

Pennsylvania Supreme Court Leaves in Limbo Applicability of Attorney-Client Privilege to Communications from Attorney to Client

March 9, 2010

On January 29, an evenly split Supreme Court of Pennsylvania left standing the state Superior Court's controversial 2007 decision in *Nationwide Mutual Insurance Company v. Fleming*, which denied protection under the Pennsylvania attorney-client privilege statute to a confidential communication *from* in-house counsel *to* the corporate client containing legal advice regarding litigation. No. 32 WAP 2007, 2010 WL 336171 (Pa. Jan. 29, 2010).

At issue in the case was "Document 529," a memorandum from one of Nationwide's in-house attorneys to 15 Nationwide officers, managers, and attorneys that the Pennsylvania Supreme Court described as containing counsel's assessment of the defection of Nationwide agents, the strategy behind Nationwide's lawsuits against former agents and their new agencies, and counsel's opinion as to the likely outcome of such litigation. Specifically, Document 529 stated in part that Nationwide could not reasonably expect to succeed in its litigation against former agents and that the primary purpose of the litigation was to send a message to current agents considering defecting.

Nationwide did not invoke the work product doctrine to protect Document 529 from disclosure but rather asserted that Document 529 was protected from disclosure by the attorney-client privilege. However, the defendants—former Nationwide agents and their agencies sued by Nationwide for allegedly taking confidential Nationwide policyholder information—successfully argued to the trial court that Nationwide had waived privilege through its disclosure of two other attorney-client communications containing the same "agent defection" subject matter, Documents 314 and 395.

Based on the Superior Court's descriptions, Document 395 appears to have been a memorandum from Nationwide's agency administration director to 35 Nationwide officers, employees, and attorneys outlining Nationwide's multifaceted response to the large number of agent defections. According to the court, the document was not labeled privileged and/or confidential, and did not include any direct request for legal assistance. Document 314 was a memorandum labeled "Privileged and Confidential" from a Nationwide in-house attorney to seven Nationwide officers, managers, and attorneys that the court characterized as outlining counsel's understanding regarding four agents who had left or were being fired and the need to obtain information on them to begin assessing legal options.

Applying the subject-matter waiver doctrine used by federal courts, the trial court found that Nationwide had improperly attempted to use attorney-client privilege as both a sword and a shield by disclosing favorable communications about their agent defection issue while trying to withhold an unfavorable one

as privileged. Thus, the trial court held that Nationwide had waived its privilege as to Document 529 and ordered its production.

Nationwide appealed, arguing that Documents 314 and 395 were *not* privileged because they were routine business communications that did not reveal any protected communications *from* Nationwide *to* its counsel and, consequently, their disclosure could not, as a matter of law, form the basis for subject-matter waiver of attorney-client privilege as to Document 529. In an opinion authored by then-Chief Judge McCaffery, the Superior Court agreed, but affirmed on grounds that, like Document 314, Document 529 was not privileged in the first instance.

The Superior Court interpreted the attorney-client privilege statute as protecting from disclosure only those confidential communications made *by* a client *to* counsel in connection with the provision of legal services. Accordingly, the court found that confidential communications *from* counsel *to* the client—such as Document 314 and the contested Document 529—are protected “only to the extent that such communications contain and would thus reveal confidential communications from the client.” The Superior Court recognized that it was not clear from Document 314 whether Nationwide had provided the information therein to counsel in confidence to obtain legal advice, but Nationwide was arguing to the contrary and the court accepted the argument. Turning to Document 529, the Superior Court noted that Documents 314 and 395 already made “abundantly clear” that Nationwide’s plan to deal with agent defection included considering legal action. The court then found that “Document 529 reveal[ed] no confidential facts *communicated by Nationwide* to counsel,” and, as a result, the document was not protected by the attorney-client privilege.

The Supreme Court of Pennsylvania granted allowance of appeal, but the four-member panel that considered and decided the case could not reach consensus. Because the Supreme Court was equally divided, the Superior Court’s decision was affirmed.

In the opinion in support of affirmance, Justice Eakin concluded the matter turned on waiver, finding that Nationwide “waived attorney-client privilege with respect to the subject of agent defections upon disclosing Documents 314 and 395, and cannot claim the privilege applies to [Document 529,] a document containing the same subject matter, as well as potentially damaging admissions.” While Justice Eakin expressly “decline[d] to address the merits,” the most significant aspect of the decision lies in the court’s application of waiver to resolve the issue because it implies Document 529 fell within the purview of the attorney-client privilege statute.

Justice Saylor’s well-reasoned opinion in support of reversal appears to echo that sentiment when it concludes that all the Justices agreed that “Document 529 reveals confidential client communications.” Justice Saylor found that Document 529 “exemplifies the substantial difficulty with a narrow approach to the attorney-client privilege rigidly centered on the identification of specific client communications, in that attorney advice and client input are often inextricably intermixed.” Because of this unavoidable intertwining, Justice Saylor expressed a preference for the pragmatic approach of protecting *all* confidential attorney-client communications regarding the provision of legal advice instead of only client-to-attorney communications.

As to waiver, Justice Saylor applied the multifactor subject-matter test employed by federal courts and concluded there was no waiver of privilege because Documents 314 and 395 did not contain the “same” subject matter as Document 529. Justice Saylor differentiated Document 395 as a “comprehensive business manual” on dealing with defecting agents, and distinguished Document 314 from Document 529 on the basis that the former communication was made before in-house counsel even began assessing

or preparing legal opinions as to those four agents, while the latter included discussions of many aspects of *present* litigation with other former agents. Given the varied contents of the three communications and “the principle that courts should be cautious in finding an implied waiver,” Justice Saylor’s dissenting opinion found no waiver occurred.

It should be noted that the Pennsylvania Supreme Court has the opportunity to address the parameters of the attorney-client privilege, the very issue it avoided in *Fleming*, if it grants the petition for allowance of appeal filed in *Gillard v. AIG Insurance Company*, a case in which the Superior Court affirmed the trial court’s ruling that the Pennsylvania attorney-client privilege statute applies only to communications made *by* the client *to* the attorney. No. 0864, 2007 Phila. Ct. Com. Pl. LEXIS 159 (Phila. Ct. Com. Pl. June 5, 2007), *aff’d without opinion*, 2008 Pa. Super. LEXIS 504 (Pa. Super. Ct. Jan. 4, 2008). In 2008—pending its decision in *Fleming*—the state Supreme Court reserved ruling on the *Gillard* petition for allowance of appeal. Because *Gillard* does not involve the issue of waiver, if the Supreme Court grants the petition, it will have to directly address the issue of whether the privilege statute applies to confidential attorney-to-client communications.

If you have any questions or would like more information on any of the issues presented in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Philadelphia

Coleen M. Meehan	215.963.5892	cmeehan@morganlewis.com
Timothy D. Katsiff	215.963.4857	tkatsiff@morganlewis.com
Marisel Acosta	215.963.5539	macosta@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2010 Morgan, Lewis & Bockius LLP. All Rights Reserved.