Navigating the Winding Road of Pennsylvania Privilege Law

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A little more than a year ago, using now well-known language, the Pennsylvania Supreme Court declared that the attorney-client privilege is a "two-way street." In Gillard v. AIG Insurance Co., the court held that the protections of the attorney-client privilege apply both to communications from an attorney to the client, as well as to communications from the client to the attorney.

The Supreme Court's decision in Gillard was well-received by the legal community. Headlines proclaimed that the attorney-client privilege is "revived and well" and "you have the right to speak to your client." But the import of Gillard can best be appreciated in the context of the case it overturned.

A One-Way Street: Nationwide v. Fleming

In Nationwide Mutual Insurance Co. v. Fleming, the Pennsylvania Superior Court interpreted Pennsylvania's privilege statute narrowly when it held that only communications from a client to an attorney were protected by the attorney-client privilege. Communications from the attorney to the client, under the Superior Court's Fleming decision, did not fall within the scope of Pennsylvania's privilege statute. 42 Pa.C.S.A. §5928 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."

The Superior Court held that "under our statutory and decisional law, attorney-client privilege protects from disclosure only those communications made by a client to his or her attorney which are confidential and made in connection with the providing of legal services or advice."

The Fleming opinion left open the possibility that a communication from an attorney to his or her client could enjoy "derivative protection" where the communication contained or incorporated the content of an earlier privileged communication. However, under Fleming, communications from an attorney to the client were not privileged in their own right. As a result of this "one-way" application of the attorney-client privilege, "protection is available only for confidential communications made by the client to the counsel." In other words, there exists a client-attorney privilege, but not an attorney-client privilege under the Superior Court's reasoning in Fleming.
Fleming stood on appeal to the Pennsylvania Supreme Court because three of the seven justices rescued themselves for one reason or another. Despite criticism of the decision in the legal community, the four-member panel of the Supreme Court split evenly on the Fleming appeal, ensuring that the Superior Court's decision, and its holding that Pennsylvania recognizes a "one-way" privilege, remained in place.

Though most decisions involving the attorney-client privilege are analyzed in the context of litigation, the Fleming decision impacted every area of legal practice. During its short life span, Fleming created the risk that discussions between counsel and their clients regarding sensitive legal matters might not merit the protections of Pennsylvania's attorney-client privilege.

The Fleming detour was certain to come under challenge, given the fact that only two of the justices of the Pennsylvania Supreme Court endorsed the decision's narrowing of the attorney-client privilege. In fact, a little more than a month after handing down its divided opinion in Fleming, the court agreed to hear the appeal in the Gillard case.

**The Two-Way Street is Open: Gillard Overturns Fleming**

At issue in Gillard was the discoverability of files from the law firm representing an insurer that was providing coverage in the underlying tort litigation. The insurer claimed its law firm's files were protected from discovery by the attorney-client privilege. The Philadelphia Common Pleas Court and the Superior Court found that, under Fleming and its narrow reading of Pennsylvania's privilege statute, the files were not privileged and, therefore, were discoverable. On appeal, the Supreme Court re-examined the issues that were before the short-handed panel in Fleming.

Gillard overturned Fleming. The majority opinion adopted many of the reasons the dissenting justices put forward in rejecting the Superior Court's narrowing of the attorney-client privilege in Fleming. The Supreme Court held that the attorney-client privilege exists in order to encourage "trust and candid communication" between client and attorney. However, the Supreme Court acknowledged the distinction between communications from attorney to client and communications from client to attorney (as the Superior Court had done in its Fleming decision). Noting that there is no conflict between the Supreme Court's precedent and the Superior Court's Fleming decision regarding the derivative protections that may extend to communications from the attorney to his or her client, the Supreme Court determined that to require trial courts to dissect attorney-to-client communications to identify those portions of the communication that should be afforded derivative protection would result in "inordinate practical difficulties." The Supreme Court declined to impose such a burden on Pennsylvania trial courts and, instead, broadly ruled that whether a communication originates with the client or the attorney, communications between counsel and a client are protected by Pennsylvania's two-way privilege.

**More Changes to Privilege: Barrick v. Holy Spirit Hospital**

On another front, Pennsylvania privilege law is in a state of flux regarding communications between attorneys and retained litigation experts. In Barrick v. Holy Spirit Hospital, the Superior
Court determined that communications from an attorney to a retained expert are not discoverable. In a prior issue of *The Legal*, the authors suggested that the *Barrick* decision may give rise to the creation of an attorney-expert privilege. With the issues addressed in *Barrick* likely to come under review by the Pennsylvania Supreme Court, there may be further modifications to Pennsylvania privilege law in the short term.

**The Two-Way Street is Open, But More Road to be Paved**

Despite its broad pronouncements and clear impact upon Pennsylvania law, the full scope of *Gillard* remains to be seen as Pennsylvania courts begin to analyze the decision in other cases and different settings. In *Commonwealth v. Harris*, the Pennsylvania Supreme Court recently affirmed that orders overruling claims of privilege and mandating disclosure are immediately appealable. Therefore, questions regarding privilege jump to the head of the line, because unlike most other legal issues, the case need not be resolved on the merits to merit appellate review. We expect the Pennsylvania Superior Court will face a variety of attorney-client issues from discovery rulings out of the common pleas courts.

In *Custom Designs and Manufacturing Co. v. Sherwin-Williams Co.*, the Pennsylvania Superior Court had its first opportunity to consider the applicability of *Gillard*. In *Custom Designs*, Sherwin-Williams sought to preclude discovery of two memorandums authored by a member of the company's marketing department after a fire. The memorandums were addressed to a member of the company's in-house legal department.

The Lackawanna County Common Pleas Court determined that the memorandums were not privileged and ordered their production. On appeal, the Superior Court applied *Gillard* and, importantly, looked to the U.S. Supreme Court's decision in *Upjohn v. United States*, which Pennsylvania has adopted to govern the applicability of the attorney-client privilege to communications made to in-house legal staff. Under *Upjohn*, "communications by corporate employees to corporate counsel may fall within the scope of the attorney-client privilege when they are kept confidential and when they are made at the behest of counsel and with the goal of furthering counsel's provision of legal advice to the client, the corporation."

Applying this standard, the Superior Court rejected Sherwin-Williams' argument that the memorandums were privileged. The result of *Custom Designs* is not as important as the analysis employed by the Superior Court. That analysis is based upon *Upjohn*, meaning that the *Upjohn* analysis survives the decisions in *Fleming* and *Gillard*.

In order to benefit from the protections pronounced in *Gillard*, it is important to understand the reasoning the Supreme Court employed in reaching its decision. The *Gillard* court held that the attorney-client privilege extends to communications between attorney and client, regardless of whether the communication originates with the client or the attorney.

The court's reasoning was based in no small part on the practical difficulty of splicing communications between attorneys and their clients to separate the privileged client originating statements and, as *Fleming* held, nonprivileged attorney-originating statements. Parties wishing to avail themselves of the attorney-client privilege should not forgo arguing that the practical
difficulty in separating nonprivileged from privileged portions of a communication warrants in favor of a broad application of the privilege. The Gillard decision also suggests that documents, rather than portions of their contents, may be entitled to the protections of the attorney-client privilege.

The Custom Designs decision is important because it is the first time a Pennsylvania appellate court has given detailed consideration to privilege questions after Gillard. The Superior Court relied on the analysis from Upjohn. Clearly, Pennsylvania's adoption of Upjohn, and its precedent applying the Upjohn decision, survived the Gillard decision.

A recurring theme in the case law involving the attorney-client privilege is the role that the product doctrine may play in protecting communications from discovery. Pennsylvania courts, particularly the Superior Court in Barrick, suggest that while the attorney-client privilege may be available to protect a particular document from discovery, a preferred alternative may be to raise an objection under the work-product doctrine. While it is unlikely the Pennsylvania appellate courts will reverse course again and force counsel and their clients down a dead-end, one-way street of privilege, there will be interesting twists and turns as counsel and their clients work to ensure their communications benefit from Pennsylvania's two-way attorney-client privilege.

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