

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :
by Kathleen Kane, Attorney General, :

Plaintiff :

v. :

New Foundations, Inc., a Nonprofit :
Corporation; Firetree, Ltd., a :
Nonprofit Corporation; Orange :
Stones Co., a Nonprofit Corporation; :
Allen E. Ertel, Individually; :
Catherine Ertel, Individually; :
Edward Ertel, Individually; :
Amy Ertel, Individually; and :
William C. Brown, Individually; :
Defendants :

CASE SEALED

No 36 M.D. 2014

Argued: April 9, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI

Filed: April 30, 2014

The Commonwealth of Pennsylvania, acting as *parens patriae*, through its Attorney General, Kathleen G. Kane (Commonwealth) filed a petition for review in the form of a complaint (complaint) against New Foundations, Inc., a nonprofit corporation (New Foundations), Firetree, Ltd., a nonprofit corporation (Firetree), Orange Stones Co., a nonprofit corporation (Orange Stones) (collectively, Corporate Defendants), Allen E. Ertel, Catherine Ertel, Edward Ertel, Amy Ertel, and William Brown (collectively, Individual Defendants), alleging

violations of the Nonprofit Corporation Law of 1988 (Nonprofit Law)¹ and the Solicitation of Funds for Charitable Purposes Act (Charities Act).² The Corporate Defendants filed preliminary objections, in which the Individual Defendants joined, seeking dismissal of the complaint with prejudice. For the reasons that follow, we overrule in part and sustain in part the preliminary objections.

The Commonwealth's complaint alleges that when the Individual Defendants, who serve as officers and/or directors of the Corporate Defendants, unlawfully diverted charitable assets to their personal benefit: (1) they breached their fiduciary duties to the Corporate Defendants under Section 5712 of the Nonprofit Law;³ and (2) the Corporate Defendants violated Section 13(d)⁴ and

¹ 15 Pa. C.S. §§5101–6162.

² Act of December 19, 1990, P.L. 1200, *as amended*, 10 P.S. §§162.1–162.24.

³ Section 5712 of the Nonprofit Law states:

(a) Directors.--A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

(Footnote continued on next page...)

Section 15(a)(1)–(2) and (5)⁵ of the Charities Act because they misrepresented that the proceeds of their solicitations would be used for charitable purposes. Gary A.

(continued...)

(2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person.

(3) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

(b) Effect of actual knowledge.--A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance to be unwarranted.

(c) Officers.--Except as otherwise provided in the bylaws, an officer shall perform his duties as an officer in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. A person who so performs his duties shall not be liable by reason of having been an officer of the corporation.

15 Pa. C.S. §5712.

⁴ Section 13(d) states, “A charitable organization may not misrepresent its purpose or nature or the purpose or beneficiary of a solicitation. A misrepresentation may be accomplished by words or conduct or failure to disclose a material fact.” 10 P.S. §162.13(d).

⁵ Section 15(a) provides, in pertinent part:

(a) General rule.--Regardless of a person’s intent or the lack of injury, the following acts and practices are prohibited in the planning, conduct or execution of any solicitation or charitable sales promotion:

(Footnote continued on next page...)

Shade, a Senior Financial Investigator in the Office of Attorney General (OAG)'s Charitable Trusts and Organizations Section, verified the complaint.⁶

(continued...)

(1) Operating in violation of, or failing to comply with, any of the requirements of this act, regulations of the department or an order of the secretary, or soliciting contributions after registration with the department has expired or has been suspended or revoked or soliciting contributions prior to the solicitation notice and contract having been approved by the department.

(2) Utilizing any unfair or deceptive acts or practices or engaging in any fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

* * *

(5) Misrepresenting or misleading anyone in any manner to believe that the person on whose behalf a solicitation or charitable sales promotion is being conducted is a charitable organization or that the proceeds of such solicitation or charitable sales promotion will be used for charitable purposes when such is not the fact.

10 P.S. §162.15.

⁶ The verification states,

I, Gary A. Shade, Senior Financial Investigator, being duly sworn according to law, hereby state that I am a Senior Financial Investigator with the Office of Attorney General, Charitable Trusts and Organizations Section, that I am authorized to make this verification on behalf of the Office of Attorney General, and the facts in the Attorney General's Complaint are true and correct to the best of my knowledge, information and belief.

Compl., Ex. A.

The complaint identifies as a source of its information a prior Lycoming County complaint, attached to its petition, filed by Maria Casey, former in-house counsel for Firetree, against the Individual Defendants, alleging [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] improprieties and the manner in which Defendants executed them. Ms. Casey attached to her complaint communications with the Defendants, including s she sent to Allen Ertel and William Brown and quarterly reports to Firetree's Board of Directors, in which Ms. Casey documented her concerns [REDACTED]

[REDACTED].

Because they believed that the Commonwealth's complaint was based on information covered by the attorney-client or work-product privilege, Defendants deposed Attorney Heather J. Vance-Rittman, the Deputy Attorney General assigned to this case, before they filed preliminary objections.⁸ Ms. Vance-Rittman testified that the OAG first learned that Firetree may have engaged in misconduct when Ms. Casey's counsel contacted the Attorney General's secretary and requested a conference call with the Attorney General to discuss

⁷ Over a month after Ms. Casey filed her complaint as a matter of public record, the Individual Defendants filed a motion to seal it, which the Lycoming County Court of Common Pleas granted.

⁸ Defendants were granted leave to pursue discovery in furtherance of their preliminary objections.

Firetree's activities. Dep. of Ms. Vance-Rittman, at 27–32; Notice of “conference call with Chris Casey of Dilworth Law” (July 22, 2013).

Ms. Vance-Rittman testified that after the conference call, the Attorney General printed the electronic teleconference appointment,⁹ hand-delivered it to Mark Pacella, the Chief Deputy Attorney General, and directed him to follow up on the information. Dep. of Ms. Vance-Rittman, at 36, 42. No notes were made regarding the Attorney General's or her secretary's discussion with Ms. Casey's counsel, and neither discussed the calls with Ms. Vance-Rittman. *Id.* at 33–34.

Ms. Vance-Rittman further testified that the OAG opened an investigative file and completed an initial report, which noted that the complainant was Firetree's in-house counsel but did not state the complainant's name. *Id.* at 47. In follow up, Ms. Vance-Rittman called Ms. Casey's counsel and requested a copy of all documentation relating to Firetree. *Id.* at 49–52. In response, Ms. Vance-Rittman was provided a memorandum addressed to Ms. Casey's attorney, James Rodgers, Esq., which bore the heading “ATTORNEY CLIENT/WORK PRODUCT” and described in detail the improprieties in which Defendants allegedly engaged. *Id.* at 66–67; Memorandum to James Rodgers, Esq. (June 24, 2013). The memorandum stated that its content was based upon personal

⁹ The appointment states, in pertinent part, “Chris wishes to speak with you about 2 cases which he feels ‘you’ should be aware of. 1) He has a client who is aware of fraudulent activity with-in a nonprofit which she works for. ‘Firetree’ located in Central PA.” Notice of “conference call with Chris Casey of Dilworth Law” (July 22, 2013).

observations but did not disclose its author. Memorandum to James Rodgers, Esq. (June 24, 2013). Attached to the memorandum were eleven sets of documents containing financial records¹⁰ of the Corporate Defendants and other companies owned by the Individual Defendants. *Id.*

Ms. Vance-Rittman also stated that after the OAG opened the file, its financial investigators, Gary Shade and Monique Erickson, pulled and reviewed Firetree's publicly available Form 990 tax returns, as per standard procedure. Dep. of Ms. Vance-Rittman, at 55, 106, 109, 119. Based on the initial investigation,¹¹ Mr. Shade determined that further inquiry was warranted, and he prepared investigative subpoenas for the Corporate Defendants, which Ms. Vance-Rittman reviewed and signed. *Id.* at 67–68, 108, 110.

Ms. Vance-Rittman testified that her only direct contact with Ms. Casey occurred after the Corporate Defendants received the subpoenas, and in her capacity as general counsel, Ms. Casey called Attorney Vance-Rittman to request a two-week extension to respond. *Id.* at 70–72. A few hours later, Ms. Casey called

¹⁰ The financial records contained [REDACTED]

See Memorandum to James Rodgers, Esq. (June 24, 2013).

¹¹ Ms. Vance-Rittman stated that the Form 990s raised concern because they demonstrated that the Corporate Defendants, which are unrelated nonprofit corporations with separate purposes, had numerous overlapping board members and engaged in related-party transactions. Dep. of Ms. Vance-Rittman, at 116, 119.

Ms. Vance-Rittman a second time, indicating that her employment had been terminated and that the Corporate Defendants would be filing *something* in response to the subpoenas, but that the OAG would have to wait to discuss the subpoenas with successor counsel. *Id.* at 76–79.

Subsequently, Mr. Rodgers forwarded a copy of Ms. Casey's Lycoming County complaint to the OAG.¹² Ms. Vance-Rittman testified that it

¹² Mr. Rodgers sent the copy before the Lycoming County record was sealed. A cover letter directed to Attorney Vance-Rittman accompanied the complaint and stated:

As you may know, this Firm represents Maria Casey, the former general counsel of Firetree, Ltd. Ms. Casey has been discharged from that position, and she has filed a civil action in Lycoming County against the officers and directors of Firetree under the Pennsylvania Whistleblower Act. I enclose a copy of the Complaint for your information. As alleged in the complaint, the precipitating cause of her premature dismissal (in advance of the previously determined termination date) was her refusal to sign and file a complaint against the Attorney General seeking to avoid compliance with the subpoenas issued by your office to Firetree and related entities. I understand that such an action has been filed in Commonwealth Court.

Several weeks ago, I spoke to Mark Pacella of your office, who, while not wishing to discuss any particulars of the Firetree matter, acknowledged that one remedy that your office has used in cases of diversion of funds from non-profit organizations is the appointment of a receiver to replace directors and/or officers. Ms. Casey wishes to cooperate fully with your investigation, and to be of service in the event that your office should determine to seek the appointment of a receiver. We are also able to suggest a highly-qualified individual who would be available to serve in that capacity.

Letter from James J. Rodgers to Heather J. Vance-Rittman, "Firetree, Ltd." (Sept. 23, 2013).

was only upon reading Ms. Casey's complaint that she realized Ms. Casey was the complainant. Dep. of Ms. Vance-Rittman, at 88; *see also id.* at 73-74.

During the discovery process, the Corporate Defendants also deposed Ms. Casey. In advance of her deposition, defense counsel provided the Commonwealth copies of Ms. Casey's memorandum and its attachments. At her deposition, defense counsel marked Ms. Casey's complaint and her memorandum¹³ as exhibits and questioned her extensively regarding these documents, although they cautioned her to refrain from divulging any information protected by the attorney-client privilege. Copies of the exhibits were again provided to the Commonwealth following the deposition.

Following discovery, Defendants filed preliminary objections, seeking dismissal of the Commonwealth's complaint because:

(1) it is the product of Ms. Casey's improper disclosure of her former clients' confidential information;

(2) after the improper matter is stricken, the complaint is legally insufficient under Pa. R.C.P. No. 1028(a)(4) and insufficiently specific under Rule 1028(a)(3); and

(3) the complaint contains an improper verification under Pa. R.C.P. No. 1024.

¹³ The copy of the memorandum used at Ms. Casey's deposition was not identical to the one defense counsel previously supplied to the Commonwealth in that the former contained a signature page. Dep. of Ms. Casey, at 60.

If the case is not dismissed, Defendants seek to disqualify the Commonwealth's counsel on the basis that they have been irrevocably tainted by Ms. Casey's improper disclosures.¹⁴

I.

Regarding its first claim, Defendants contend that Ms. Casey violated Pennsylvania Rule of Professional Conduct 1.6 when she disclosed her client's confidential information to the OAG. At the outset we note that Ms. Casey only had one client, Firetree and its Board of Directors, and was under no ethical obligation not to disclose information for the other Corporate Defendants or the Individual Defendants, when those defendants were not acting as employees, officers, or agents of Firetree, so long as the information did not involve Firetree's interests, even though she became aware of it while representing Firetree.

As to her obligations when representing Firetree, Rule 1.6 provides:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

¹⁴ Defendants' supplemental memorandum was not authorized by the briefing schedule this Court issued on January 27, 2014, and Defendants did not otherwise seek leave to file it. As such, it will not be considered.

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

* * *

(3) 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; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client....

* * *

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Pa. R. Prof'l Conduct 1.6(a), 204 Pa. Code §81.4.

Comment 3 to the rule explains that it affords protection greater than the attorney-client privilege, as it "applies not only to matter communicated in confidence by the client but also to all information relating to the representation,

whatever its source.” Pa. Rules of Prof’l Conduct R. 1.6(a) cmt. 3, 204 Pa. Code § 81.4; *see also* Restatement (Third) of the Law Governing Lawyers §59 cmt. b (2000) (explaining that the rule “covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege,” “information acquired by a lawyer in all client-lawyer relationships,” and information acquired while a lawyer is “functioning as inside or outside legal counsel”).

In *Commonwealth of Pennsylvania, Department of General Services v. United States Mineral Products Company*, 809 A.2d 1000 (Pa. Cmwlth. 2002), *rev’d on other grounds*, 898 A.2d 590 (Pa. 2006), we discussed the attorney-client privilege¹⁵ and its importance, stating that:

[t]he attorney-client privilege is intended to foster candid communications between legal counsel and the client so that counsel can provide legal advice based upon the most complete information possible from the client. The historical concern has been that, absent the attorney-client privilege, the client may be reluctant to fully disclose all the facts necessary to obtain informed legal advice if these facts may later be exposed to public scrutiny.

¹⁵ See Section 5928 of the Judicial Code, 42 Pa. C.S. §5928, which provides, in relevant part:

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.

Id. at 1028 (internal citation omitted).

As the Defendants conceded at oral argument most, if not all, of the information disclosed by Ms. Casey was work-product. In *United States Mineral* we explained that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation.” *Id.* The work product doctrine protects mental impressions, conclusions, or opinions regarding a defense such as in this case.

Ms. Casey disclosed voluminous financial records and information which unquestionably related to her representation as in-house counsel. [REDACTED]

[REDACTED] Whether this

information is protected by the attorney-client privilege is of no import in this proceeding because, at a minimum, it was subject to Rule 1.6's prohibition against disclosing confidential information.¹⁶ The fact that Ms. Casey obtained this information through her *observations* rather than through communications with her clients does not alter the analysis under Rule 1.6.

The Commonwealth next contends that the disclosure was permitted or required by the Rules of Professional Conduct. The Rules of Professional Conduct permit disclosure of a client's confidential information only in extraordinary circumstances. The Rules strive to strike a balance between two compelling interests: the "fundamental principle in the client-lawyer relationship ... [that] the lawyer must not reveal information relating to the representation," and the societal interest of preventing serious harm to third parties. Pa. Rules of Prof'l Conduct R. 1.6 cmt. 2, 204 Pa. Code §81.4. The former "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 lawyer even as to embarrassing or legally damaging subject matter." *Id.* The balance struck by Rule 1.6 is described in comment 7: "Generally, the public interest is better served if full disclosure by clients to their lawyers is encouraged rather than inhibited. With limited exceptions, information relating to the representation must be kept

¹⁶ Defendants' argument that Ms. Casey further violated Rule 1.6 by disclosing their confidential information to her attorney is without merit. Rule 1.6(c)(5) expressly permits a lawyer to disclose confidential information to the extent necessary to secure legal advice. Pa. Rules of Prof'l Conduct R. 1.6(c)(5), 204 Pa. Code § 81.4; *see also* Pa. Rules of Prof'l Conduct R. 1.6 cmt. 16, 204 Pa. Code §81.4.

confidential by a lawyer....” Pa. Rules of Prof’l Conduct R. 1.6 cmt. 7, 204 Pa. Code §81.4.

A.

The Commonwealth argues that even if this information is generally protected by Rule 1.6, disclosure was warranted in this case because the information is subject to the crime-fraud and defense exceptions enumerated in Rule 1.6(c)(3)–(4). We disagree. First, Rule 1.6(c)(3)’s crime-fraud exception applies only when “the lawyer’s services *are being or had been used*” by the client to commit a criminal or fraudulent act. Pa. Rules of Prof’l Conduct R. 1.6(c)(3), 204 Pa. Code §81.4 (emphasis added); *see also* Pa. Rules of Prof’l Conduct R. 1.6 cmt. 12, 204 Pa. Code §81.4 (“To avoid assisting a client’s criminal or fraudulent conduct, the lawyer may have to reveal information relating to the representation.”). Disclosure is permitted under these circumstances because when the lawyer’s services are “made an instrument of the client’s crime of fraud, the lawyer has a legitimate and overriding interest” in rectifying the conduct’s consequences. Pa. Rules of Prof’l Conduct R. 1.6 cmt. 13, 204 Pa. Code §81.4.

Although Ms. Casey’s disclosures may have revealed wrongdoing by the Defendants, she has not set forth a single instance of her services being used to commit wrongdoing. To the contrary, at all relevant times, Ms. Casey expressly objected to participating in any misconduct. In fact, her objections to, and refusal to participate in, the alleged misconduct is documented throughout her complaint, her e-mail communications with the Individual Defendants, and her reports to the

Board.¹⁷ Moreover, many of the acts she complained of were committed before her tenure as in-house counsel, and therefore, she could not possibly have participated in them. Notably, Rule 1.6(c)(3) prohibits disclosures for the purposes of “voluntarily assisting a law-enforcement agency to apprehend and prosecute the client” and voluntarily serving as a witness for the victim when the lawyer’s services have not been used in the commission of the wrongdoing. Restatement (Third) of Law Governing Lawyers §67 cmt. f.

Second, Rule 1.6(c)(4) permits an attorney to disclose confidential information to: (a) establish a claim or defense in a controversy between the lawyer and the client; (b) establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon the conduct in which the client was involved; or (c) respond to allegations in any proceeding concerning the lawyer’s representation of the client. Pa. Rules of Prof’l Conduct R. 1.6(c)(4), 204 Pa. Code §81.4. Because the Commonwealth has not articulated how or why Rule 1.6(c)(4) applies, we will examine each of its subsections in turn.

¹⁷ Like the Pennsylvania Rules of Professional Conduct, the Restatement (Third) of the Law Governing Lawyers contains a crime-fraud exception. See Restatement (Third) of Law Governing Lawyers §67(1)(d) (2000). The Restatement provides the following example, which is illustrative here: A client has instituted a scheme to defraud a victim. After doing so, the client seeks its lawyer’s guidance regarding the victim’s anticipated lawsuit for restitution and regulatory action. The lawyer urges the client to take remedial action, but the client refuses. Nonetheless, “[b]ecause Lawyer’s services have not been employed in the commission of Client’s fraud, Lawyer may not use or disclose Client’s confidential information under this Section.” Restatement (Third) of Law Governing Lawyers §67(1)(d) cmt. e, ill. 2.

Rule 1.6 cautions that even when disclosure is appropriate, it is permitted:

only to the extent the lawyer believes the disclosure is necessary to accomplish one of the purposes specified.... If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective order or other arrangements should be sought by the lawyer to the fullest extent practicable.

Pa. Rules of Prof'l Conduct R. 1.6 cmt. 22, 204 Pa. Code §81.4. Insofar as Ms. Casey's disclosures in the Lycoming County complaint were necessary to establish her action against the Individual Defendants, those disclosures should have been made under seal. Although Rule 1.6(c) authorized her to file her complaint, the manner in which she filed it exceeded the protections of the rule.

Because there are no any criminal, civil, or disciplinary actions against Ms. Casey, Rule 1.6(c)(4)'s second exception is inapplicable. Likewise, the Commonwealth has not averred that Ms. Casey disclosed the confidential information in response to an allegation that she participated in her clients' wrongdoing. Therefore, Rule 1.6(c)(4)'s third exception did not authorize her disclosure. *See* Pa. Rules of Prof'l Conduct R. 1.6 cmt. 14, 204 Pa. Code §81.4 (explaining that a lawyer may disclose confidential information to defend herself against a third party's assertion that the lawyer participated in the client's wrongdoing). While Rule 1.6 does provide exceptions, they are narrow, and for the reasons articulated above, they do not encompass Ms. Casey's disclosures.

B.

Next, the Commonwealth argues that Ms. Casey's disclosures were permitted because as counsel for a nonprofit, which holds assets in trust for the benefit of the public, Ms. Casey's true client was the public-at-large, and she had a derivative duty to notify it of the Defendants' misconduct. Stated otherwise, the Commonwealth invites us to adopt a "fiduciary" exception to Rule 1.6(a). The Commonwealth relies on *In re Thirty Third Statewide Investigating Grand Jury*, 86 A.3d 204 (Pa. 2014), *Follansbee v. Gerlach*, No. GD00-5183, 56 Pa. D. & C.4th 483 (C.C.P. Allegheny June 13, 2002), and *In re Pew Trust*, 16 Fiduc. Rep. 2d 73 (O.C. Montgomery Nov. 8, 1995) for the proposition that a trust's counsel owes a fiduciary duty to the trust's beneficiary.

In *In re Thirty Third Statewide Investigating Grand Jury*, the OAG issued grand-jury subpoenas to the Turnpike Commission, seeking communications between the Commission and its counsel, which the Commission claimed were protected by the attorney-client privilege and work-product doctrine. *In re Thirty Third Statewide Investigating Grand Jury*, 86 A.3d at 206. The trial court denied the Commission's motion for protective order, and our Supreme Court affirmed, finding that these protections did not apply to the Commission, a Commonwealth agency, when its own government sought to investigate it for purposes of protecting the Commission's client, the public:

[W]here the agency itself, its employees and officials, are being investigated by the Commonwealth itself, in grand jury proceedings, through the office of the chief enforcement officer of the Commonwealth, due to suspicion of wrongdoing, it is crucial to be mindful that the actual client of the agency's lawyers in such circumstances is the public. It follows that the only

proper manner of considering the privilege in these circumstances is that the client-citizenry has impliedly waived the attorney-client privilege that might otherwise shield from revelation evidence of corruption and criminal activity. To hold that the Commission itself is the client entitled to claim the privilege in the face of a duly-authorized grand jury investigation by the Commonwealth government is tantamount to concluding that the Commission is independent of the Commonwealth government, is beholden only to itself and, although the Commission is ultimately funded by the public through a variety of means established by the General Assembly, the Commission need not account for its expenditures and operations to the Commonwealth's citizens, who are represented, in this instance, by the OAG. In our view, this position obviously cannot prevail....

Id. at 223–24.

In the instant case, Rule 1.6(a) is not made inapplicable just because of the Corporate Defendants' nonprofit status. Unlike in *In re Thirty Third Statewide Investigating Grand Jury*, the Corporate Defendants are not government agencies, and this matter does not involve government lawyers; therefore, the application of Rule 1.6(a) differs. *See In re Thirty Third Statewide Investigating Grand Jury*, 86 A.3d at 219–20 (“[T]he Rules acknowledge that the attorney-client privilege must be analyzed differently in the government context than in the private sector.”). This case involves nonprofit corporations, with a Board of Directors which manage the nonprofits' affairs. *See Dorsett v. Hughes*, 509 A.2d 369, 371 n.3 (Pa. Super. 1986) (holding that counsel for a trust does not represent the beneficiary); *see also* Pa. Rules of Prof'l Conduct R. 1.13(a), 204 Pa. Code §81.4 (“A lawyer employed or retained by an organization represents the

organization acting through its duly authorized constituents.”). Moreover, the case at hand does not concern whether a client can be compelled to produce documents purportedly protected by the attorney-client privilege and the work-product doctrine;¹⁸ it concerns whether prior counsel can *voluntarily* disclose confidential information.

In *Follansbee*, the beneficiaries-plaintiffs filed an action against former counsel of a trust and issued a subpoena upon the non-party trustee to produce its communications with prior counsel regarding management of the trust. *Follansbee*, 56 Pa. D. & C.4th at 485. The trustee objected to the subpoena, asserting that it sought documents protected by the attorney-client privilege. *Id.* at 485–86. Recognizing that the *trustee* owes a fiduciary duty to the beneficiaries to furnish information regarding the management of the trust under Section 173 of the Restatement (Second) of Trusts, the trial court held that the trustee was required to produce the requested documents to the beneficiaries. *Id.* at 491. While *Follansbee* recognized that a fiduciary duty flows from a trustee to a beneficiary, it did not hold that a trust’s *attorney* owes a fiduciary duty to a beneficiary. *Id.*; see also *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713–14 (Del. Ch. 1976) (ordering trustees to produce documents to beneficiaries).

In re Pew Trust involved an action filed by the beneficiaries of a trust against the trust’s former counsel for breach of their fiduciary duties to the

¹⁸ See Pa. Rules of Prof’l Conduct R. 1.6 cmt. 21, 204 Pa. Code §81.4 (explaining that disclosure may be ordered “by a court or by another tribunal or government entity claiming authority pursuant to other law to compel the disclosure”).

beneficiaries.¹⁹ *In re Pew Trust*, 16 Fiduc. Rep. 2d at 74. Asserting that no fiduciary duties run from a trust's counsel to its beneficiaries, the defendants sought dismissal of the complaint. *Id.* at 74. The orphans' court refused to dismiss the complaint, acknowledging that while an attorney representing a fiduciary does not share an attorney-client relationship with a beneficiary, counsel has "joint, derivative, or secondary duties" to a beneficiary, which arise "because the lawyer stands in a fiduciary relationship as to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries." *Id.* at 74–75. The court described these derivative duties as "prohibitive or restrictive, as opposed to the affirmative duties owed by counsel for the fiduciary to its client" and as "tantamount to prohibitions from the lawyer taking advantage of his or her position to the detriment of the fiduciary estate or its beneficiaries." *Id.* at 75. It reasoned that:

the fiduciary estate has been created by the settlor for the exclusive benefit of the beneficiaries, the fiduciary and the lawyer for the fiduciary are compensated by the fiduciary estate, and ... the fiduciary traditionally stands in a superior position relative to the beneficiaries, who, in turn, repose trust and confidence in the lawyer.

Id. at 76 (internal quotation omitted).

Although the rationales articulated by the orphans' court may warrant application of a fiduciary exception in another context, they do not warrant application, and in fact, have never been applied in Pennsylvania, in the context of

¹⁹ The beneficiaries sought to sue the law firm for bad advice it rendered in negotiating and consummating a transaction on behalf of the trust, because the trustee refused to file such a suit himself. *In re Pew Trust*, 16 Fiduc. Rep. 2d at 77–78.

a nonprofit corporation. *In re Pew Trust* was founded on the premise that the unrepresented estate beneficiaries should be able to trust the estate's lawyer. This rationale is inapplicable here, where the interests of the public-at-large are well-represented by the Commonwealth acting in its capacity as *parens patriae*. See 20 Pa. C.S. §7710(d). The public does not blindly place its trust and confidence into a nonprofit's general counsel.

Finally, the Commonwealth cites three Pennsylvania Ethical Opinions in support of its claim that Ms. Casey had an *affirmative* duty to inform the beneficiaries of the Defendants' misconduct. See PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-75, 1996 WL 928175 (1996); PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-65, 1996 WL 928169 (1996); PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-13, 1996 WL 928123 (1996). Like *In re Pew Trust*, these opinions arise in the context of settlement of decedents' estates. Indeed, Opinion 96-13 notes that "*This opinion reflects a change in the law of decedents' estates,*" which area clearly is not at issue in this case. PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-13, 1996 WL 928123, at *1. Moreover, the opinions involve situations where the lawyers' services were used for the commission of a crime or fraud, and therefore, disclosure was permitted under Rule 1.6(c). See PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-75, 1996 WL 928175, at *1; PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-65, 1996 WL 928169, at *1; PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 96-13, 1996 WL 928123, at *1. For the same reasons we find *In re Pew Trust* inapposite, we decline to follow these opinions based on *In re Pew Trust*.

Rule 1.3(b) contemplates the situation Ms. Casey allegedly encountered and advises:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any 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. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) 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.** (Emphasis added).

Pa. Rules of Prof'l Conduct R. 1.3(b), 204 Pa. Code §81.4 (emphasis added). Notably, Rule 1.3(b) was amended in 2004 after the *In re Pew Trust* decision; the revision could have provided a derivative duty as was discussed in *In re Pew Trust*, but it neglected to do so.

II.

Having found that the information disclosed was subject to Rule 1.6 and that no exceptions applied,²⁰ the Defendants urge us to apply a fruit-of-the-poisonous-tree analysis similar to that applicable in the criminal context and strike all allegations in the Commonwealth's complaint which were the product of Ms. Casey's improper disclosures under Pa. R.C.P. No. 1028(a)(2).²¹ The Commonwealth contends it did not seek out Ms. Casey to obtain the information and that the matters involved in this case were already made public when it filed its

²⁰ Although we find that disclosure violated Rule 1.6, we do not find that it violated Rule 1.8(b) or 1.9(c)(1) which precludes disclosure of information that would "disadvantage" the client. See Pa. Rules of Prof'l Conduct R. 1.8(b), 204 Pa. Code §81.4; Pa. Rules of Prof'l Conduct R. 1.9(c)(1), 204 Pa. Code §81.4. Assuming for the disposition of Defendants' preliminary objections that the averments in the Commonwealth's complaint are true, Ms. Casey's disclosures were arguably made to further and protect the interests of the nonprofits.

²¹ Rule 1028(a)(2) permits preliminary objections to be filed when a complaint includes "scandalous or impertinent matter." Pa. R.C.P. No. 1028(a)(2). "To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action." *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000).

complaint because Ms. Casey's complaint was not initially filed under seal. Moreover, the Commonwealth argues that the Defendants waived the confidential nature of the information when they voluntarily supplied the same documents Ms. Casey disclosed during the course of discovery and proceeded to question her about them in the Commonwealth's presence.

Importantly, Rule 1.6(a) is a disciplinary rule and not an evidentiary rule, and an attorney's duty to comply with Rule 1.6 cannot be waived by subsequent disclosure.²² At the same time, failure to comply with Rule 1.6(a) "does not necessarily warrant any other nondisciplinary remedy" and is not intended to be used by "an antagonist in a collateral proceeding...to seek enforcement of the Rule." Pa. Rules of Prof'l Conduct scope cmt. 18-19, 204 Pa. Code §81.2. However, as our Supreme Court has noted, under certain circumstances, we may enforce the rules by "disqualifying counsel or otherwise restraining his participation or conduct in litigation" before us "in order to protect the rights of litigations to a fair trial." *In re Estate of Pedrick*, 482 A.2d 215, 221 (Pa. 1984). In this way, the remedies of dismissal and/or disqualification serve to promote due process rather than to sanction. *Reilly by Reilly v. Southeastern Pennsylvania Transportation Authority*, 489 A.2d 1291, 1299 (Pa. 1985); *In re Estate of Pedrick*, 482 A.2d at 221.

²² In the context of judicial proceedings, the principle of confidentiality is given effect through the attorney-client privilege and the work-product doctrine, but the Defendants have not asserted these as bases for their preliminary objections. Pa. Rules of Prof'l Conduct R. 1.6 cmt. 3, 204 Pa. Code § 81.4. It is this evidentiary privilege, and not compliance with the ethical rules, that may be waived.

Defendants rely upon numerous federal cases from outside jurisdictions to support their claim that the Commonwealth's complaint is tainted and that its action should be dismissed. The majority of the cases cited concerns disqualification motions and, *in fact*, rejects the defendants' requests for dismissal. *See Gifford v. Target Corp.*, 723 F. Supp. 2d 1110, 1122–23 (D. Minn. 2010) (granting motion to disqualify and denying motion to dismiss); *Arnold v. Cargill Inc.*, No. 01-2086, 2004 WL 2203410, at *13–14 (D. Minn. Sept. 24, 2004) (same); *see also Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 755–56 (D. Md. 1997), *aff'd*, 141 F.3d 1162 (1998) (granting motion to disqualify and motion to dismiss for reasons unrelated to taint).

Most cases in which the complaint was dismissed, *albeit*, without prejudice, involved ethical violations by plaintiffs' own counsel. *See Ackerman v. National Property Analysts, Inc.*, 887 F. Supp. 510, 515–16 (S.D.N.Y. 1993) (dismissing the complaint without prejudice and disqualifying an attorney who acted as plaintiff's counsel when he formerly represented the defendants and had access to their confidential information); *Doe v. A Corp.*, 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971) (dismissing the complaint without prejudice and disqualifying plaintiff's counsel, who formerly represented the defendant and disclosed its confidential information when he served as plaintiff in a case against it).

The most analogous case cited by Defendants is *In re Potash Antitrust Litigation*, No. 3-93-197, 1993 WL 543013 (D. Minn. Dec. 8, 1993) (*Potash*), which involved several antitrust actions filed against multiple corporations. *Id.* at *1–2. Former general counsel to those corporations resigned when he became

concerned about the defendants' conduct, and after his employment ended, he initiated contact with multiple law firms regarding potential antitrust actions against defendants, and he supplied several attorneys with documentary evidence supporting his claims. *Id.* at *6–7. The trial court determined that the documents contained confidential information and therefore, that former counsel violated his ethical duties when he disclosed them. *Id.* at *13–15.

The defendants moved to disqualify all of plaintiffs' counsel, including counsel who had direct contact with general counsel, those who had read the documents he supplied, and those who did not know of him or his documents but who read the complaints. *Id.* at *17–18. Noting that the purpose of disqualification is to “remov[e] the taint that may attach to the judicial process,” the district court found it improper to disqualify attorneys who did not have direct or indirect contact with general counsel or his materials, because under those circumstances, a client's right to choose his attorney must prevail. *Id.* at *17. The court disqualified the other classes of attorneys, stating:

it is proper to disqualify counsel where they knowingly associate with a lawyer who divulges confidential information in a manner prejudicial to his former counsel, or where counsel know enough to improperly benefit from those disclosures, even though they have no direct contact with the divulging lawyer. As to both classes of counsel, disqualification is required in order to inoculate the litigation against a continuing taint.

Id.

Regarding the defendants' request to dismiss plaintiffs' complaints, the district court found that general counsel provided substantial information upon which the complaints were based when they contained the same assertions as contained in the confidential documents. *Id.* at *18. It further found that the plaintiffs offered no facts "sufficient to controvert [d]efendants' assertion that [prior counsel] played a substantial role in preparing the complaint." *Id.* Therefore, finding dismissal necessary to ensure that the taint from counsel's ethical violations would be removed in subsequent litigation, the court dismissed the complaints without prejudice and provided plaintiffs leave to file amended complaints based upon information "independent from [the] ethical violations." *Id.*

Potash is consistent with Pennsylvania law and the facts of this case, and we find that a similar approach is warranted. As in *Potash*, here, the OAG did not actively solicit the information from Ms. Casey; rather, Ms. Casey voluntarily provided it through her counsel. Indeed, OAG did not ask for a copy of her complaint or know that one had even been filed until it received a copy of the same. Still, we must consider the appropriate remedy without regard to the OAG's culpability in the matter because the remedies serve to ensure due process, not to sanction. *See Reilly by Reilly*, 489 A.2d at 1299; *In re Estate of Pedrick*, 482 A.2d at 221.

We are constrained to dismiss the Commonwealth's complaint without prejudice, to ensure that the proceedings are free from taint and that Defendants receive the fair trial required by due process. *See Pedrick*, 482 A.2d at

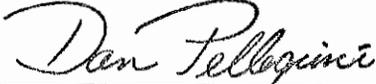
221; *see also Slater v. Rimar, Inc.*, 338 A.2d 584, 590 (Pa. 1975) (recognizing that dismissal is warranted when “the information on which the suit is bottomed has been supplied altogether by the former lawyer for the defendant”). As in *Potash*, if here, the Commonwealth has sufficient independent information to support its claims, it is free to file a new complaint. That information can include disclosures by Ms. Casey that do not breach any ethical obligation to Firetree.

As to Defendants’ request for disqualification, we note the seriousness of the remedy and the delicate balance we must weigh “between an individual’s right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. This balance is essential if the public’s trust in the integrity of the Bar is to be preserved.” *Slater*, 338 A.2d at 590.

Because the Commonwealth’s current counsel, Ms. Vance-Rittman and Mr. Pacella, have been exposed to confidential information in violation of the Pennsylvania Rules of Professional Conduct, we must disqualify them to ensure that Defendants receive a fair proceeding. *In re Estate of Pedrick*, 482 A.2d at 221. This measure is necessary to absolve the irrevocable taint which would otherwise color this litigation. Insofar as Defendants contend that this remedy is inadequate, we reject their argument. Defendants have provided no evidence that the OAG’s office “is tainted from top-to-bottom” or that attorneys beyond Ms. Vance-Rittman and Mr. Pacella have received confidential information. (Corporate Defs.’ Mem. of Law in Supp. of their Prelim. Objections to the Commonwealth’s Compl. in the Form of a Pet. for Review, at 29.) The mere fact that Attorney General Kane received a call from Ms. Casey’s counsel, or that

Attorney General Kane walked a scheduling e-mail to Mr. Pacella for follow up does not change this conclusion, particularly where the only testimony offered establishes that this practice was not out of the ordinary. Dep. of Ms. Vance-Rittman, at 37–39. Indeed, if other attorneys at the OAG have received confidential information, the ethical rules will preclude their representation as well.

Because we dismiss the Commonwealth’s complaint without prejudice and provide it leave to file an amended pleading, Defendants’ remaining objection regarding the complaint’s verification is moot. Accordingly, Defendants’ preliminary objections are overruled in part and sustained in part.



DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :
by Kathleen Kane, Attorney General, :
 :
Plaintiff :
 :
v. :
 :
New Foundations, Inc., a Nonprofit :
Corporation; Firetree, Ltd., a :
Nonprofit Corporation; Orange :
Stones Co., a Nonprofit Corporation; :
Allen E. Ertel, Individually; :
Catherine Ertel, Individually; :
Edward Ertel, Individually; :
Amy Ertel, Individually; and :
William C. Brown, Individually; :
 :
Defendants : No. 36 M.D. 2014

ORDER

AND NOW, this 30th day of April, 2014, it is ordered that:

(1) The Commonwealth of Pennsylvania's Petition for Review is dismissed, without prejudice.

(2) Heather J. Vance-Rittman, Esquire and Mark A. Pacella, Esquire, counsel for the Commonwealth, are disqualified from any further involvement in this case and from having any contact with the Commonwealth in matters pertaining to this case.

(3) The Commonwealth may file a new petition for review, with an affidavit stating that counsel has:

(a) had no contact, direct or indirect, with Ms. Vance-Rittman, Mr. Pacella, and/or Ms. Casey;

(b) had no contact, direct or indirect, with any materials or documents containing or describing disclosures made by Ms. Casey relating to her representation of Firetree; and

(c) had no discussions with any person concerning Ms. Casey or any of her disclosures relating to Firetree.



DAN PELLEGRINI, President Judge