

In Pennsylvania, The Attorney-Client Privilege Now Operates On A Two-Way Street

By Linda J. Karpel

The Pennsylvania Supreme Court recently brought Pennsylvania in line with majority of jurisdictions when it held “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.” *Gillard v. AIG Ins. Co.*, No. 10 EAP 2010, 2011 Pa. LEXIS 393, at * 40 (Pa. Feb. 23, 2011).

Gillard arose in the context of an insurance coverage case, where a policyholder pressing a bad faith claim against various uninsured motorist carriers sought discovery of documents in the file of the insurer’s law firm. The insurers withheld and redacted documents on the basis of the attorney-client privilege.

As set forth by the Pennsylvania Judicial Code, the attorney-client privilege is limited to protecting communications made by a client to his attorney for the purpose of obtaining legal advice, the so-called “one-way street” view of the privilege:

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. Although there have been some inconsistencies, most Pennsylvania courts have followed the “one-way street” approach of the Judicial Code, including the Superior Court, in a decision rendered in 2007 and affirmed by an equally divided Supreme Court in 2010. *See Nationwide Mut. Ins. Co. v. Fleming*, 2007 PA Super 145, 924 A.2d 1259 (2007) (protection available for confidential communications of client), *aff’d on other grounds by equally divided court*, 992 A.2d 65 (Pa. 2010) (attorney-client privilege had been waived by production of documents on same subject).

In applying the attorney-client privilege under the “one-way street” approach, Pennsylvania courts have allowed “derivative protection” of communications from the attorney to the client, but only where the attorney’s communication contains or would disclose privileged information communicated by the client. In *Gillard*, however, the insurers did not claim that “derivative protection” applied to the law firm documents that they withheld and redacted.

Instead, the insurers argued for a “two-way street” approach, with the attorney-client privilege protecting not only client communications made for the purpose of obtaining legal advice but also “all attorney-to-client communications containing advice, analysis, and/or legal opinions.” *Gillard*, 2011 Pa. LEXIS 393, at * 19.

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In adopting the position of the insurers, the Supreme Court examined the two competing interests involved: (i) the encouragement of candid communications between attorneys and their clients, and (ii) the interest of having all material evidence accessible to further the determination of the truth. The Court acknowledged that there are good arguments for both a “one-way street” and “two-way street” approach. However, the Court stressed that the current approach of allowing only narrow derivative protection for communications from attorneys to their clients involves “inordinate practical difficulties” in unraveling attorney advice from client input, since “client communications and attorney advice are often inextricably intermixed.” *Id.* at *38.

The decision of the Pennsylvania Supreme Court in *Gillard* brings the law of attorney-client privilege in Pennsylvania in line with the majority of jurisdictions across the country. Although the policyholder in *Gillard* did not prevail, it remains the law in Pennsylvania that, when an insurer accused of bad faith relies on the advice of counsel, it waives any right to rely on the attorney-client privilege. *See, e.g. Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D.&C.4th 23, 32-33 (Pa. Common Pleas, Allegheny Co. 1996). Moreover, in the long run, the *Gillard* decision may benefit policyholders as much as insurers, in making attorney communications off limits to their adversaries in litigation.

[Editor's Note: Linda "Lin" Karpel is an Associate at Fried & Epstein LLP, which regularly represents policyholders in insurance coverage disputes. Information concerning Fried & Epstein's Insurance Coverage Practice Group may be obtained by visiting the firms' website at www.fried-epstein.com. The opinions expressed in this article are solely those of the author and do not necessarily reflect the views of Fried & Epstein or its clients. Responses to this article are welcome. Copyright 2011 Linda J. Karpel.]