defense of a senior corporate executive accused of slander, in addition to the prosecution of a libel case on behalf of an individual against a foreign media company and a local individual. He frequently appears before state and federal courts in western Pennsylvania. In addition to his first-chair bench and jury trial experience, Kevin has argued appellate cases before the Third Circuit, the Federal Circuit, and Pennsylvania's Supreme, Superior, and Commonwealth Courts.

In addition to his litigation practice, Kevin also counsels clients from various industries when legal questions intersect with clients' business issues. Kevin has experience working with clients who are manufacturers, suppliers, and distributors and in industries that include energy, telecommunications and Internet, beauty care, food manufacturing, financial, insurance, funereal, marketing and branding, and hospitality.

Kevin is also the author of the treatise, *The Attorney-Client Privilege and Work-Product Doctrine in Pennsylvania*, now in its fifth edition. Kevin has served as a court-appointed special discovery master to address privilege and work-product issues. He also advises clients and in-house legal departments on best practices for establishing and preserving the attorney-client privilege.

## REPRESENTATIVE MATTERS

### COMMERCIAL LITIGATION

- Represented Pittsburgh-based manufacturer in injunction proceedings where court blocked competitor's \$58 million acquisition of manufacturer's distributor. The Pennsylvania Superior Court affirmed the preliminary injunction. *York Group v. Yorktowne Caskets, Inc.*, 924 A.2d. 1234 (Pa. Super. Ct. 2007).
- Represented Pittsburgh-based paint manufacturer in three-week federal trial involving multi-million dollar claims of breach of contract, defamation and breach of covenant not to compete. Court declared the manufacturer the "prevailing

party" and awarded more than \$900,000 for reimbursement of attorneys' fees and costs. *PPG Industries, Inc. v. Zurawin, C.A.* No. 95-2078 (W.D. Pa.). The United States Court of Appeals for the Third Circuit affirmed, 52 Fed. Appx. 570, 2002 WL 31289285 (3d Cir. 2002).

- Represented landowner in successful defense against proposed condemnation of private property, essentially nullifying on constitutional grounds a centuries-old Pennsylvania statute. *In re O'Reilly*, 100 A.3d 689 (Pa. Commw. Ct. 2014), *appeal denied* (Pa. 2015).
- Obtained, from the Allegheny County Court of Common Pleas, summary judgment and a damage award of more than \$4,600,000 on behalf of an industrial corporation deprived of contractually-guaranteed royalty payments.
- Represents energy company in cases involving alleged violations of Telephone Consumer Protection Act.
- Represented leading life insurance company in numerous federal and state actions involving claims of fraudulent sales practices.
- Represented defendant in precedent-setting case establishing that no right to a jury trial exists under Pennsylvania's Consumer Protection Law. See *Ihnat v. Povar*, 26 PLW 979 (2003).

## DEFAMATION-FIRST AMENDMENT

- Represents both plaintiffs and defendants in defamation actions and also advises subjects of and publishers of alleged defamatory statements regarding their rights and options concerning those statements.
- Represented publicly held corporation in a federal court action and appeal involving alleged defamatory statement by a senior executive of the corporation.
- Represented a plaintiff in a state court defamation action that drew national and international attention where defendants were a prominent media entity and an individual defendant.
- Obtained a jury verdict in favor of a schoolteacher who was defamed in the workplace.
- Obtained a jury verdict in favor of a forensic investigative firm accused of malicious prosecution following the firm's investigation of a suspicious fire.

## SECURITIES AND SHAREHOLDER LITIGATION

- Represented corporate officer and director in actions where minority shareholders claimed damages from officer's multi-million dollar sale of stock. See *Pitterich v. Styling Technology Corp.*, 148 P.L.J. 244 (2000) (dismissing claims based on defendant's alleged conduct as a corporate director or officer).
- Obtained, in a related proceeding, a complete defense verdict in a court-mandated federal arbitration where claimant sought in excess of one million dollars in damages from selling shareholder.

- Obtained summary dismissal of federal securities and RICO claims directed against former bank president.
- Represented corporate officer and director in action by debt security holder which alleged that officer/director abused office for personal gain. Obtained summary dismissal of action in federal court. The U.S. Court of Appeals for the Third Circuit affirmed that decision, holding that there are no fiduciary duties owed to debt security holders.

## COMMUNITY INVOLVEMENT

- Pittsburgh History & Landmarks Foundation, Board of Trustees – Vice-Chair
- Yale Alumni Club of Pittsburgh, Board of Governors

## AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers*

## NEWS AND INSIGHTS

### PUBLICATIONS

#### *Attorney-Client Privilege*

- "[PA. Court Muddles Privilege And Work-Product Waters.](#)" Law360, July 10, 2019.
- "[No Work-Product Protection for Notes Written by Investigator Hired by Counsel.](#)" *The Legal Intelligencer*, December 3, 2018.
- "[In Camera Review of Privileged Documents: Is It Both Mandatory and Immediately Appealable?](#)" *The Legal Intelligencer*, February 8, 2018.
- "Federal Court Endorses 'Functional Equivalent' Doctrine for Purpose of Pennsylvania's Attorney-Client Privilege," ACBA's *Lawyers Journal*, May 12, 2017.
- "Carefully Guard the Confidentiality of Privileged Communications," PBI Now, March 21, 2017.
- *The Attorney-Client Privilege and Work-Product Doctrine in Pennsylvania*, Fifth Edition (PBI Press 2016).
- "[In-house Attorney-Client Privilege and 'Lawyerly Things.'](#)" *Corporate Counsel*, January 2015.
- "[Insurance Counsel and the Attorney-Client Privilege: Who is the Client?](#)" *The Legal Intelligencer*, February 28, 2013; *Eckert Seamans' Legal Update*, Spring 2013.
- "In re Teleglobe: The Attorney-Client Privilege and In-House Counsel," Washington Legal Foundation, November 30, 2007.
- "White Collar Crime Policy on Legal Fee Payment Implicates Civil Liberties," Washington Legal Foundation, June 8, 2007.
- "The Attorney-Client Privilege and the 'Complete Lawyer': More than Mere Legal Advice," Law.com, March 6, 2007.
- "Attorney-Client Privilege: Everyday Rules from a High-Profile Case," Law.com, October 3, 2006.

## Defamation

- "The Right to Remain Anonymous – Should Anonymous Speech Be Protected in the Age of the Internet," *Pennsylvania Lawyer*, July/August 2011 issue.
- "Delimiting Defamation: Pennsylvania Supreme Court Protects Reputation From Freedom of Speech Defense," *Philadelphia Lawyer*, Summer 2008.
- "Is the 9th Circuit Reining in the CDA?" Law.com, September 11, 2007.
- "Federal Law Protects Internet Companies from Blame for Content," Law.com, July 3, 2007.
- "Multiple Hits, Single Publication," Law.com, June 15, 2007.
- "The Oddity and Odyssey of 'Presumed Damages' in Defamation Actions under Pennsylvania Law," *42 Duq. Law Review* 495 (Spring 2004).

## Miscellaneous

- "INSIGHT: Third Circuit Continues to Rein in Runaway TCPA Claims," co-author, *Bloomberg Law*, July 3, 2018.
- "[Intangible Concrete- Spokeo, Inc. v. Robins and Constitutional Standing.](#)" co-author, *Internet Telephony*, September 6, 2016.
- "[Rules of the Game: Tortious Interference With Contract.](#)" *The Legal Intelligencer*, October 30, 2013.
- "Contractual Fee Shifting Clauses – How to Determine 'Prevailing Party' Status," *Pennsylvania Bar Assoc. Quarterly*, LXXIV, No. 4 at 178 (October 2003).

## MEDIA COVERAGE

- "Special Master Could Play Big role in Trump Lawyer Doc Review," *Corporate on Bloomberg Law*, April 2018.
- "Paterno Ruling Highlights Broad Pa. Work Product Protections," *Law360*, July 28, 2017.
- "First Amendment Violation? Facebook's Arguments on Alleged TCPA Violations May Fall Flat, Say Experts," *Communications Daily*, November 7, 2016.
- "Pennsylvania court rules against owner of landlocked plot seeking road across neighbor's land," *FoxBusiness.com*, August 29, 2014.
- "Court Eyes Discovery of Attorney-Expert Communication," *The Legal Intelligencer*, May 28, 2013.

## SPEAKING ENGAGEMENTS

- "Attorney-Client Privilege and Related Ethics Issues for Corporate Counsel – A Case Study," presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2018.
- "Attorney/Client Privilege," presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2017.
- "Attorney-Client Privilege and Work Product Issues for Corporate Counsel," presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2016.

- "The Attorney-Client Privilege and the Work-Product Doctrine in Pennsylvania," Pennsylvania Bar Institute 21<sup>st</sup> Annual Employment Law Institute, April 2015.
- "Preparing a Witness to Testify," Pennsylvania Bar Institute, March 30, 2015.
- "Pennsylvania Attorney-Client Privilege and Work-Product Doctrine," Pennsylvania Bar Institute Continuing Legal Education, December 2014.
- "Attorney-Client Privilege and Work-Product Issues for Corporate Counsel and Clients," presented at Eckert Seamans' Continuing Legal Education Seminar, August 2014.
- "Tortious Interference with Contract: Walking or Crossing the Line Between Vigorous Competition and Unfair Business Conduct," CLE seminar for in-house counsel presented by *The Legal Intelligencer*, June 2012; presenter at the Philadelphia Bar Institute 16th Annual Business Lawyers Institute, November 2010; Seminars for in-house counsel and corporate executives in Philadelphia, May 2010, and in Pittsburgh, October 2009.

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# Attorney-Client Privilege, Work-Product Doctrine, and Related Ethical Issues for Corporate Counsel – Three Recent Landmark Pennsylvania Cases

Presented by:

Kevin P. Allen, Esq.

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August 8, 2019

## Three Recent Landmark Decisions



1. Newsuan v. Republic Services, 2019 PA Super 196, \_\_\_ A.3d \_\_\_, 2019 WL 2528793 (June 20, 2019)
2. BouSamra v. Excela Health, 5 WAP 2018, \_\_\_ A.3d \_\_\_, 2019 WL 2509384 (Pa. July 19, 2017)
3. Pittsburgh History & Landmarks Foundation v. Ziegler, 200 A.3d 58 (Pa. January 23, 2019)



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## Three Recent Landmark Decisions



All beg the question:

Who is your client?



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## Restatement (Third) Law Governing Lawyers



### Elements

- a communication
- made between privileged persons
- in confidence
- for the purpose of obtaining or providing legal assistance for the client

Restatement § 68; In re Grand Jury, 705 F.3d 133 (3d Cir. 2012)



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## Newsuan v. Republic Services



Who is your client?





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## Newsuan v. Republic Services



- Republic Services counsel interviews:
  - 9 current 
  - 3 former 
    - Privileged?
- Republic Services counsel took notes of those interviews
  - Protected?



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## Newsuan v. Republic Services



### Trial Court

- Republic Services claims that all 12 witnesses agreed to have Republic Services counsel represent them in their individual capacities
- Thus, Republic Services argues that privilege should apply, and no *ex parte* contacts should be allowed



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## Newsuan v. Republic Services



### Trial Court

- Trial court was not happy:
  - No attorney-client relationship with witnesses
  - No privilege
  - No work-product protection
  - Produce notes



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## Newsuan v. Republic Services



### Appeal – Superior Court

- Interviews by corporate counsel of former employees 
- Communications by opposing counsel with former employees 
- Communications by opposing counsel with current employees 
- Work-product protection not dependent on attorney-client relationship



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## BouSamra v. Excelsa Health



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# BouSamra v. Excelsa Health



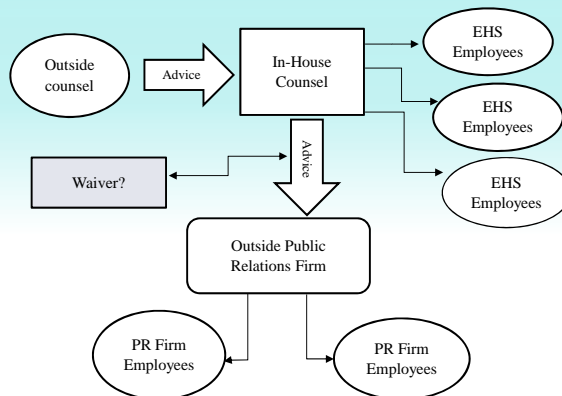
Who is your client?



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# BouSamra v. Excelsa Health



- Privilege?
- Work Product?



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## Restatement (Third) Law Governing Lawyers



### Elements

- a communication
- made between privileged persons
- in confidence
- for the purpose of obtaining or providing legal assistance for the client

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## “Privileged Person”



- Client
- Lawyer
- Agents of either who facilitate communications
- Agents of lawyer who facilitate the representation

Restatement § 70



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## BouSamra v. Excelsa Health



- Was PR Firm a “privileged person”?
- If not, then attorney-client privilege waived



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## BouSamra v. Excelsa Health



- Was third-party's involvement “necessary for the lawyer to provide legal advice to the client”?
- If so, privileged
- If not, waiver



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# Functional Equivalent Doctrine



Courts may treat independent contractors as employees of a corporate/entity client for purposes of the attorney-client privilege if the particular contractor acted as the “functional equivalent” of an employee.

Endeavor Energy v. Gatto & Reitz, 2017 WL 1190499 (W.D. Pa. Mar. 31, 2017).



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Endeavor Energy v. Gatto & Reitz, 2017 WL 1190499 (W.D. Pa. Mar. 31, 2017)



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## BouSamra v. Excela Health



- In BouSamra, PR firm did not help lawyer in formulating advice. PR firm helped client to *execute* the advice the lawyer had already provided.
  - Therefore, waiver of privilege



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## BouSamra v. Excela Health



- However . . . .
  - Do not forget about the work-product doctrine.



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## Work-Product Doctrine



Pa. R. Civ. P. 4003.3

- Unlike federal rule (26(b)(3)), work-product is generally discoverable in Pennsylvania courts
  - Unless the work product falls into a specifically enumerated exception as set forth in Rule 4003.3



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## Work-Product Doctrine



Rule is “carefully drawn and means exactly what it says.”

- Two types of work-product; differing treatment
  1. Attorney Work-Product
    - Exceptions:
      - Mental impressions
      - Conclusions
      - Opinions
      - Memoranda
      - Notes
      - Summaries
      - Legal research
      - Legal theories



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## Work-Product Doctrine



### 2. Non-Attorney Work-Product

- Exceptions
  - Mental impressions
  - Conclusions
  - Opinions
- Respecting value or merit of a claim or defense, or
- Respecting strategy or tactics



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## BouSamra v. Excela Health



- Work-product doctrine and attorney-client privilege are not the same
- First impression: waiver of work-product is harder to do than waiver of attorney-client privilege
  - Privilege: disclosure to third-party generally is a waiver.
  - Work-Product: disclosure to third-party is not necessarily a waiver



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## BouSamra v. Excela Health



- “Confidentiality is not a cornerstone” principle of the work-product doctrine
- Attorney work-product need be kept confidential only from the adversary



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## BouSamra v. Excela Health



Test:

Did disclosure to a third-party significantly increase the likelihood that an adversary or potential adversary would obtain it?

- Reasonable basis for belief that recipient would keep disclosed material confidential?



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## Pittsburgh History & Landmarks Foundation v. Ziegler



Who is the client?



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## Pittsburgh History & Landmarks Foundation v. Ziegler



- Privilege issues trickier when client is a corporation.
- How about when the litigation involves a derivative claim purportedly advanced on behalf of a corporation by a disgruntled shareholder?
- Really tricky because “both sides profess to represent the corporation.”



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## Pittsburgh History & Landmarks Foundation v. Ziegler



### Derivative Actions and ALI Principles

#### Proper Sequence

- Derivative plaintiff seeks to bring claim on behalf of entity;
- Entity has opportunity to investigate claim and decide for itself if it has merit;
  - Appoint committee
  - Hire independent counsel
  - Issue report
- Court should defer to decision of company, unless something wrong with the process.



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## Pittsburgh History & Landmarks Foundation v. Ziegler



### Derivative Actions and ALI Principles

- Derivative plaintiffs seek discovery of privileged communications between corporation and counsel.
- Invoke Garner fiduciary exception.



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## Pittsburgh History & Landmarks Foundation v. Ziegler



Garner v. Wolfenbarger, 430 F.2d 1093 (5<sup>th</sup> Cir. 1970)

- “Good cause” fiduciary exception to attorney-client privilege in derivative litigation
- Nine-factor test that could give derivative plaintiff access to company’s privilege communications



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## Pittsburgh History & Landmarks Foundation v. Ziegler



- Supreme Court declines to adopt Garner
- Garner “eliminates the necessary predictability of the privilege.”
- Declines to adopt § 85 of Restatement (Third) of Law Governing Lawyers



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## Pittsburgh History & Landmarks Foundation v. Ziegler



- Derivative plaintiffs entitled to formal “related legal opinions” if the corporation relies on advice of counsel as grounds for not pursuing claim
- Otherwise derivative plaintiffs are not entitled to invade corporation’s or investigating committee’s privilege



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## Questions?



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## Pa. Court Muddies Privilege And Work-Product Waters

By **Kevin Allen** (July 10, 2019, 1:50 PM EDT)

On June 20, 2019, the Pennsylvania Superior Court issued a decision in *Newsuan v. Republic Services Inc.*[1] It would perhaps have been better if the court had not done so. The *Newsuan* opinion is significantly flawed with respect to Pennsylvania's attorney-client privilege and work-product doctrine.

*Newsuan* suffered an injury while working at a Republic Services work site. She sued Republic Services and others for negligence. Sixteen people, who were, at that time, Republic Services employees, witnessed the incident. However, by the time of the discovery dispute at issue in the litigation, seven of the 16 eyewitnesses were no longer Republic Services employees.



Kevin Allen

Republic Services retained counsel to defend Republic Services against *Newsuan's* claim. The corporate counsel conducted interviews of all nine current and three of the former employees/witnesses. The corporate counsel took notes at those interviews.

In discovery, *Newsuan* sought contact information for the witnesses. The corporate counsel resisted that request and informed the court that the 12 (nine current and three former) employees had agreed to be represented by the corporate counsel, thus barring any ex parte interviews of them by *Newsuan's* counsel.

The trial court did not respond favorably to that tactic. The trial court held that, due to alleged conflicts of interest, the corporate counsel had not effectively established attorney-client relationships with the 12 witnesses. The court therefore rejected all claims of privilege and work product. The court ordered the production of all of the corporate counsel's interview notes and other communications with the witnesses and precluded the corporate counsel from representing the witnesses moving forward absent the execution of written conflict waivers after detailed explanations of any potential conflicts.

As an initial matter, *Newsuan* is a valuable reminder and cautionary tale for corporate counsel regarding potential privilege pitfalls with regard to conducting interviews of current and former corporate employees. The key for corporate counsel is to remember that your client (generally) is not that woman or man sitting in front of you during the interview. Your client is the corporate entity.

Therefore, counsel must carefully consider the very real possibility that, because you are talking to a nonclient, the interview may well not be privileged. Now, if that woman is the current CEO of your corporate client, or even if that man is an employed corporate security guard, the conversation you are having may in fact be privileged — as to the corporation — because you as counsel cannot talk to a corporation in an effort to provide legal advice; you can only talk to human beings, such as the corporation's officers, directors and employees. However, in that circumstance, you, as counsel, generally need to let that CEO, or that security guard, know that you are the corporation's lawyer, and that you are not her or his personal attorney.[2]

The risks are even greater when interviewing former employees, even former officers and directors. They really are not your clients. The corporation is your client, and that retired CEO sitting with you on the veranda of her beachfront house, who, though retired, is more than happy to talk to you about the dispute at hand, is not your client, not unless you, with the consent of the corporation and

the former CEO, agree that you can jointly represent both.

Newsuan has value in reminding corporate counsel of those general principles.

Unfortunately, while providing a reminder for counsel to be cognizant of the existence of those issues, Newsuan does not then provide a reliable road map for navigating through those risks. To the contrary, Newsuan could cause counsel to veer far off course, to the detriment of counsel and clients alike.

In broad strokes, the Superior Court in Newsuan held that:

- The trial court was correct that, due to potential conflicts, the corporate counsel had not effectively established attorney-client relationships with the 12 current and former employees;
- Nonetheless, contrary to the trial court's decision, the interviews of the 12 current and former employees were protected by the attorney-client relationship between the corporate counsel and Republic Services; and
- The work-product doctrine protected the corporate counsel's notes of the interviews.

The details of the Superior Court's opinion are where serious problems and errors reside. The problematic passages and holdings of Newsuan are as follows:

#### **"At the Behest of Counsel"**

Newsuan regrettably perpetuates an error that the Superior Court originally made in 2012 in *Custom Designs & Manufacturing Co. v. Sherwin-Williams Co.*[3] There, the court suggested that communications to counsel were only privileged if "made at the behest of counsel." This is palpably wrong. Many clients or potential clients — both sophisticated and unsophisticated — reach out to lawyers, without any prior prodding from those lawyers, to share information and relay facts in an effort to obtain legal advice. Such communications are not made "at the behest of counsel," but they surely are privileged communications.

Newsuan doubles down on the loose and unfortunate "behest of counsel" language from *Custom Designs*, by quoting it and then by stating that the proponent of the attorney-client privilege has the "burden to produce evidence that the [communication] in question had been prepared at the request of counsel ..." The Superior Court erred in making that statement in *Custom Designs* and now the risk is that Newsuan may serve to cement that error.

#### **Former Employees Are Within the Corporate Privilege**

Recall that the Newsuan panel held that, because the corporate counsel had not established separate attorney-client relationships with the witnesses, the only viable privilege was held by the corporation, Republic Services. In a remarkable passage of its opinion, the Newsuan panel, without citation to any Pennsylvania authority, held that the corporation's attorney-client privilege not only protected the counsel's communications with Republic Services' current employees, but also protected the counsel's communications with the witnesses who were no longer Republic Services employees.[4] Why did the court reach that conclusion? Because both sets of employees' communications about work site conditions would be "helpful" to corporate counsel in "providing legal advice" to Republic Services.

Lots of interviews of witnesses by attorneys are "helpful" to those attorneys in providing advice to their clients. That does not make those communications privileged.

A former employee of a corporate client is no longer a constituent part of that corporate entity.[5] The Pennsylvania state appellate courts have never extended a corporation's privilege to cover communications between corporate counsel and a former employee, and the weight of authority from other jurisdictions does not extend a corporation's attorney-client privilege to corporate counsel's communications with former employees of the corporate client.[6]

Newsuan's extension of the privilege to "helpful" communications between corporate lawyers and nonemployees of a corporate client seems casual, perhaps even unintentional. The court took that step in a footnote and without fanfare or any discernible recognition that it was endorsing a new and significant extension of Pennsylvania's attorney-client privilege.

Somehow the court also concluded that the communications at issue were more worthy of privilege protection through the corporation's privilege because the corporate counsel informed the witnesses that "Republic Services would provide [the witnesses] with counsel during the litigation." That purported logic — an offer to provide individual representation to a witness serves as evidence of the applicability of a corporation's attorney-client privilege to a communication — is difficult to follow.

### **Blanket Permission to Conduct Ex Parte Interviews of Current Employees**

After concluding that the privilege protected the corporate counsel's prior communications with the 12 current and former employees, the Superior Court sweepingly authorized Newsuan's attorneys to conduct ex parte interviews not just of the former employees, but also of current Republic Services employees. That holding entirely failed to mention or otherwise account for long-standing authorities, including the Rules of Professional Conduct, that place fairly stringent limitations of ex parte interviews of current employees of a represented corporate party.[7]

### **Attorney-Client Relationship as Predicate for Work-Product Protection**

The trial court erroneously rejected work-product protection to the corporate counsel's interview notes because the interviews occurred in the absence of an attorney-client relationship, thus wrongly suggesting that the existence of the latter is a condition precedent for the application of the former. Counsel's notes of an interview with any witness are work product, even in the absence of an attorney-client relationship with that witness.[8]

On appeal, the Superior Court lent some credence to the premise of the trial court's ruling by stating that, because the Superior Court had concluded that the attorney-client privilege applied, the trial court's rejection of work-product protection had to fall. While the Newsuan panel acknowledged, in a footnote, that the attorney-client privilege is not a predicate for application of the work-product doctrine, the opinion would have provided greater clarity if the Superior Court had simply stated that the trial court was simply wrong for conditioning the availability of the work-product doctrine on the existence of an attorney-client relationship.

### **Conclusion**

The attorney-client privilege and the work-product doctrine are fundamental but surprisingly difficult and treacherous concepts for attorneys and clients. Misapprehensions and misunderstandings by clients, lawyers and even judges are not unusual. Newsuan unfortunately will contribute to, not reduce, confusion, uncertainty and risks with respect to the attorney-client privilege and the work-product doctrine in Pennsylvania.

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[1] 2019 PA Super 196.

[2] See *Commonwealth v. Shultz*, 133 A.3d 294, 324-25 (Pa. Super. 2016).

[3] 39 A.3d 372 (Pa. Super. 2012).

[4] 2019 PA Super 196 at 13 n.6 ("we deem the relevant decisional law equally applicable to

communications from both current and former employees”).

[5] See 1 Epstein, Edna Selan, *The Attorney-Client Privilege and the Work-Product Doctrine* at 168 (5th Ed. 2007)(“A former employee is . . . no longer an agent of the corporation and occupies a position no different than that of any stranger.”) (“Epstein”); see also *Pritts v. Wendy’s of Greater Pittsburgh, Inc.*, 37 Pa. D.&C. 4th 158, 164 (Allegh. Cty. 1998)(Wettick, J.).

[6] See 1 Rice, Paul R., *Attorney-Client Privilege in the United States* § 4:18 (2018)(“When considered from either a utilitarian or theoretical perspective, it is difficult to rationally argue that the privilege should apply to communications between corporate counsel and past employees of the corporation.”); 1 Epstein at 168 (“no privilege should extend to a former employee with respect to communications with corporate counsel after the termination of the employment”); Restatement (Third) Law Governing Lawyers § 73, cmt.e (subject to certain exceptions, “persons [must] be agents of the organization at time of communicating” for the privilege to apply.); see also *Pritts*, 37 Pa. D.&C. 4th at 164 (“a person who no longer has any relationship with the organization cannot be considered a client”); but see *In re Flonase Antitrust Litig.*, 723 F. Supp. 2d 761, 764 (E.D. Pa. 2010); *U.S. v. Merck-Medco*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004).

[7] See Pa. R. Prof. C. 4.2, cmt. 7; *Pritts*, 37 Pa. D.&C. 4th at 168-69; see also PA Eth. Op. 90-142 (Dec. 7, 1990)(“Under Rule 4.2, . . . an attorney is prohibited from interviewing a current managerial or any other employee whose actions or omissions . . . may be imputed to the corporation . . . or when an employee’s statement may constitute an admission on the part of the organization.”); accord PA Eth. Op. 2005-200 (Nov. 2005)(same); ABA Formal Op. 91-359 (Mar. 22, 1991)(same).

[8] See Pa. R. Civ. P. 4003.3.