

[J-58-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

WILLIAM GILLARD,	:	No. 10 EAP 2010
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on 1/4/08 at No. 1065 EDA
	:	2007 affirming the order entered on
v.	:	4/16/07 in the Court of Common Pleas,
	:	Philadelphia County, Civil Division at No.
	:	864, June term 2005
AIG INSURANCE COMPANY AND AIG	:	
AND THE INSURANCE COMPANY OF	:	Gillard v. AIG Insurance Co., No. 1065
THE STATE OF PENNSYLVANIA AND	:	EDA 2007, (Pa.Super. Jan. 4, 2008)
KEY AUTO INSURANCE PLAN AND AIG	:	
CLAIMS SERVICES,	:	
	:	
Appellants	:	ARGUED: September 14, 2010

DISSENTING OPINION

MR. JUSTICE McCAFFERY

DECIDED: February 23, 2011

Relying primarily on policy-based arguments, the majority reads a provision not enacted by the General Assembly into the Pennsylvania attorney-client privilege statute. With this decision, the majority has, in my view, acted in a legislative capacity, and therefore, I must respectfully dissent.

The attorney-client privilege as codified in this Commonwealth could hardly be clearer; it expressly applies to “confidential communications made to [counsel] by his [or her] client.” 42 Pa.C.S. § 5928. This Court recently stated the following with regard to application of this privilege:

“The attorney-client privilege has been a part of Pennsylvania law since the founding of the Pennsylvania colony, and has been codified in our statutory law.” In re Estate of Wood, 818

A.2d 568, 571 (Pa.Super. 2003). ... While the attorney-client privilege is statutorily mandated, it has a number of requirements that must be satisfied in order to trigger its protections. **First and foremost is the rule that the privilege applies only to confidential communications made by the client to the attorney in connection with the provision of legal services.** Slater v. Rimar, Inc., 462 Pa. 138, 338 A.2d 584, 589 (1975).

Commonwealth v. Chmiel, 889 A.2d 501, 531 (Pa. 2005) (plurality)¹ (emphasis added); see also Commonwealth v. Maquigan, 511 A.2d 1327, 1337 (Pa. 1986) (in another criminal case, again citing Slater, supra, for the proposition that the application of the attorney-client privilege is “limited to confidential communications and disclosures made by the client to his legal advisor for the purpose of obtaining his professional aid or advice”);² The Birth Center v. The St. Paul Companies, Inc., 727 A.2d 1144, 1164 (Pa.Super. 1999) (recognizing that the attorney-client privilege “only bars discovery or testimony regarding confidential communications made by the client during the course of representation” and holding, therefore, that two letters prepared by St. Paul’s counsel were not protected by the privilege because they contained no confidential communication from St. Paul to its attorney).

Although the statute expressly refers only to communications made by the **client** to his/her or its attorney, our appellate courts have consistently recognized the need for a derivative privilege to protect communications made by an attorney to a client to the extent that they are based upon confidential facts initially disclosed by the client to the attorney. See In re Condemnation by the City of Philadelphia, 981 A.2d 391, 396 (Pa.Cmwlt. 2009)

¹ Only two justices of the six participating in Chmiel joined the majority opinion; however, no justice disputed the above-quoted statement of law.

² I recognize that both Chmiel, supra and Maquigan, supra, are criminal cases, and that the attorney-client privilege is codified in separate provisions for criminal and civil matters. See 42 Pa.C.S. §§ 5916 and 5928, respectively. However, the text of the two provisions is for all relevant purposes identical.

(“The attorney-client privilege applies in both criminal and civil matters, [] to confidential communications made by a client to his or her attorney in connection with legal services and by an attorney to the client when based upon confidential facts that the client has disclosed.”); Slusaw v. Hoffman, 861 A.2d 269, 273 (Pa.Super. 2004) (“In addition to confidential communications which flow from a client to his or her attorney, we have held that the attorney-client privilege applies to confidential communications which flow from an attorney to his or her client to the extent the communications are based upon confidential facts that the client disclosed initially to the attorney.”).

Here, the majority ignores the plain text of the statute and decades of decisional law faithful to that statutory text to hold that the privilege operates in a “two-way fashion” not only to protect confidential client-to-attorney communications, but also to protect broadly attorney-to-client communications regardless of whether they implicate confidential facts disclosed by the client. Gillard v. AIG Insurance Co., slip op. at 21. In other words, the majority removes the statute-based requirement that attorney-to-client communications be based upon confidential communications initially made by the client to counsel in order to be protected under attorney-client privilege.

As part of the rationale for this departure from the statute, the majority concludes that Pennsylvania courts have been “inconsistent” and characterized by “disharmony” in “expressing the scope of the attorney-client privilege.” Gillard, supra, slip op. at 19. I cannot agree with this blanket assertion. While an occasional sentence taken out of context might support the majority’s view, my analysis of the facts and holdings of prior cases decided by the appellate courts of this Commonwealth, including this Court, reveals little inconsistency or disharmony in judicial understanding or application of the attorney-client privilege.

The opinions from Pennsylvania courts cited by the majority as precedential or persuasive for the proposition that the Pennsylvania attorney-client privilege statute affords

broad two-way protection are not determinative. See National Bank of West Grove v. Earle, 46 A. 268 (Pa. 1900) (cited by Gillard, supra, slip op. at 5-6, 8, 17-18, and 20), and Maiden Creek T.V. Appliance, Inc. v. General Casualty Insurance Co., No. Civ.A. 05-667, 2005 WL 1712304, at *2 (E.D. Pa. July 21, 2005) (cited by Gillard, supra, slip op. at 3). Earle is over 100 years old, never mentions the words “attorney-client privilege,” does not purport to interpret the statute, and had never been cited by an appellate court until this Court’s divided opinion in Nationwide Mutual Insurance Co. v. Fleming, 992 A.2d 65 (Pa. 2010). Even the majority concedes that Earle’s brevity and relative obscurity make reliance on this case somewhat questionable. Gillard, supra, slip op. at 20. Maiden Creek, which the majority recognizes as cited by Appellants, is an unpublished federal district court case citing only federal law -- notably, **no** Pennsylvania law -- for its statement of attorney-client privilege as applied in this Commonwealth.³ I simply cannot agree that Earle or Maiden Creek creates inconsistency or disharmony in the scope of attorney-client privilege as applied to date under the law of this Commonwealth.⁴

³ It is well established that this Court considers federal district court decisions to be persuasive but not binding authority. See, e.g., Stone Crushed Partnership v. Kassab Archbold Jackson & O’Brien, 908 A.2d 875, 883-84 n.10 (Pa. 2006).

⁴ The majority’s footnote list of several other opinions purporting to support a broad scope of attorney-client privilege does not, in my view, strengthen the majority’s assertion of inconsistency in our decisional law. See Gillard, supra, slip op. at 19-20 n.13.

In Search Warrant B-21778, 521 A.2d 422 (Pa. 1987), this Court held that a client’s business records were not protected from discovery merely because the client had given them to his attorney and then claimed attorney-client privilege. We stated the purpose of the attorney-client privilege as follows:

The purpose of this time-honored privilege is to protect confidential communications between the lawyer and his client, and to foster the free exchange of relevant information between them. It provides security that the **information and facts**

(continued...)

(...continued)

revealed by the client will not be seized and used by others to his or her detriment.

Id. at 428 (emphasis added).

In Alexander v. Queen, 97 A. 1063 (Pa. 1916), the issue was whether an attorney-client relationship existed between the defendant and a lawyer-acquaintance he had consulted. Concluding that an attorney-client relationship did exist, we held that the communications made by the client to his attorney were privileged. Id. at 1064.

In Cohen v. Jenkintown Cab Company, 357 A.2d 689 (Pa.Super. 1976), the issue was whether, under the particular and unusual facts of the case, the court could require disclosure of communications from a client to his attorney. Explaining the attorney-client privilege, the Cohen court stated the following:

[T]he communications [the client] so makes to [counsel] should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent) ...

Id. at 691 (citation omitted).

It is for the protection and security of clients that their attorneys at law or counsel are restrained from giving evidence of what they have [e]ntrusted to them in that character; so that legal advice may be had at any time by every man who wishes it in regard to his case, whether it be bad or good, favorable or unfavorable to him, without the risk of being rendered liable to loss in any way, or to punishment, by means of what he may have disclosed or [e]ntrusted to his counsel.

Id. at 692 (citation omitted).

Thus, in each of the above cases cited by the majority, the issue concerned a client communication to his attorney.

The only case in the majority's list arguably consistent with the majority's expansion of the attorney-client privilege is Sedat, Inc. v. Department of Environmental Resources, 641 A.2d 1243 (Pa.Cmwlt. 1994). We note only that this seventeen-year-old opinion, rendered by a single judge in the Commonwealth Court's original jurisdiction, has never been cited by any appellate court.

I am also perplexed by the majority's statement that it does "not find it clear that the Legislature intended strict limits on the necessary derivative protection" under the attorney-client privilege. Gillard, supra, slip op. at 20. In general, the best indication of legislative intent is the plain language of a statute. Malt Beverages Distributors Ass'n v. Pennsylvania Liquor Control Board, 974 A.2d 1144, 1149 (Pa. 2009). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). In my view, the words of the attorney-client privilege statute are clear and free from all ambiguity: "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" 42 Pa.C.S. § 5928. Pursuant to the plain text of Section 5928, it is unmistakably clear that confidential communications by the client are the **only** communications protected. By adding broad protection for counsel's advice and other attorney-to-client communications, regardless of whether or not they implicate confidential client communications, the majority disregards the text and the letter of the statute, in violation of our rules of statutory construction.

The majority attempts to rationalize its disregard of the statutory text by asserting that "in any event, statutory construction frequently entails resort to necessary, legitimate, and expressly authorized assumptions about legislative purpose." Gillard, supra, slip op. at 20. While this is no doubt a true statement, the majority neglects to note that the object of a statute and the occasion and necessity for a statute's enactment are to be considered **only** when the words of a statute are not explicit. 1 Pa.C.S. § 1921(c). The majority does not establish -- or even argue -- that the words of the attorney-client privilege statute are not explicit, and thus, the majority invokes statutory purpose under circumstances that are not permitted by subsection 1921(c).

The majority claims that I have implicitly acknowledged "material ambiguity" in the attorney-client privilege statute by recognizing derivative protection for attorney to client

communications to the extent that they are based upon confidential facts initially disclosed to the attorney by the client. Gillard, supra, slip op. at 21-22. I cannot agree. It would completely undermine and contradict the clear text of the statute if confidential client to attorney communications lost all protection if those client communications were subsequently mouthed or written by the attorney. Such an interpretation would render the statute absurd. The derivative protection long and uniformly recognized by this Court is in no manner comparable to the majority's broad expansion of the privilege to encompass attorney communications not contemplated by the statutory text.

Finally, I must emphasize that I do not dismiss the policy concerns, as raised by Appellants and the various amici, which have apparently convinced the majority that the Legislature did not intend for the attorney-client privilege statute to mean what it says. However, many if not most of these policy concerns are addressed by the work-product privilege, which provides as follows:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The **discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.** ...

Pa.R.Civ.P. 4003.3 (emphasis added).

I agree with the majority that it is beyond the scope of the instant case to determine the precise breadth of the work-product privilege. However, I cannot accept the majority's assertion that its two-way reading of the attorney-client privilege does not totally encompass, and essentially render redundant, the work-product privilege merely based on the latter's limited application to materials prepared in anticipation of litigation. Gillard, supra, slip op. at 21-22 n.14. I am loath to consider an undeveloped assertion concerning

the scope of the work-product privilege as support for a non-textual, policy-based interpretation of the attorney-client privilege statute.

For all of the above reasons, I respectfully but firmly dissent from the majority's holding, and would affirm the order of the Superior Court.