

Pennsylvania Supreme Court Rules Attorney-Client Privilege Is a Two-Way Street

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Last year, in *Nationwide Mutual Insurance Company v. Fleming*, the Pennsylvania Supreme Court missed an opportunity to provide guidance to lawyers and clients in Pennsylvania about whether, and to what extent, the attorney-client privilege attaches to attorney-to-client—as opposed to client-to-attorney—confidential communications. With three Justices having to recuse and the remaining four Justices unable to reach a majority decision, the Pennsylvania Supreme Court’s plurality opinion in *Nationwide* left standing the Pennsylvania Superior Court’s controversial 2007 holding that the Commonwealth’s attorney-client privilege statute applies only to confidential communications made *by the client to the attorney*.¹ That is, until now.

On February 23, in a 5-to-2 decision, the Pennsylvania Supreme Court held in *Gillard v. AIG Insurance Co.* that “in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.”² *Gillard* overturned the highly criticized precedent set by the Superior Court in *Nationwide*, bringing Pennsylvania into line with most other jurisdictions in the country in recognizing the attorney-client privilege as a two-way street.

The appellants in *Gillard* were insurance companies defending against a bad-faith claim arising from their handling of the appellee’s uninsured motorist claim. In response to the appellee’s request for production of all documents from the file of the law firm that represented the appellants in the underlying litigation, the appellants withheld and redacted certain documents created by counsel on the ground that these were protected by attorney-client privilege. When the appellee moved to compel production, the trial court ruled that the Pennsylvania attorney-client privilege statute³ applies only to communications made *by the client*, making it a “one-way street.” On appeal, the Pennsylvania Superior Court relied on its *Nationwide* decision. While recognizing that communications from an attorney to a client are protected under the privilege statute *if, and to the extent*, they reveal privileged communications from the client, the Superior Court did not discern any claim by appellants that the sought-after documents were entitled to such derivative protection. The Superior Court therefore affirmed the trial court’s ruling.

1. 924 A.2d 1259 (Pa. Super. Ct. 2007), *aff’d on other grounds*, 992 A.2d 65 (Pa. 2010) (plurality opinion).

2. *Gillard v. AIG Insurance Co.*, No. 10 EAP 2010, 2011 WL 550552 (Pa. Feb. 23, 2011).

3. 42 Pa. C.S.A. § 5928.

On March 16, 2010, however, less than two months after its decision in *Nationwide* failed to establish any precedent as to the application of the privilege to attorney-to-client communications, the Pennsylvania Supreme Court granted appellants' petition for allowance of appeal in *Gillard*, thereby giving the full panel of seven Justices another chance to address the scope of the attorney-client privilege.⁴

Stressing the purpose and historical acceptance of the privilege, the *Gillard* appellants argued that the applicability of the attorney-client privilege should be based on the *purpose* of the communication rather than the direction of the communication flow. The appellants asserted that strictly limiting derivative protection is unrealistic and unworkable because it requires "surgical separations" of communications based on whether the information came from the client or another source and—as noted in the opinion of the Justices supporting reversal in *Nationwide*—"attorney advice and client input are often inextricably intermixed." Accordingly, the appellants urged the court to adopt a broader view and hold that the attorney-client privilege applies to all attorney-to-client communications containing advice, analysis, and/or legal opinions.

Several amici also filed briefs in support of reversal. Of special interest, several amici briefs focused on the application of the attorney-client privilege to in-house counsel in particular, asserting that in-house counsel are "uniquely subject to the intertwining of advice and confidential communications" by virtue of their position within an organization. These amici therefore urged the court to interpret the privilege so as to extend protection not only to the advice in-house counsel give in response to their clients' specific requests for legal assistance, but also to the legal advice in-house counsel proactively provide to their clients based on their observations and monitoring of changes in applicable laws. Although in-house counsel communications were not implicated in *Gillard*, before turning to its legal analysis, the Supreme Court made a point of acknowledging the reasoning behind amici's position, noting in part:

A business that brings a lawyer inside its operation does so with the expectation that the lawyer will observe its operations, so that the lawyer can proactively render advice without waiting for a formal, discrete request. Providing the opportunity for such observation is a form of client communication to the lawyer and is, in essence, a standing request for legal advice. The lawyer's advice, in turn, is necessarily based on the totality of client communications.⁵

By a 5-to-2 vote, the Pennsylvania Supreme Court agreed with appellants and amici that the attorney-client privilege is a two-way street. Justice Saylor's majority opinion—in which Justices Castille, Baer, Todd, and Orié-Melvin joined—noted the inconsistency among existing Pennsylvania decisions on the application of the attorney-client privilege to attorney-to-client communications. This inconsistency, Justice Saylor presumed, was a result of the continuing tension between two strong, yet competing, interest-of-justice factors: "[1] the encouragement of trust and candid communication between lawyers and their clients. . . and [2] the accessibility of material evidence to further the truth-determining process." Nonetheless, the majority agreed with those courts that recognized the difficulty

4. *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).

5. *Gillard*, No. 10 EAP 2010, 2011 WL 550552 (quoting Brief for Amicus Energy Ass'n of Pa. at 1–2).

in separating attorney advice from client input and the need for greater certainty as to the applicability of the privilege in order to facilitate open and frank communications between clients and their counsel. The majority therefore concluded that the range of derivative protection afforded by the privilege must be broader than that previously recognized by the Superior Court. Lastly, while recognizing the possibility of abuse, the majority expressed the opinion that the practices, procedures, and limitations currently in place—including in camera judicial review and the “central requirement that protected communications be for the purpose of securing or providing professional legal services”—provide sufficient checks against such abuse.

In separate dissenting opinions, Justice McCaffery and Justice Eakin criticized the majority for essentially legislating from the bench by disregarding the plain language of the attorney-client privilege statute, which refers only to communications made *by* the client. As Justice Saylor pointed out, however, the Justices universally recognize that derivative protection—though legislatively unstated—attaches to certain attorney-to-client communications. Therefore, Justice Saylor characterized the disagreement between the dissents and the majority as related only to the *degree* to which attorney-to-client communications are protected, and not as to whether they may be protected in the first instance based on the direction of the communication.

In conclusion, *Gillard* establishes that the attorney-client privilege in Pennsylvania applies equally to attorney-to-client and client-to-attorney communications. By setting forth a clear standard for determining when a confidential communication between a client and lawyer is protected, based on the *purpose*—as opposed to the *direction*—of the communication, *Gillard* alleviates the uncertainty previously created by the Pennsylvania Superior Court’s *Nationwide* decision.

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