

Only Client-to-Attorney Communications Protected Pending Pennsylvania Supreme Court Review of Statutory Attorney-Client Privilege

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In a case of interest to companies undergoing or pursuing litigation in Pennsylvania state court, the Supreme Court of Pennsylvania has agreed to tackle again the issue of whether the attorney-client privilege protects communications made by counsel to a client in connection with the provision of legal advice, an issue on which the court was unable to reach a majority decision earlier this year.¹ Until the court reaches a decision on the issue, the Pennsylvania Superior Court's controversial 2007 decision in *Nationwide Mutual Insurance Company v. Fleming*²—which denied such protection—is considered binding precedent for the state's trial courts. At least that is the conclusion reached by Philadelphia Court of Common Pleas Judge Mark I. Bernstein in his recent opinion explaining his May 2010 Orders denying more than 300 claims of privilege that were based solely on the Pennsylvania attorney-client privilege statute found at 42 Pa. C.S.A. § 5928.³

In his opinion, Judge Bernstein described the state's statutory attorney-client privilege as “extremely limited,” recognizing in a footnote that its scope stands in sharp contrast to that of the federal attorney-client privilege, which “protects two related, but different, communications: (1) confidential communications made by a client to his lawyer for the purpose of obtaining legal advice; and (2) any communication from an attorney to his client when made in the course of giving legal advice, whether or not that advice is based on privileged communications from the client.”⁴ According to Judge Bernstein, the Pennsylvania attorney-client privilege is much narrower than the attorney work-product privilege, which “broadly protects most aspects of an attorney's work” and “enables attorneys to prepare cases without any risk that their own work will be used against their clients.”

Judge Bernstein further found that, unlike the attorney work-product doctrine, which was based on common law and adopted by the state's Supreme Court in its discovery rules, the attorney-client privilege was codified by the state legislature, and judicial review is therefore limited by the Statutory Construction Act. Because the statute's “clear language” unambiguously protects “only confidential factual communications from a client to her attorney” and makes no mention of attorney

¹ *Gillard v. AIG Insurance*, 990 A.2d 1147 (Pa. 2010).

² 924 A.2d 1259 (Pa. Super. Ct. 2007), *aff'd on other grounds*, 992 A.2d 65 (Pa. 2010).

³ *Kolar v. Preferred Unlimited, Inc.*, July Term 2008 No. 02472 (Phila. Ct. Com. Pl. June 22, 2010).

⁴ *Id.* at n. 39 (citing *United States of America v. Mobil Corp.*, 149 F.R.D. 533, 536 (N.D. Tex. 1993)).

communications, Judge Bernstein concluded that the Superior Court’s decision in *Nationwide* was proper.

In *Nationwide*, the Superior Court—led by then Chief Judge McCaffery (now a Pennsylvania Supreme Court Justice), and joined by then Judge Todd (also presently a state Supreme Court Justice)—held that the Pennsylvania attorney-client privilege protects only confidential communications from client to attorney. Communications from attorney to client are *not* protected, except to the extent they contain and would reveal confidential *client* communications. The Pennsylvania Supreme Court granted an appeal in *Nationwide*, but failed to reach a majority decision. With Justices McCaffery and Todd having to recuse themselves, the remaining Justices were evenly split. Two expressly declined to reach the merits, finding that any privilege was waived by defendant’s voluntary disclosure of other documents on the same subject-matter. The other two Justices disagreed, concluding instead that, because attorney advice and client input were often inextricably intertwined, *all* attorney-client confidential communications regarding the provision of legal advice fall within the purview of the attorney-client privilege statute, and the privilege in the instant case was not waived.⁵

The Supreme Court’s January 29, 2010 plurality opinion in *Nationwide* left standing the Superior Court’s holding and failed to establish any precedent as to the application of the attorney-client privilege to attorney-to-client communications. Less than two months later, however, on March 16, the court granted the petition for allowance of appeal in *Gillard*, where the Superior Court had affirmed the trial court’s holding that the attorney-client privilege applies solely to client-to-attorney communications.⁶ While Judge Bernstein did not make a direct reference to *Gillard* in his *Kolar* opinion, he noted that a pending appeal was irrelevant, stating that “as long as the decision has not been overturned by our Supreme Court,” the Superior Court’s decision on the issue—in this case, in *Nationwide*—remains binding precedent.⁷

Gillard, however, does give the Supreme Court a second chance to overturn—or affirm by a majority—the Superior Court’s *Nationwide* decision. Because *Gillard* does not implicate the subject-matter waiver doctrine, this time around the court will have to reach the merits and address whether the statutory attorney-client privilege applies to all attorney-client confidential communications. Oral argument is scheduled for September 2010.

Until and unless the Pennsylvania Supreme Court reverses *Nationwide*, to ensure protection from disclosure pursuant to the Pennsylvania attorney-client privilege statute, counsel should make clear that any communications to the client reflect the client’s confidential communications so that the advice and the input are inextricably intertwined. Regardless of the final outcome in *Gillard*, both *Nationwide* and *Kolar* serve to remind litigants in Pennsylvania of the importance of the attorney work-product doctrine as a complement and alternative to the statutory attorney-client privilege to protect the confidentiality of an attorney’s work in anticipation of litigation.

⁵ *Nationwide*, 992 A.2d 65 (Pa. 2010).

⁶ *Gillard v. AIG Insurance*, No. 0864, 2007 Phila. Ct. Com. Pl. LEXIS 159 (Phila Ct. Com. Pl. June 5, 2007), *aff’d without opinion*, 947 A.2d 836 (Pa. Super. Ct. 2008), *appeal granted*, 990 A.2d 1147 (Pa. 2010).

⁷ *Kolar*, July Term 2008 No. 02472, at 10.

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