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PENNSYLVANIA'S ATTORNEY-CLIENT PRIVILEGE IS REVIVED AND WELL: THE PENNSYLVANIA SUPREME COURT'S DECISION IN GILLARD V. AIG INS. CO.

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I. Introduction

On February 23, 2011, the Pennsylvania Supreme Court held that Pennsylvania's attorney-client privilege operates as a "two-way street" and protects confidential communications from client-to-attorney as well as communications from attorney-to-client. See *Gillard v. AIG Ins. Co.*, No. 10 EAP 2010 (Pa. Feb. 23, 2011). The Court's decision marks the end of lingering uncertainty that has existed in Pennsylvania regarding the scope of the attorney-client privilege — uncertainty that was sharply brought into focus by the Pennsylvania Superior Court's May 2007 decision in *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. Ct. 2007). There, the Superior Court construed the Pennsylvania privilege statute narrowly and held that only communications from client-to-attorney (and not attorney-to-client) were privileged. As discussed in greater detail below, the *Fleming* Court did acknowledge that attorney-to-client communications could enjoy so-called "derivative protection" where such communications incorporated or reflected prior confidential client-to-attorney communications. (*Fleming* eventually made its way to the Pennsylvania Supreme Court, but due to the recusal of three Justices and an equally divided decision, the Superior Court's ruling remained controlling law).

In *Gillard*, appellant AIG Insurance Company ("AIG"), was successful in persuading five of the seven Justices that a narrow, formalistic reading of Pennsylvania's privilege statute is antithetical to the important policies underlying the privilege, and that the legal profession, as well as individual and corporate clients, would greatly benefit from a clearly articulated and bright-line standard for the attorney-client privilege. Thomas G. Wilkinson, Pennsylvania Bar Association Vice President and a member of Cozen O'Connor in its Commercial Litigation Department, served as *amicus* counsel to the PBA and the Philadelphia Bar Association in the briefing in the Supreme Court on the scope of the privilege.

II. The Road to Gillard

In *Fleming*, the Superior Court held that, under the specific language of the Pennsylvania privilege statute, only communications from client-to-attorney were protected by the attorney-client privilege. At issue in *Fleming* was a document drafted by Nationwide's general counsel concerning insurance agent defections. When opposing counsel sought production of the document, Nationwide refused on the grounds that the document was protected by the attorney-client privilege. The trial court had previously concluded that the document was privileged but that the privilege had been waived by Nationwide's production of related documents, but the Superior Court held that the document was not privileged in the first place, and thus there was no privilege to waive. The Pennsylvania statute governing privilege is entitled "Confidential communications to attorney," which provides:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5928.

In accord with the statutory language, the court explained that "under this privilege, protection is available *only* for confidential communications made by the client to counsel." *Fleming*, 924 A.2d at 1269. The court did acknowledge that insofar as attorney-to-client communications contained confidential information that was previously relayed to the attorney by the client, those portions could enjoy "derivative protection." The *Fleming* court concluded that the document at issue was simply a communication from attorney-to-client that did not reveal any confidential communications previously made by the client to counsel, and that the document was therefore non-privileged. The Court intimated that the document may have received protection under the

work product doctrine, but the Court declined to consider that issue because “Nationwide has invoked *only* attorney-client privilege.” *Id.*

In January 2010, with three Justices not participating, the Pennsylvania Supreme Court reached a 2-2 impasse, and the Superior Court’s opinion thus remained controlling law.¹ Justices Baer and Eakin wrote in support of affirmance, and never reached the merits of the attorney-client privilege issue because they decided the case based solely upon waiver. Chief Justice Castille and Justice Saylor set forth why, in their view, the attorney-client privilege should run both ways, and the Superior Court’s decision in *Fleming* should be reversed. Indeed, many of the arguments advanced in support of a broad, two-way attorney-client privilege were later adopted by the majority in *Gillard*. Less than two months after the split decision in *Fleming*, the Supreme Court granted allocatur in *Gillard*.

In *Gillard*, an uninsured motorist sought production of files from the law firm that was representing the insurer, AIG, in the underlying litigation. The insurer withheld the files, which were created by counsel, asserting that they were protected by the attorney-client privilege. The Philadelphia County Court of Common Pleas construed the privilege narrowly, and held that communications from attorney-to-client were not protected. See *Gillard v. AIG Ins. Co.*, No. 0864, 2007 Phila. Ct. Com. Pl. LEXIS 159 (June 5, 2007). The trial court did not recognize the potential availability of derivative protection to all or some of the content of the attorney-to-client communication. The Superior Court affirmed on the ground that the privilege was “strictly limited” under *Fleming*. See *Gillard v. AIG Ins. Co.*, No. 1065 EDA 2007, *slip op.* at 4 (Pa. Super. Ct. Jan. 4, 2008). Shortly thereafter, the Pennsylvania Supreme Court granted allocatur in *Gillard* to decide the “appropriate scope of the attorney-client privilege in Pennsylvania . . . [i]n the aftermath of the divided *Fleming* decision[.]”

III. The Attorney-Client Privilege is a “Two-Way Street” Under Pennsylvania Law

The *amici* in the Supreme Court supporting reversal included the Pennsylvania, Philadelphia, and Allegheny County Bar

Associations, as well as the Association of Corporate Counsel, the Chamber of Commerce of the United States, the American Insurance Association and others. The *amici* advanced policy-based and historical common law arguments accepting the position that the privilege should broadly apply to protect confidential communications made in both directions so as to encourage full and frank discussion between lawyer and client, including in-house counsel called upon to advise their organizational clients. Gillard countered with text-based arguments grounded in the Pennsylvania privilege statute, urging the Court not to extend protection for attorney communications beyond any existing derivative protection, and arguing that any expansion would be “inappropriate judicial interference with the prevailing legislative scheme.”

The Court acknowledged that Pennsylvania courts have been inconsistent in the application and scope of the privilege, but explained that this was largely due to the “competing interests-of-justice . . . in encouraging trust and candid communication” between attorney and client, while also rendering evidence accessible to “further the truth-determining process.” Proceeding from common ground, the Court noted that all sides agreed that the privilege affords derivative protection to attorney communications that encompass confidential client communications. The Court highlighted the “inordinate practical difficulties” that would result from having to unravel attorney advice from client input, and cited decisions from the United States Supreme Court and the U.S. Court of Appeals for the Third Circuit in support of its adoption of a rule that encourages candid communications between attorney and client. Indeed, the Court explained that, as a practical matter, generally both attorney and client already operate under the assumption that their communications will remain private.

Next, the Court tackled the troubling text of § 5928 by explaining that the Court was not convinced that the Pennsylvania Legislature intended to set strict limits on the privilege despite the statutory language. The majority noted that even the dissenting Justices acknowledge that § 5928 affords derivative protection and that therefore “it is not possible to employ close literalism relative to Section 5928.” In sum, the majority characterized the disagreement of the dissents as one of degree rather than direction. The Court explained that often client and attorney communications are “inextricably intermixed” and that, in its view, the Legislature had not intended for the privilege to require the “surgical

¹ Justices McCaffery and Todd recused because both had previously sat on the Superior Court panel that decided *Fleming*. Justice Melvin recused because her brother represented one of the parties.

separations” implicit in a strictly derivative approach.

Interestingly, the *amici* Bar Associations argued that even if the Court discerned legislative intent to limit the privilege only to communications from client to attorney, under Art. V, § 10(c) of the Pennsylvania Constitution, the Supreme Court nevertheless retained decisional authority with regard to procedural rulemaking. The Court agreed with the *amici* that the Court played a role “beyond the mere construction of statutes in determining the appropriate scope of testimonial privileges,” but ultimately found it unnecessary to determine the limitations of power of the respective branches of government regarding privilege due to the Court’s interpretation of the statute as well as its determination that the Legislature did not intend to “cabin [the Court’s] involvement.” In conclusion, the majority acknowledged the possibility for abusive assertions of the attorney-client privilege — such as disguising ordinary business advice as legal advice — but ultimately concluded that existing checks such as *in camera* judicial review provide sufficient security to protect the integrity of the truth-seeking process. The Court definitively concluded that the attorney-client privilege “operates in a two-way fashion” and protects confidential communications made for the purpose of obtaining or providing legal advice. The Court also recognized the continued vitality of the attorney work product doctrine reflected in Pennsylvania Rule of Civil Procedure 4003.3, excepting from disclosure in discovery “the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.”

Justice Eakin and Justice McCaffery each filed a dissenting opinion. Justice Eakin dissented on the grounds that, in his view, the privilege should not apply with equal force to attorney-to-client communications, and that even if the privilege should be extended to cover such communications, this should be accomplished either by Rule, after publication

or comment, or by the Legislature. Justice McCaffery reiterated his position espoused in *Fleming*, contending that the plain text of § 5928 was “unmistakably clear,” that the majority relied too heavily on policy-based arguments, ignored decades of decisional law, and acted in an improper legislative capacity.

The Court left for another day the question of whether discovery orders requiring the disclosure of claimed privileged information would remain available for interlocutory appeal under the collateral order doctrine. The United States Supreme Court held in *Mohawk Indus., Inc. v. Carpenter*, ___ U.S. ___, 130 S. Ct. 599, 609 (2009), that there is no interlocutory appellate review as of right of such orders, but the collateral order question had not been accepted for review in *Gillard*.

IV. Conclusion

The Court’s decision in *Gillard* realigns Pennsylvania with the majority of jurisdictions as well as federal law in providing broad protection for confidential attorney-client communications. The Court adopted a pragmatic, bright-line approach to protecting confidential attorney-client communications, while acknowledging that a waiver of the privilege may occur under various circumstances. The ruling serves to encourage counsel, including staff counsel, to proactively provide legal advice to clients regardless of whether that advice follows a specific request for advice on that topic. The Court conceded the privilege can, under certain circumstances, function as an impediment to truth-seeking, but nevertheless tipped the balance of competing interests in favor of broad protection aimed at fostering candid communications to and from an attorney. The Pennsylvania Supreme Court clearly recognized what the United States Supreme Court long ago advised in *Upjohn*, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”