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

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

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

OPINION

MR. JUSTICE SAYLOR **DECIDED: February 23, 2011**

In this appeal, we consider whether, and to what degree, the attorney-client privilege attaches to attorney-to-client communications.

This litigation entails a claim of bad faith arising out of insurance companies' handling of Appellee's uninsured motorist claim. During discovery, Appellee sought production of all documents from the file of the law firm representing the insurers in the underlying litigation (who are the appellants here). Appellants withheld and redacted documents created by counsel, asserting the attorney-client privilege.

In response, Appellee sought to compel production. Appellee took the position that the attorney-client privilege in Pennsylvania is very limited -- according to Section 5928 of the Judicial Code -- to confidential communications initiated by the client:

> **5928. Confidential communications to attorney**
>
> 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.

Appellee's motion allowed, in the abstract, that certain lawyer-initiated communications might contain information originating with the client and, accordingly, may be privileged. Appellee observed, however, that Appellants had not sought such derivative protection, but rather, asserted the privilege broadly, as if it were a "two-way street." Appellee maintained that the privilege is, in fact, a "one-way street" and must be strictly contained to effectuate the will of the General Assembly and minimize interference with the truth-determining process. As further support, Appellee referenced Birth Center v. St. Paul Cos., Inc., 727 A.2d 1144, 1164 (Pa. Super. 1999) ("The attorney-client privilege . . . only bars discovery or testimony regarding confidential communications made by the client during the course of representation.").

For their part, Appellants highlighted the privilege's purpose to foster the free and open exchange of relevant information between the lawyer and his client.[1] To

[1] Accord Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928 (1996) (explaining the privilege is "rooted in the imperative need for confidence and trust" (citation and quotation marks omitted)); Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."); Hunt v. Blackburn, 128 U.S. 464, (continued . . .)

encourage such candid disclosure, Appellants reasoned, both client- and attorney-initiated communications must enjoy protection. In this regard, Appellants referenced 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) ("The attorney-client privilege protects disclosure of professional advice by an attorney to a client or of communications by a client to an attorney to enable the attorney to render sound professional advice." (citing Upjohn, 449 U.S. at 390, 101 S. Ct. at 683)). Appellants also stressed, that, under caselaw prevailing in the bad-faith litigation arena, a carrier asserting an advice-of-counsel defense waives the attorney-client privilege relative to such advice. See, e.g., Mueller v. Nationwide Mut. Ins. Co., 31 Pa. D. & C.4th 23, 32-33 (C.P. Allegheny, 1996) (Wettick, J.). According to Appellants, such a waiver would be superfluous were the advice of counsel discoverable from the outset.

During in camera review proceedings in the presence of counsel, the common pleas court adopted the "one-way street" perspective. See N.T., Mar. 29, 2007, at 8 ("According to the Pennsylvania statute, the attorney-client protection only applies to communications made by the client. That's my ruling."). Further, as reflected in the

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(. . . continued)
470, 9 S. Ct. 125, 127 (1888) (relating that professional "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); In re Search Warrant B-21778, 513 Pa. 429, 441, 521 A.2d 422, 428 (1987) ("Its necessity obtains in the objective of promoting the most open disclosure in order to enhance the attorney's effectiveness in protecting and advancing his client's interests."); Alexander v. Queen, 253 Pa. 195, 202, 97 A. 1063, 1065 (1916) ("Without such a privilege the confidence between client and advocate, so essential to the administration of justice would be at an end."); Pa.R.P.C. 1.6 cmt. [2] (2008) (observing that the "fundamental principle" that communications between lawyers and clients are confidential contributes to the "trust that is the hallmark of the client-lawyer relationship"). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §68 cmt. c (2000) (stating that the privilege "enhances the value of client-lawyer communications and hence the efficacy of legal services").

following interchange with defense counsel, the court repeatedly grounded its ruling on the direction of the flow of the information, not the content, suggesting that derivative protection was absent:

> [Defense Counsel]: I think with that ruling, Your Honor, then that would obviate the need to go through a number of documents that are communications from attorney to client, because as I understand the ruling, is that those communications are, pursuant to the Court's ruling, not going to be within the scope of the attorney-client privilege.
>
> THE COURT: Exactly.

Id. at 8-9. Additionally, the common pleas court couched its ruling as a "blanket" one. Id. 27.

In its opinion under Rule of Appellate Procedure 1925, the court referenced the following decisions as supportive of its ruling: Slater v. Rimar, Inc., 462 Pa. 138, 148, 338 A.2d 584, 589 (1975) ("[T]he law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged[.]" (citation and quotation marks omitted)); Commonwealth v. Maguigan, 511 Pa. 112, 131, 511 A.2d 1327, 1337 (1986) (describing the attorney-client privilege in the context of the criminal law, see 42 Pa.C.S. §5916, as "limited to confidential communications and disclosures made by the client to his legal advisor"); and In re Estate of Wood, 818 A.2d 568, 571 (Pa. Super. 2003) ("[T]he privilege applies only to confidential communications made by the client to the attorney[.]"). The court, however, appeared to moderate its focus on the direction of flow and to accept the possibility of some derivative protection. Nevertheless, it explained that Appellants had not argued that the withheld attorney communications contained information originating with the client.

Appellants filed an interlocutory appeal, invoking the collateral order doctrine. See Pa.R.A.P. 313; Ben v. Schwartz, 556 Pa. 475, 483-85, 729 A.2d 547, 551-52 (1999). The Superior Court exercised jurisdiction and affirmed in a brief memorandum opinion, relying on Nationwide Mutual Insurance Co. v. Fleming, 924 A.2d 1259, 1269 (Pa. Super. 2007) (holding that "protection is available only for confidential communications made by the client to counsel" (emphasis in original)), aff'd on other grounds by an equally divided court, ___ Pa. ___, 992 A.2d 65 (2010). Consistent with Fleming, the Gillard panel treated the privilege as being "strictly limited." See Gillard v. AIG Ins. Co., No. 1065 EDA 2007, slip op. at 4 (Pa. Super. Jan. 4, 2008).

Like Appellee, the Superior Court did recognize Fleming's allowance for some derivative protection of attorney-to-client communications. See id. at 5-6 ("Fleming makes it clear that communications from an attorney to a client are protected … under Section 5928, but only to the extent that they reveal confidential communications previously made by the client to counsel for the purpose of obtaining legal advice." (quotation marks omitted and emphasis in original)). Nevertheless, the panel discerned no specific claim that the sought-after documents would disclose confidential communications made by Appellants to their attorneys. Thus, it held, the privilege did not apply. See id. at 6.

After the Superior Court entered its opinion in Gillard, this Court addressed Fleming in an equally divided opinion. See Fleming, ___ Pa. at ___, 992 A.2d at 65.

Central to the argument of the Fleming appellants (also insurance companies) was that, in National Bank of West Grove v. Earle, 196 Pa. 217, 46 A. 268 (1900), this Court determined the privilege did apply to the advice of counsel. Earle explained that,

> [i]f it [did] not, then a man about to become involved in complicated business affairs, whereby he would incur grave responsibilities, should run away from a lawyer rather than

> consult him. If the secrets of the professional relation can be extorted from counsel in open court, by the antagonist of his client, the client will exercise common prudence by avoiding counsel.

Id. at 221, 46 A. at 269. The Fleming appellants stressed that the statutory prescription for the privilege already was in place, via a predecessor statute, at the time of Earle's issuance. See 42 Pa.C.S. §5928, Official Comment (explaining the statute is "[s]ubstantially a reenactment of act of May 23, 1887 (P.L. 158) (No. 89), § 5(d) (28 P.S. § 321)").

The lead opinion in Fleming did not resolve the facial tension between Earle's broad perspective on the privilege and the statute's narrower focus. Rather, the lead Justices found the appellants had waived the attorney-client privilege by producing documents reflecting the same subject matter as the withheld documents. See Fleming, ___ Pa. at ___, 992 A.2d at 69-70 (opinion in support of affirmance).

The opinion supporting reversal differed with this finding of waiver. Furthermore, and as relevant here, the Justices favoring reversal also took a broader approach to the attorney-client privilege than that of the Superior Court. The opinion expressed agreement with amici that a "narrow approach to the attorney-client privilege rigidly centered on the identification of specific client communications" was unworkable, "in that attorney advice and client input are often inextricably intermixed." Id. at ___, 992 A.2d at 71 (opinion in support of reversal). The Justices supporting this opinion also reasoned that allowing for derivative protection but closely limiting its scope would lead to uncertainty and undue precaution in lawyer-client discussions, rather than fostering the desired frankness. Their opinion concluded:

> While [we] acknowledge that the core concern underlying the attorney-client privilege is the protection of client communications, due to the unavoidable intertwining of such communication and responsive advice, [we] would remain

> with the pragmatic approach reflected in [Earle]. Although this may inevitably extend some degree of overprotection, [we] find it to be consistent with the policies underlying the privilege and the relevant legislative direction, particularly in light of the principle of statutory construction pertaining to legislative enactments. See 1 Pa.C.S. §1922 ("[W]hen a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language."). Moreover, the approach is consistent with that of a majority of jurisdictions, accord Restatement (Third) of the Law Governing Lawyers §§68-70 & §69 cmt. i (2000), which yields greater consistency for the many corporations doing interstate business. [We] recognize that this Court has issued a few decisions in tension with Earle; however, none has entailed a deeper reassessment of the attorney-client privilege in Pennsylvania, as this case was selected to achieve.

Id. at ___, 992 A.2d at 73-74 (footnotes omitted); cf. Alexander, 253 Pa. at 203, 97 A. at 1065 ("The general rule is, that all professional communications are sacred." (citation and quotation marks omitted)).

In the aftermath of the divided Fleming decision, this appeal was selected to determine the appropriate scope of the attorney-client privilege in Pennsylvania.

Appellants couch the threshold issue as "whether communications from an attorney to the client may ever enjoy protection from disclosure as an attorney-client communication." Brief for Appellants at 7 (emphasis in original). They acknowledge the particular terms of the statute protecting confidential client communications, but they assert the provision was not intended to change or limit the essential nature of the common law governing confidential lawyer-to-client communications. Cf. 8 WIGMORE, EVIDENCE §2320 (McNaughton rev. 1961) ("That the attorney's communications to the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question." (emphasis in original)); accord 81 AM. JUR. 2D Witnesses §357 (2010). Moreover, according to Appellants, Earle interpreted and

clarified the confidential-communications statute, validating the position that attorney advice is within the scope of the protection. In this regard, Appellants recognize that Earle made no specific reference to the statute, but their position is that it should be presumed the decision was interpretive in nature.[2] They also advance a presumption that, when the General Assembly substantially reenacted the language in Section 5928 of the Judicial Code, its intention was to incorporate Earle, consistent with Section 1922(4) of the Judicial Code, 1 Pa.C.S. §1922(4).[3]

Throughout their brief, Appellants stress the historical acceptance of the privilege, see, e.g., Commonwealth v. Chmiel, 558 Pa. 478, 493, 738 A.2d 406, 414 (1999) ("Although now embodied in statute, the attorney-client privilege is deeply rooted in the common law. Indeed, it is the most revered of the common law privileges." (citations omitted)), as well as the underlying policy justifications, see supra note 1.[4]

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[2] Similar positions regarding the common law and Earle are advanced in joint amicus briefs supporting Appellants filed on behalf of: the Association of Corporate Counsel, Pennsylvania Bar Association, Philadelphia Bar Association, Allegheny County Bar Association, and Chamber of Commerce of the United States of America; the American Insurance Association, Pennsylvania Defense Institute, Insurance Federation of Pennsylvania, Inc., and Philadelphia Association of Defense Counsel; as well as in a separate, supportive amicus brief submitted by Energy Association of Pennsylvania.

[3] Accord Cohen v. Jenkintown Cab Co., 238 Pa. Super. 456, 462 n.2, 357 A.2d 689, 692 n.2 (1976) (noting that the original statute "has been treated as a restatement of the principle of attorney-client privilege as it existed at common law."); Brief for Amici Ass'n of Corporate Counsel, et al. at 14 ("The [Earle] opinion evidences this Court's contemporaneous understanding that, by enacting the predecessor to § 5928, the General Assembly did not intend to alter the 'seldom questioned' common law view that communications from an attorney to a client for the provision of legal advice are privileged.").

[4] In a recent resolution, the American Bar Association encapsulated such purposes as follows:

(continued . . .)

Appellants maintain that a close confinement to client-initiated communications undermines the salutary purposes by inhibiting free and open communications, in light of the weakened protection and associated uncertainties. Accord Upjohn, 449 U.S. at 393, 101 S. Ct. at 684 ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.").[5] In this regard, Appellants believe lawyers will be reticent to provide advice where there is a significant chance this will be

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> RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice[.]

American Bar Association Task Force on the Attorney-Client Privilege, Recommendation 111 (adopted by ABA House of Delegates, Aug. 2005), cited in, Brief for Amici Ass'n of Corporate Counsel, et al. at 7.

[5] Accord Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994) ("If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain. 'An uncertain privilege -- or one which purports to be certain, but rests in widely varying applications by the courts -- is little better than no privilege.'" (quoting In re von Bulow, 828 F.2d 94, 100 (2d Cir. 1987))). See generally Brief for Amici Ass'n of Corporate Counsel, et al., in Nationwide Mut. Ins. Co. v. Fleming, ___ Pa. ___, 992 A.2d 65 (2010) (No. 32 WAP 2007), at 16 ("The Superior Court's holding will reduce Pennsylvania's attorneys to guessing when their own legal advice may be privileged, leaves clients uncertain as to when their lawyers' communications are confidential, and, consequently, will significantly disrupt the free and candid exchange of information between attorneys and clients.").

employed adversely to the client. See 8 WIGMORE, EVIDENCE §2320 (highlighting the "necessity of preventing the use of [an attorney's] statements as admissions of the client . . ., or as leading to inferences of the tenor of the client's communications"). In particular, Appellants posit that a restrictive approach will inhibit written communications such as opinion letters.[6]

More broadly, it is Appellants' position that centering the privilege on the purpose of the communications, rather than the direction of flow, best serves the overall interests of justice. See generally In re Investigating Grand Jury of Phila. County No. 88-00-3503, 527 Pa. 432, 440, 593 A.2d 402, 406 (1991) ("The intended beneficiary . . . is not the individual client so much as the systemic administration of justice which depends on frank and open client-attorney communication." (citing, inter alia, Search Warrant B-21778, 513 Pa. at 441, 521 A.2d at 428)). Appellants maintain that strict and formalistic limits on derivative protection are unrealistic and unworkable, on account of the close relationship between client confidences and responsive advice. This point is stated by one group of amici, as follows:

> [t]he Superior Court's Opinion, and its decision in Fleming, is premised on the erroneous assumption that a lawyer, whether it is outside or in-house counsel, can communicate with a client for the purpose of providing legal advice in a manner that does not reveal, reflect, or lead to inferences about confidential client communications. However, "attorney advice and client input are often inextricably intermixed." Fleming[, ___ Pa. at ___, 992 A.2d at 71 (opinion in support of reversal)]. In fact, "it is absurd to suggest that any legal advice given does not at least

[6] See also Brief for Amici Ass'n of Corporate Counsel, et al. at 11 ("It would be a great disservice to the legal profession and their clients to yield a rule encouraging important client decisions to be based only on legal advice communicated orally to clients simply because counsel could not trust that their opinion letters would be protected from disclosure to their clients' adversaries.").

> implicitly incorporate or, at a minimum, give a clue as to what the content of the client communication was to which the lawyer's responsive legal advice is given." [Edna Selan] Epstein[, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 10 (5th ed. 2007)]. Under the Superior Court's approach, the only inquiry in determining whether an attorney's communication to a client is privileged is whether that communication "reveals" a previous confidential communication from the client to the attorney. "Whatever the conceptual purity of this 'rule,' it fails to deal with the reality that lifting the cover from the [legal] advice [provided by an attorney] will seldom leave covered the client's communication to his lawyer." In re LTV Secs. Litig., 89 F.R.D. [595, 603 (N.D. Tex. 1981)].
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> The Superior Court's constricted view of the attorney-client privilege requires lawyers, clients, and courts to make "surgical separations" of communications based on client confidences from communications based on other sources. Spectrum Sys. Int'l Corp. [v. Chemical Bank], 581 N.E.2d [1055,] 1061 [(N.Y. 1991)]. In practice, drawing such distinctions "would be imprecise at best." In re LTV Secs. Litig., 89 F.R.D. at 603. Determining what documents are privileged will have the practical effect of unnecessarily complicating the court's in camera review of claimed privilege documents and result in affidavits and depositions of attorneys to determine where they obtained the information used as a basis for their legal advice.

Brief for Amici Ass'n of Corporate Counsel, et al. at 17, 20.[7]

Accordingly, consistent with the approach of the Restatement Third, Appellants contend the privilege should extend to all attorney-to-client communications containing

[7] See also In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) ("In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters."); Spectrum Sys. Int'l Corp., 581 N.E.2d at 1060 (describing "inordinate practical difficulties" associated with a close, derivative approach to the attorney-client privilege).

advice, analysis, and/or legal opinions. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §69.[8] Appellants acknowledge, "[r]egrettably," that the judicial decisions have not been consistent but advocate in favor of the line extending broader coverage.[9]

As to Fleming, Appellants stress that the purpose of the privilege -- to encourage full and frank communications, see supra note 1 -- is recognized in the opinions of all Justices. Further, Appellants infer from the lead opinion's conclusion that the privilege

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[8] Appellants and their amici do appreciate that there are well-recognized limits and exceptions to the attorney-client privilege, including the central requirement that protected communications be for the purpose of securing or providing professional legal services. Thus, they acknowledge, the privilege does not extend to business advice or protect clients from factual investigations. See Upjohn, 449 U.S. at 395-96, 101 S. Ct. at 685-86. Exceptions include the crime-fraud exception. See Investigating Grand Jury, 527 Pa. at 441-42, 593 A.2d at 406-07. Appellants and their amici also recognize the need for courts to guard against the possibility of abuse. See generally Brief for Amici Ass'n of Corporate Counsel, et al. at 10-11 n.5 ("Nothing in this brief should be construed as an endorsement of any practice, either by outside or in-house counsel, of failing to provide legitimate discovery through an overbroad interpretation of the privilege or of failing to timely or adequately identify claimed privileged documents that have been withheld from discovery.").

[9] See Brief for Appellants at 13-14 (citing Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1974); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1971); Byrd v. Arkansas, 929 S.W.2d 151, 154 (Ark. 1996)); Reply Brief for Appellants at 1-2 (citing SEPTA v. CareMarkPCS Health, L.P., 254 F.R.D. 253, 265 (E.D. Pa. 2008)); see also In re Ford Motor Co., 110 F.3d 954, 965 n.9 (3d Cir. 1997) ("[T]he entire discussion between a client and an attorney undertaken to secure legal advice is privileged, no matter whether the client or the attorney is speaking."); United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980) ("Legal advice or opinion from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the attorney-client privilege."); Sedat, Inc. v. DER, 163 Pa. Cmwlth. 29, 35, 641 A.2d 1243, 1245 (1994) ("It is well settled that legal advice given by an attorney in his professional capacity in response to a client inquiry is immune from discovery on the basis of the attorney-client privilege pursuant to Rule 4003.1."). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§68-70 & §69 cmt. i.

was waived that the Justices supporting affirmance, like those supporting reversal, believed the privilege pertained in the first instance. See Brief for Appellants at 21 (explaining that the finding of waiver "begs the question: if there is no privilege, what is there to waive?").

Appellants conclude with a request for a clear articulation from this Court endorsing the broader approach to the privilege. Accord Brief for Amici Ass'n of Corporate Counsel, et al. at 2 ("Amici urge the Court to reverse the Superior Court with a clear statement that communications made within the lawyer/client relationship are privileged when made for the very purpose of soliciting or providing legal advice.").

Several of Appellants' amici focus specifically on the privilege as it applies to in-house counsel, asserting that, given their proximity to the employer/client's business affairs, they are uniquely subject to the intertwining of advice and confidential information. Along these lines, Energy Association of Pennsylvania offers the following observations:

> Members of the Energy Association conduct their business in highly regulated environments, and they rely on their counsel -- particularly those in their own legal departments -- to monitor changes in statutes, regulations and judicial and agency interpretations of the law and then to advise corporate managers about those changes and how corporations should respond to them. They likewise rely on their in-house lawyers to serve as ongoing monitors of corporate compliance with the law. The lawyers who regularly serve the Energy Association's members, especially the counsel who are full-time employees, are exposed to a continuous stream of client communications (many of which are clearly confidential client communications in the traditional sense). These client communications are not only oral and written, but are observational as well. A business that brings a lawyer inside its operations does so with the expectation that the lawyer will observe its operations, so that the lawyer can proactively

> render advice without waiting for a formal, discrete request. Providing the opportunity for such observation is a form of client communication to the lawyer and is, in essence, a standing request for legal advice. The lawyer's advice, in turn, is necessarily based on the totality of client communications.
>
> To disclose the lawyer's advice is necessarily to disclose something about the operation of the client's business that was communicated to the lawyer through various media, including the lawyer's privileged observations. The disclosure of the client's communication, either explicitly or inferentially, occurs regardless of whether that advice is rendered in response to a discrete client request for legal guidance or whether it is rendered proactively as a result of the client's standing invitation to its counsel to observe and advise.

Brief for Amicus Energy Ass'n of Pa. at 1-2. See generally Upjohn, 449 U.S. at 392, 101 S. Ct. at 684 ("The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."). According to this amicus, "[a] reliably confidential relationship between counsel and client is needed more than ever for companies to operate as the good citizens the people of the Commonwealth expect them to be." Brief for Amicus Energy Ass'n of Pa. at 3.

Finally, several amici argue that, even if this Court were to discern a legislative intent underlying Section 5928 consistent with the Superior Court's narrow approach to the privilege, Article V, Section 10(c) of the Pennsylvania Constitution allocates the decisional authority on the subject to this Court. See PA. CONST. art. V, §10(c) (investing the Court with procedural rulemaking authority).

Appellee opens, in his initial statement of jurisdiction, with the observation that this appeal was taken as of right under the collateral order doctrine. He then references the United States Supreme Court's recent decision in Mohawk Industries, Inc. v. Carpenter, ___ U.S. ___, 130 S. Ct. 599 (2009), for the proposition that interlocutory appellate review does not extend as of right to discovery disputes centered on the assertion of the attorney-client privilege. See id. at ___, 130 S. Ct. at 609. Appellee indicates that this Court needs to decide whether to depart from the contrary approach prevailing under its own decision in Ben v. Schwartz to follow Mohawk.

On the merits, Appellee initially "agrees that attorney 'advice, analysis, and/or opinions' is privileged if confidential client communications are intermixed." Brief for Appellee at 10.[10] He stresses, however, that the common pleas court (at least in its Rule 1925 opinion) did allow for derivative protection. See id. at 9 ("Contrary to the Appellants' statement of the Case, the trial court did not make a ruling that all communications from the attorneys to the client are outside the protection of the attorney-client privilege." (emphasis in original)). It is his position that Appellants simply failed, upon the common pleas court's in camera inspection, to establish that attorney-created documents contained confidential information conveyed from the clients.

[10] Appellee regards the derivative protection afforded by the privilege as a judicially-created "corollary doctrine." Accord CaremarkPCS Health, L.P., 254 F.R.D. at 257 ("The attorney-client privilege has historically been applied only to 'communications from a client to an attorney,' but 'Pennsylvania courts have . . . developed a corollary doctrine covering communications from an attorney to a client when such communications reflect the communications from the client to the attorney.'" (quoting Santer v. Teachers Ins. & Annuity Ass'n, No. 06-CV-1863, 2008 WL 821060, at *1 n.3 (E.D. Pa. Mar. 25, 2008))); Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C., 186 F. Supp. 2d 567, 571-72 (E.D. Pa. 2002) ("A corollary to the rule, crafted by Pennsylvania courts, cloaks communications from the attorney to the client with privilege if disclosure of the communication would reveal the communications from the client to the attorney.").

Accord Gillard, No. 1065 EDA 2007, slip op. at 5 ("Neither at argument before the trial court nor in their merit brief or reply brief to this Court do the insurance companies assert that the communications of the attorneys to the client would reveal confidential communications from the client." (emphasis in original)). Further, according to Appellee, Appellants failed to assert that the withheld documents so much as contained advice, opinion, and/or analysis at the common-pleas level.[11]

Appellee also criticizes any extension of the attorney-client privilege beyond close derivative protection, denominating such expansion as inappropriate judicial interference with the prevailing legislative scheme. See Brief for Appellee at 22 ("With all due respect to this Court, Appellee submits that it is the role of the courts to interpret statutes enacted by the General Assembly[, . . . not to] substitute its own policy determinations whenever this Court believes the General Assembly enacted a statute outside of the majority rule, and which this Court believes may affect the Commonwealth's financial well-being with corporations."). While Appellee acknowledges the argument that the authority to determine the scope of the privilege appropriately rests with this Court under Article V, Section 10(c) of the Pennsylvania Constitution, he tersely couches this position as reflecting amici's improper belief that "it is the role of this Court to substitute its policy determinations for that of the legislature [sic] branch." Id. at 22 n.7.

[11] In this last regard, it was certainly implicit in Appellants' averments that the withheld documents contained legal advice, as, for example, they advanced a line of argument centered on the application of the advice-of-counsel defense. Presumably, Appellants did not press the position that the withheld documents contained legal advice at the in camera proceeding in light of the common pleas court's focus on the direction of flow, as well as its characterization of its ruling as a blanket one. See N.T., Mar. 29, 2007, at 8-9, 27.

According to Appellee, strong policy concerns influenced the General Assembly to take a narrow approach to the codification of the attorney-client privilege, id. at 10, including the adverse impact on the truth-determining process of a broadly applied privilege. Indeed, Appellee asserts that public policy favors strict construction of all testimonial exclusionary privileges. See id. at 24 (citing Ebner v. Ewiak, 335 Pa. Super. 372, 377, 484 A.2d 180, 183 (1984) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' . . . As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" (quoting Trammel v. United States, 445 U.S. 40, 50, 100 S. Ct. 906, 912 (1980))); accord Commonwealth v. Stewart, 547 Pa. 277, 282, 690 A.2d 195, 197 (1997). Appellee contends that an extension of the privilege to advice, analysis, and/or opinion will foster uncertainty as to the scope of the protection, and that in camera review proceedings will proliferate as a result. Furthermore, Appellee asserts, attorney analysis and opinion already is governed by the work product doctrine under Rule of Civil Procedure 4003.3, which would be rendered meaningless under Appellants' broad approach to the attorney-client privilege.

As to Earle, Appellee draws support from Coregis in contending that the decision had been displaced. See Coregis, 186 F. Supp. 2d at 570 n.2 ("Given that the Pennsylvania Supreme Court has never cited to Earle in the past 110 years, although having repeated opportunity to do so, and that the legislature in 1976 re-enacted the original attorney-client privilege statute, which is plainly at odds with Earle, the court concludes that Earle was either overruled by the legislature directly or by the Pennsylvania Supreme Court sub silentio."). In any event, Appellant does not regard

Earle as a legitimate reconciliation of a broad approach to the privilege with the statutory treatment. See Brief for Appellee at 14 (highlighting that Earle "does not use the word 'privilege,' let alone the words 'attorney-client privilege'"); cf. Coregis, 186 F. Supp. 2d at 570 n.2 (noting that "[a]lthough the predecessor to § 5928 was already on the books, [Earle] did not cite to it and did not purport to interpret the statute.").

Appellee's argument thus returns to Section 5928, which he contends is appropriately encapsulated by Coregis, as follows:

> By its very terms, the statute cloaks with privilege communications from the client to the attorney but does not extend an equal and full protection to those communications flowing from the lawyer to the client. The apparent one-sidedness of the Pennsylvania statute on attorney-client privilege is not a matter of whim or oversight, but rather it is based on sound policy judgments.

Coregis, 186 F. Supp. 2d at 569 (citations omitted) (emphasis added). In this regard, Appellee also points back to the Slater, Maguigan, and Woods decisions, expressing the privilege in the narrower terms. Accord Commonwealth v. Chmiel, 585 Pa. 547, 599, 889 A.2d 501, 531 (2005) (plurality, in relevant part) ("[T]he privilege applies only to confidential communications made by the client to the attorney in connection with the provision of legal services.").[12]

Finally, Appellee asserts that the broader matters discussed in the amicus briefs, such as issues faced by corporate counsel, simply are not pertinent to the limited controversy presently before the Court.

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[12] See also Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. 2003) (citing Slater and Commonwealth v. duPont, 730 A.2d 970 (Pa. Super. 1999)); Commonwealth v. Hetzel, 822 A.2d 747, 757 (Pa. Super. 2003) (citing duPont).

I. Propriety of the Interlocutory Appeal

As noted, Appellee initially highlights the difference between the prevailing application, in Pennsylvania, of the collateral order doctrine to discovery orders requiring disclosure over the assertion of a privilege, and the federal approach, under the recent Mohawk decision, which denies interlocutory appellate review as of right of such orders. See Mohawk, ___ U.S. at ___, 130 S. Ct. at 609.

In Commonwealth v. Harris, No. 8 EAP 2009, this Court recently requested briefing and entertained argument on the question of whether we should adopt the Mohawk approach to Pennsylvania collateral order review. Pending our resolution of the question in an appropriate case, however, the decision in Ben v. Schwartz governs. Since the Superior Court followed Ben v. Schwartz, and this case was not accepted for further consideration of the collateral order doctrine, we will proceed to the merits question, which has been ably argued by the parties and amici. Cf. Castellani v. Scranton Times, L.P., 598 Pa. 283, 292 n.5, 956 A.2d 937, 943 n.5 (2008).

II. Scope of the Attorney-Client Privilege

As is apparent from the above, Pennsylvania courts have been inconsistent in expressing the scope of the attorney-client privilege.[13] Presumably, the disharmony

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[13] In his dissent, Mr. Justice McCaffery finds no such inconsistency, relegating to the "occasional sentence taken out of context," Dissenting Opinion, slip op. at 3 (McCaffery, J.), all decisions which have expressed the broader view of the privilege. See, e.g., Search Warrant B-21778, 513 Pa. at 441, 521 A.2d at 428 ("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." (emphasis added)); Alexander, 253 Pa. at 203, 97 A. at 1065 ("The general rule is, that all professional communications are sacred." (citation and quotation marks omitted)); Earle, 196 Pa. at 221, 46 A. at 269; Sedat, 163 Pa. Cmwlth. at 35, 641 A.2d at 1245 ("It is well settled that legal advice given by an attorney in his professional capacity in response to a client inquiry is immune from discovery on the basis of the attorney-client (continued . . .)

relates to the ongoing tension between the two strong, competing interests-of-justice factors in play -- namely -- the encouragement of trust and candid communication between lawyers and their clients, see supra note 1, and the accessibility of material evidence to further the truth-determining process. In light of this conflict, very good arguments are made on both sides concerning the privilege's appropriate breadth. See generally Grace M. Giesel, The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations, 48 MERCER L. REV. 1169, 1172 (1997) ("At least since the time of Jeremy Bentham, a debate has raged about the benefits and burdens of the attorney-client privilege.").

Initially, here and elsewhere, it is now recognized by all that the privilege does afford derivative protection. Moreover, it is our own considered judgment, like that of the United States Supreme Court, that -- if open communication is to be facilitated -- a broader range derivative protection is implicated. See Upjohn, 449 U.S. at 394-95, 101 S. Ct. at 685. In this regard, we agree with those courts which have recognized the difficulty in unraveling attorney advice from client input and stressed the need for greater certainty to encourage the desired frankness. See, e.g., id.; see also supra note 5. Indeed, we believe it would be imprudent to establish a general rule to require the

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(. . . continued)
privilege pursuant to Rule 4003.1."); Cohen, 238 Pa. Super. at 462 n.2, 357 A.2d at 692 n.2 (observing that the original statute "has been treated as a restatement of the principle of attorney-client privilege as it existed at common law."); accord Pa.R.P.C. 1.6 cmt. [2] (observing that the "fundamental principle" that communications between lawyers and clients are confidential contributes to the "trust that is the hallmark of the client-lawyer relationship"). Like Appellants and their amici, we obviously take a different view.

disclosure of communications which likely would not exist (at least in their present form) but for the participants' understanding that the interchange was to remain private.

We acknowledge Appellee's arguments relative to Section 5928. Nevertheless, we do not find it clear that the Legislature intended strict limits on the necessary derivative protection. Cf. Search Warrant B-21778, 513 Pa. at 441, 521 A.2d at 428 (characterizing the attorney-client privilege as a "broad privilege"). While, in light of Earle's brevity and relative obscurity, reliance on the legislative presumption pertaining to reenactments (1 Pa.C.S. §1922(4); see generally supra note 3) may be regarded as somewhat of a fiction, Earle dovetails with our own present assessment concerning the privilege's proper application. Moreover, and in any event, statutory construction frequently entails resort to necessary, legitimate, and expressly authorized assumptions about legislative purposes.

In his dissent, Justice McCaffery chastises us for legislating, asserting that Section 5928 "could be hardly clearer," and thus, contending that it is inappropriate for us to refer to authorized presumptions concerning legislative intent. Dissenting Opinion, slip op. at 1, 5 (McCaffery, J.). Nevertheless, this dissent acknowledges: "[a]lthough 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." Id. at 2; cf. supra note 10 (reflecting Appellee's couching of derivative protection as a judicially-created "corollary doctrine").

Accordingly, the dissent itself recognizes that it is not possible to employ close literalism relative to Section 5928 and, at the same time, give effect to its purpose of facilitating open communication in soliciting legal advice. There is, therefore, material

ambiguity in the scope of the universally-recognized (but legislatively unstated) derivative protection, and we regard our disagreement with the dissents as one of degree rather than direction. For this reason, we also believe that, in determining the appropriate scope of this derivative protection, it is essential to consider the underlying purpose of the privilege. Such approach is consistent with logic and established principles of statutory construction. In terms of those purposes, we appreciate that client communications and attorney advice are often inextricably intermixed, and we are not of the view that the Legislature designed the statute to require "surgical separations" and generate the "inordinate practical difficulties" which would flow from a strict approach to derivative protection. Spectrum Sys. Int'l Corp., 581 N.E.2d at 1060.

We also agree with amici that, under the Pennsylvania Constitution, this Court does maintain a role beyond the mere construction of statutes in determining the appropriate scope of testimonial privileges.[14] Presently, given our determination that the Legislature has not manifested a desire to cabin our involvement, it is beyond the scope of this opinion to determine the limitations on the power of our respective branches of government relative to privilege matters.

Finally, as in other areas, we acknowledge the possibility for abuses. See, e.g., Gregory C. Sisk & Pamela J. Abbate, The Dynamic Attorney-Client Privilege, 23 GEO. J. LEGAL ETHICS 201, 230-35 (2010) (discussing the "ruse abuse," in which ordinary

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[14] As highlighted by various amici, this Court promulgated the Pennsylvania Rules of Evidence governing admissibility, as well as the Rules of Civil Procedure establishing the framework and scope of discovery, under its procedural rulemaking authority. See Pa.R.E. 101(b); Pa.R.Civ.P., Adoption of Rules of Civil Procedure.

Indeed, in his arguments, Appellee accepts the legitimacy of the work-product privilege reflected in this Court's rules. See Brief for Appellee at 23 (citing Pa.R.Civ.P. No. 4003.3).

business matters are disguised as relating to legal advice). For the present, at least, we believe the existing practices, procedures, and limitations, including in camera judicial review and the boundaries ascribed to the privilege, see supra note 8, are sufficient to provide the essential checks.[15]

We hold that, in Pennsylvania, 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.[16]

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[15] Mr. Justice Eakin offers an example of one abusive situation in which a client-insurer disregards counsel's admonition that there is no legal basis to deny a claim. See Dissenting Opinion, slip op. at 2 (Eakin, J.). According to the dissent, treating the advice as privileged does not protect any client disclosures. See id.

Initially, we question the dissent's apparent premise that advice concerning the validity of defenses invariably can be separated from client confidences regarding the claim. Moreover, exceptions may apply in such circumstances depending on variables not considered by the dissent. For example, where a client blatantly disregards the law and is untruthful in submissions to the courts, the crime-fraud exception may apply. See supra note 8. See generally Lewis E. Hassett and Cindy Chang, Bad Faith Allegations Versus an Insurer's Attorney-Client Privilege, 9 No. 11 INS. COVERAGE L. BULL. 1 (Dec. 2010) (discussing the crime-fraud exception and other approaches to waiver of the attorney-client privilege in the context of bad-faith litigation conduct). At a minimum, the insurer acting in bad faith will be deprived of an advice-of-counsel defense (or, alternatively, risk revelation of what counsel actually said).

[16] Contrary to Appellee's argument, our holding does not obviate the work product privilege. Such privilege, unlike the attorney-client privilege, does not necessarily involve communications with a client. See Pa.R.Civ.P. No. 4003.3 (exempting from discovery "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"). Moreover, while it is beyond the scope of this opinion to determine the precise breadth of the privilege, we note that Rule 4003.3, on its overall terms, manifests a particular concern with matters arising in anticipation of litigation. See Nat'l R.R. Passenger Corp. v. Fowler, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001) (indicating that "[t]he 'work product rule' is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation"). But see Sedat, 163 Pa. Cmwlth. (continued . . .)

The order of the Superior Court is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Mr. Chief Justice Castille, Mr. Justice Baer and Mesdames Justice Todd and Orie Melvin join the opinion.

Mr. Justice Eakin files a dissenting opinion.

Mr. Justice McCaffery files a dissenting opinion.

(. . . continued)
at 34, 641 A.2d at 1245 (holding that "anticipation of litigation is not a prerequisite to the application of the work product doctrine as it pertains to the work product of attorneys acting in their professional capacity.").

Thus, while the two privileges overlap, they are not coterminous.