



Alerts

Attorney-to-Client Communications Categorically Protected in Pennsylvania

May 10, 2011

Lawyers for the Profession® Alert

Gillard v. AIG Insurance Co., 15 A.3d 44 (Pa. 2011)

Brief Summary

The Pennsylvania Supreme Court held, in a 5-2 decision, that communications flowing from lawyer to client are categorically protected by the statutory attorney-client privilege.

Complete Summary

In the course of litigating an insured's bad faith claim against insurers, plaintiff insured sought discovery of all documents from the file of defense counsel to defendant insurer with respect to the underlying uninsured motorist claim. The Pennsylvania attorney-client privilege statute states that it protects "communications made to [counsel] by his client." The Pennsylvania Supreme Court held that communications flowing the other way—from attorney to client—also are protected. In reaching that conclusion, the Court weighed the competing policies behind the privilege, namely, the encouragement of candid communication and trust between lawyer and client, and the countervailing need for access to information in the search for truth.

Moreover, in framing the issue, the Court noted that attorney-to-client communications had been, at times, protected by Pennsylvania courts to the extent those communications revealed confidences previously communicated by the client to the lawyer (i.e., "derivative protection"). But the Court also noted that defendants in the present matter had made no claim that the sought-after documents contained such client confidences. Thus the Court addressed whether to keep with the somewhat established rule of derivative protection or to hold that the privilege more broadly applies to any attorney-to-client communications.

The court chose to apply the privilege to all attorney-to-client communications. That decision was based, in part, on the difficulty of applying derivative protection. The Court noted that "client communications and attorney advice are often inextricably intermixed . . ." And although such broad protection runs the risk of abuse (e.g., by disguising business-related communications as legal advice), the Court opined that such risks are tempered by other limitations on the scope of the privilege, as well as by safeguards such as *in camera* review.

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One of the main points of contention within the Court was rooted in the issue of separation of powers. The majority suggested that the Court may hold expanded powers (beyond statutory construction) in the realm of determining the scope of evidentiary privileges. By contrast, a dissenting opinion criticized the majority for essentially legislating by adding provisions to the attorney-client privilege statute from the bench.

Significance of Opinion

This opinion clarifies a contentious issue in Pennsylvania that was brought to the fore last year in *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65 (Pa. 2010), in which the same Court was evenly divided (2-2) on the issue of whether to protect attorney-to-client communications. Although this decision is closely tied to the Pennsylvania statute and the prior evolution of the law in that state, it nonetheless represents a major victory for the Association of Corporate Counsel, among others, who appeared as *amicus curiae* in this case and in *Nationwide*, and for whom these issues are central to the protection of communications with in-house counsel as well as with outside retained counsel.

For more information, please contact your regular [Hinshaw](#) attorney.

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