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CRIMINAL DEFENSE AND INTERNAL INVESTIGATIONS ALERT

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NEW PA SUPERIOR COURT DECISION INDICATES EXTRA PRECAUTIONS NEEDED BY ATTORNEYS TO PROTECT WORK PRODUCT OF THIRD PARTY CONSULTANTS

By Brandy S. Ringer and Laurel Gift

Attorneys engaged to conduct internal investigations are often sought and retained in order to allow a sensitive inquiry to unfold under the cloak of protection available through the attorney-client relationship. Businesses, municipalities, and public entities need to be able to uncover potential misconduct or scandal and receive legal advice relating to those issues without fear that their concerns will be made public, resulting in reputational harm and other negative consequences. A recent Pennsylvania Superior Court decision, *McIlmail v. Archdiocese of Philadelphia*, __ A.3d __, 2018 WL 2731404 (Pa. Super. June 7, 2018), calls into question the scope of protections afforded to attorneys and their third-party consultants hired to conduct or assist in these sensitive investigations.

As a general rule, the attorney-client privilege renders confidential communications between an attorney and client nondiscoverable. This privilege protects all communications from disclosure, when made "for the purpose of obtaining professional legal advice." Closely related to the attorney-client privilege is the work-product doctrine. The work-product doctrine, which provides broader protections than the attorney-client privilege, is designed to protect the confidentiality of documents prepared by an attorney in anticipation of litigation.

Pennsylvania courts have routinely been called upon to define the parameters of these protections, including to whom the protections extend. The Pennsylvania Superior Court has held that under certain circumstances, the attorney-client privilege extends to a third-party, including an agent of an attorney such as a consultant in an investigation. This narrow extension of the attorney-client privilege is only afforded to communications with an agent that are necessary to assist the attorney in giving legal advice.

In *McIlmail*, the Pennsylvania Superior Court addressed the parameters of the work-product doctrine as it pertains to third parties. In its June 7, 2018 opinion, the Superior Court ruled that the work-product doctrine does not extend protection to the notes, memoranda, or summaries of witness interviews prepared by private investigators, acting at the express direction of defense counsel. In reaching its decision, the Superior Court examined the language of Pennsylvania Rule of Civil Procedure 4003.3, along with the Explanatory Comments, and found that "[t]he rule obviously sets a different restriction on material prepared by a party's attorney compared to material sought from a party's representative." While the rule

broadly "protect[s] from disclosure an attorney's thoughts and views about a case" – including any notes, summaries, and memoranda – the rule only protects from disclosure a party representative's "mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics." Based on this difference, the Court determined that production of notes, memoranda, or summaries "relat[ing] solely to factual information obtained by the investigator from potential witnesses," does not violate the rule, which was intended "to shield the mental processes of an attorney … [and] protect from disclosure an attorney's thoughts and views about a case including theories, mental impressions or litigation plans." Accordingly, the Court concluded that "conferring attorney work-product protection to the investigator's notes of the interviews would impermissibly expand Rule 4003.3."

The *McIlmail* decision is in accord with the Superior Court's 2017 decision in *Estate of Paterno v. Nat'l Collegiate Athletic Assoc.*, 168 A.3d 187 (Pa. Super. 2017), wherein the Court concluded that the notes of investigators hired to create a report on Penn State University's handling of the scandal involving a former assistant football coach, Jerry Sandusky, were only protected to the extent they "reflected mental impressions respecting merit of claim or respecting strategy or tactics." There, the Court explained that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes […] what he saw fit to write down regarding witnesses' remarks […] the statement would be his [the attorney's] language, permeated with his inference." The Court concluded, however, that "[t]he same result does not obtain for the notes of [] investigators [, or] representatives other than the party's attorney." To the contrary, the Court noted that the explanatory comments to Rule 4003.3 clarifies that "[m]emoranda or notes made by the representative are not protected."

The Superior Court's decisions on this topic reflect that all businesses and attorneys should be mindful when engaging investigators or other representatives to assist in the preparation and development of a case. The Superior Court acknowledges that the work-product doctrine was designed to provide "a privileged area within which [an attorney] can analyze and prepare his client's case" and "promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." The Court, however, may fail to recognize the impact of their decisions on an attorney's ability to effectively investigate, develop, and defend their case, as attorneys routinely utilize investigators with confidence that their work product is fully protected.

Although the Court perceives a clear demarcation between factual information and a party representative's mental impressions, conclusions or opinions, in practice, the distinction is often not obvious. In particular, just as an attorney's "notes and memoranda … tend[] to reveal the attorney's mental processes … [and are] permeated with his inferences," the notes and memoranda of an investigator, acting at the express direction of an attorney, are also permeated with the same insights into the investigation and research being conducted, and the theories and defenses being pursued. Namely, there is much to be gleaned from the type of witnesses being interviewed and the type of information being sought from the witnesses.

Despite the *McIlmail* decision, there are steps that attorneys can take to better preserve privilege and the work product of third party consultants, including:

- Ensure that the nature of the engagement of the third party is clearly spelled out in a signed written agreement. The third party should be engaged by the lawyer or law firm for the express purpose of providing legal counsel to the client.
- Communicate regularly with third-party consultants. Ensure that written directives are

given to the consultant, directly connected to the legal counsel sought by the client.

- Require that work product of the third party be property of the client.
- Require that work product of the third party include directives, instructions, and rationale from the lawyer for the work performed and the information developed.

By taking such precautions, attorneys can protect their client's interests and position their case to defend against attempts to breach the work-product privileges of the attorney-client relationship.

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