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Supreme Court of Pennsylvania Clarifies—and Expands—Scope of Attorney-Client Privilege

On February 23, 2011, in *Gillard v. AIG Insurance Company,* the Pennsylvania Supreme Court clarified a century of ambiguous and inconsistent case law and expressly recognized that communications from an attorney to a client —not just communications from a client to an attorney—are privileged under Pennsylvania law. In doing so, the Supreme Court brought Pennsylvania into accord with other American jurisdictions, reduced the possibility of inconsistent results between cases in different courts, and has given both attorneys and clients greater confidence that *all* communications among them will be privileged.

Prior to *Gillard,* whether communications from an attorney to a client were privileged was unsettled in Pennsylvania. In 1887, Pennsylvania enacted a statute, section 5928 of the Judicial Code, 42 Pa.C.S. § 5928, that stated: "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." Many decisions since the enactment of section 5928 interpreted it as the exclusive codification of the attorney-client privilege in the Commonwealth. Because by its terms section 5928 only protected communications from a client to his lawyer, courts often concluded that as a matter of statutory interpretation—either because of the express language of the statute itself or what that language revealed about legislative intent—the privilege did not extend to communications back from an attorney to a client (the so-called "two-way privilege"). Courts reached this conclusion despite the fact that at common law the privilege had protected both types of communications, and that nowhere did section 5928 purport to be the exclusive statement of the attorney-client privilege in the Commonwealth.

But the treatment of the privilege was not consistent. The Supreme Court, just 13 years after section 5928 was enacted, in *National Bank of West Grove v. Earle,* recognized the two-way privilege instead. And numerous later decisions—particularly from the federal courts in Pennsylvania—assumed, sometimes without argument, that a two-way privilege existed. Many lawyers in fact never even recognized this could be an issue. Nevertheless, other decisions clung to the explicit text of section 5928 and recognized the privilege as extending only to communications made by a client to an attorney.

Finally, in *Gillard,* the Supreme Court clarified the scope of the privilege. In *Gillard,* the plaintiff sought production of documents created by an insurer's lawyers from the law firm's file. The Court of Common Pleas

refused to recognize that the privilege extended to communications made by (or intended to be made by) an attorney to the client, relying on section 5928. On appeal the Superior Court affirmed, noting that the privilege is "strictly limited" to communications made by client to counsel, unless communications made back to the client reveal confidential communications previously made by the client to the attorney for the purpose of obtaining legal advice.

By a 5-2 vote, the Supreme Court reversed and clarified the law of privilege in the Commonwealth. The Court recognized that two competing interests were at stake in the battle over the scope of the privilege: the need to encourage trust and candid communication between lawyers and their clients, and the need to make material evidence accessible in civil actions to further the truth-finding process.

In balancing these interests, the Supreme Court held that "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." The majority based its decision on, among other factors: (i) the broader nature of the privilege at common law; (ii) the belief that the General Assembly did not intend to limit the attorney-client privilege by enacting section 5928; and (iii) the practical issue that client communications and attorney advice are often inextricably intertwined, and uncertainty surrounding the privilege has led lawyers in the Commonwealth to resort to unnecessary and inefficient actions to preserve the privilege of advice communicated to a client, such as by incorporating recitation of facts conveyed by a client into written communications made back to a client. Parsing through attorney communications to determine what parts are, and are not, privileged requires a "surgical separation" that the Supreme Court thought unnecessary.

Gillard brings Pennsylvania law into accord with the current state of American law, which generally recognizes a broad "derivative" privilege attaching to all communications between attorney and client. It will benefit the legal profession because it clarifies the status of attorney-client communications. It will lower litigation costs because many discovery battles will be eliminated, or streamlined. And *Gillard* may increase the candor and detail of advice attorneys give to clients, now that there is much less doubt that advice will be protected.

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