TEMPLE INN OF COURT

April 27, 2011

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WILLIAM GILLARD, Appellee v. AIG INSURANCE COMPANY AND AIG AND THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA AND KEY AUTO INSURANCE PLAN AND AIG CLAIMS SERVICES, Appellants

No. 10 EAP 2010

SUPREME COURT OF PENNSYLVANIA

15 A.3d 44*; *2011 Pa. LEXIS 393

September 14, 2010, Argued
February 23, 2011, Decided

PRIOR HISTORY: [*1]

Appeal from the Judgment of Superior Court entered on 1/4/08 at No. 1065 EDA 2007 affirming the Order entered on 4/16/07 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 864, June term 2005. Trial Court Judge: Jacqueline F. Allen, Judge. Intermediate Court Judges: John L. Musmanno, Jack A. Panella, Robert C. Daniels, Judge.
Gillard v. AIG Ins., 947 A.2d 836, 2008 Pa. Super. LEXIS 504 (Pa. Super. Ct., 2008)

COUNSEL: For AIG Insurance Company and AIG and The Insurance Company of The State of Pa., et al, APPELLANT: David J. Rosenberg, Esq., Weber, Gallagher, Simpson, Stapleton, Fires & Newby, L.L.P.

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For William Gillard, APPELLEE: Matthew A. Moroney, Esq., Claire Neiger, Goldberg, Miller & Rubin, P.C., Michael T. Sosnowicz, Esq., Michael T. Sosnowicz & Associates, P.C., , Esq.

JUDGES: MR. JUSTICE SAYLOR. CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ. 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.

OPINION BY: SAYLOR

OPINION

MR. JUSTICE SAYLOR

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 [*2] 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., 1999 PA Super 49, 727 A.2d 1144, 1164 (Pa. Super. 1999)* ("The attorney-client privilege . . . only bars discovery or testimony regarding [*3] 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 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 U.S. Dist. LEXIS 14693, 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 [*4] the advice of counsel discoverable from the outset.

> 1 Accord *Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928, 135 L. Ed. 2d 337 (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, 66 L. Ed. 2d 584 (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, 470, 9 S. Ct. 125, 127, 32 L. Ed. 488 (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 [*5] 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").

During in camera review proceedings in the presence of counsel, the common pleas court adopted the "one-way street" perspective. See NT., 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 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 [*6] 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, 2003 PA Super 72, 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 [*7] 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, 2007 PA Super 145, 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, *605 Pa. 468, 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 [*8] 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. [*9] 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 [*10] 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 [*11] 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 communi-

cations, but they assert the provision was not intended to change or limit the essential nature of [*12] 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]

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 [*13] 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.").

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 [*14] 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] 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 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]

4 In a recent resolution, the American [*15] Bar Association encapsulated such purposes as follows:

> 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 [*16] 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, 605 Pa. 468, 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.").

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.").

More broadly, it is Appellants' position that centering the privilege on the purpose of the communications, rather than the direction of flow, best serves [*17] 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 [*18] advice given does not at least 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 Sec. Litig., 89 F.R.D. [595, 603 (N.D. Tex. 1981)]*.

* * *

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], 78 N.Y.2d 371, 581 N.E.2d [1055,] 1061, 575 N.Y.S.2d 809 [(N.Y. 1991)]*. In practice, drawing such distinctions "would be imprecise [*19] at best." *In re LTV Sec. 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]

7 See also *In re Sealed Case, 737 F.2d 94, 99, 237 U.S. App. D.C. 312 (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).

Accordingly, consistent with the approach of the Restatement Third, Appellants contend the privilege should extend to all attorney-to-client communications containing 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 [*20] broader coverage. [9]

8 Appellants and their amici do appreciate that there are well-recognized limits and exceptions to the attorney-client privilege, including the central require-

ment 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)*; [*21] *Burlington Indus, v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1971)*; *Byrd v. Arkansas, 326 Ark. 10, 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. PER, 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*.

As to Fleming. Appellants stress that the purpose of the privilege -- to encourage full [*22] 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 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 [*23] 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, [*24] 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 [*25] 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, 175 L. Ed. 2d 458 (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 ap-

proach prevailing under its own decision in Ben v. Schwartz [*26] 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. 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 [*27] as contained advice, opinion, and/or analysis at the common-pleas level. [11]

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 U.S. Dist. LEXIS 23364, 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.").

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 [*28] 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 NT., Mar. 29, 2007, at 8-9, 27.

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 [*29] 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.

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, 63 L. Ed. 2d 186 (1980))*; accord *Commonwealth v. Stewart, 547 Pa. 277, 282, 690 A.2d 195, 197 (1997)*. [*30] 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 [*31] 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 [*32] with the provision of legal services."). [12]

12 See also *Gocial v. Independence Blue Cross, 2003 PA Super 242, 827 A.2d 1216, 1222 (Pa. Super. 2003)* (cit-

ing *Slater and Commonwealth v. duPont, 1999 PA Super 88, 730 A.2d 970 (Pa. Super. 1999)*); *Commonwealth v. Hetzel, 2003 PA Super 100, 822 A.2d 747, 757 (Pa. Super. 2003)* (citing duPont).

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.

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, [*33] 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 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)* [*34] ("At least since the time of Jeremy Bentham, a debate has raged about the benefits and burdens of the attorney-client privilege.").

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. Commw. 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 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 [*35] 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.

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 disclosure of communications which likely would not exist (at least in their present form) but for [*36] 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: [*37] "[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 [*38] 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.

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, [*39] 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*).

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 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]

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 [*40] 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).

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]

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 [*41] 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 particu-

> lar 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. Commw., 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.

The order of the Superior Court is reversed, and the matter is remanded for further [*42] 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.

DISSENT BY: McCAFFERY; EAKIN

DISSENT

DISSENTING OPINION

MR. JUSTICE McCAFFERY

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, 2003 PA Super 72, 818 A.2d 568, 571 (Pa.Super. 2003)*. ... While the attorney-client privilege is statutorily mandated, it has a number of requirements that must [*43] 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, 585 Pa. 547 (Pa. 2005) (plurality) [1] (emphasis added); see also *Commonwealth v. Maguigan, 511 Pa. 112, 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., 1999 PA Super 49, 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).

> 1 Only two justices [*44] 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 *Maguigan, 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.

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.Cmwlth. 2009)* ("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, 2004 PA Super 354, 861 A.2d 269, 273 (Pa.Super. 2004)* [*45] ("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" [*46] 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, 196 Pa. 217, 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 U.S. Dist. LEXIS 14693, 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 [*47] in *Nationwide Mutual Insurance Co. v. Fleming, 605 Pa. 468, 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, 589 Pa. 296, 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, 513 Pa. 429, 521 A.2d 422 (Pa. 1987), [*48] 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 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, 253 Pa. 195, 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, 238 Pa. Super. 456, 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, [*49] 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, 163 Pa. Commw. 29, 641 A.2d 1243 (Pa.Cmwlth. 1994)*. We note only that this seventeen-year-old opinion, rendered by a single judge in the Commonwealth Court's original [*50] 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, 601 Pa. 449, 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, [*51] 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 [*52] 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 [*53] 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.

MR. JUSTICE EAKIN

I [*54] cannot agree with the majority that the attorney-client privilege applies with equal force to attorney-to-client communications as it does to client-to-attorney communications. Certainly a derivative privilege equally protects those attorney-to-client communications containing client-to-attorney communication, [1] but where the communication contains no information at all emanating from the client, and the communication is relevant to the legal rights at issue in a separate and distinct action, I would not find it covered by a blanket privilege.

> 1 The trial court conducted an in camera review of all relevant documents, and the documents now at issue do not contain information emanating from the client.

Appellee Gillard was injured January 21, 1997. He had paid premiums to appellants for $200,000 in uninsured motorist coverage. On the eve of arbitration, appellants offered full policy limits, having theretofore made no settlement offer at all. This delay led to the present suit, wherein Gillard alleges the seven-year refusal to honor the claim, followed by the 11th hour acknowledgment of full liability, shows a breach of the duty to act in good faith.

The pronouncement of my colleagues, certainly [*55] thoughtful and well-reasoned, would make privileged all communications from counsel to the client, regardless of content, even when no information from the client is revealed. Such an extension of the statute

leads to an easily applied result, but I believe this is too broad. Suppose (whether true in this case or not, for we are announcing a rule of applicability beyond the present case), that counsel advised the client in year one that there was no legal basis for denying the underlying claim, or that there was no legal basis for delaying payment. Suppose the client replied that they did not care; they were not going to pay until they were made to do so. The reply is privileged, for all the significant policy reasons advanced herein by appellants and amici. But what is the salience of calling counsel's original warning privileged? It does not protect any disclosures the client made, and it denies evidence to the finder of fact that bears significantly on the claim of bad faith.

One must assume the defense to the bad faith claim includes an assertion the failure to offer settlement was predicated, at least in part, on a belief that there was a legitimate legal basis for contesting payment. [*56] If counsel's advice was to the contrary, can appellants still assert good faith while hiding this fact under a claim of privilege?

The attorney-client privilege is a limited evidentiary privilege, and privileges are exceptions to normal evidentiary concepts and rules:

> 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 truth."

Commonwealth v. Spetzer, 572 Pa. 17, 813 A.2d 707, 717 (Pa. 2002) (quoting *Trammel v. United States, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980))* (internal citations omitted). Pennsylvania's attorney-client privilege statute 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." *42 Pa.C.S. § 5928*. Because *§ 5928* unambiguously [*57] applies the attorney-client privilege only to those communications made by the client, the attorney-client privilege cannot apply to communications made by the attorney. See *1 Pa.C.S. § 1921(b)* ("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."). [2]

> 2 Given the statute's plain language, and the narrow construction given to evidentiary privileges, I cannot agree the General Assembly intended the attorney-client privilege to be broader than provided for in *§ 5928*. The majority relies upon our statement that the attorney-client privilege is a "'broad privilege.'" Majority Slip Op., at 20 (quoting *In re Search Warrant B-21778, 513 Pa. 429, 521 A.2d 422, 428 (Pa. 1987))*. However, in Search Warrant B-21778, we also observed the privilege "provides security that the information and facts revealed by the client will not be seized and used by others to his or her detriment." *In re Search Warrant B-21778, at 428* (emphasis added). While the case holds the privilege is broad, it is broad in one direction only. Otherwise, privileges are limited and must be strictly construed. *Spetzer, at 717*.

I acknowledge the [*58] arguments advanced for extending the attorney-client privilege to protect attorney-to-client communica-

tions. It may be that the Court should expand the attorney-client privilege by Rule, after publication and comment, but we have not done so. Alternatively, it may be appropriate for the General Assembly [3] to consider these various policy concerns and craft an expansion of the privilege statute, if deemed appropriate. Accordingly, I must offer this dissent.

3 We did not grant allocatur on the constitutionality of *§ 5928*, or which branch of government had authority to delineate the attorney-client privilege; amici's arguments that the General Assembly lacked authority to enact the limited privilege set forth in *§ 5928* are not before us.

2

1 of 1 DOCUMENT

Analysis
As of: Jan 05, 2011

WILLIAM GILLARD, Respondent v. AIG INSURANCE COMPANY AND AIG AND THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA AND KEY AUTO INSURANCE PLAN AND AIG CLAIMS SERVICES, Petitioner

No. 72 EAL 2008

SUPREME COURT OF PENNSYLVANIA

990 A.2d 1147*; *2010 Pa. LEXIS 458

March 16, 2010, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [1]**

Petition for Allowance of Appeal from the Order of the Superior Court.
Gillard v. AIG Ins., 947 A.2d 836, 2008 Pa. Super. LEXIS 504 (Pa. Super. Ct., 2008)

OPINION

[*1147] *ORDER*

PER CURIAM:

AND NOW, this 16th day of March, 2010, the Petition for Allowance of Appeal is **GRANTED**. The issues, paraphrased for clarity, are:

a. Whether the attorney-client privilege applies to communications from the attorney to the client.

b. Whether the Superior Court erred in holding the attorney-client privilege applies only to confidential communications from the client to the attorney, pursuant to *Nationwide Mutual Insurance Company v. Fleming, 2007 PA Super 145, 924 A.2d 1259 (Pa. Super. 2007).*

3

J.A31045/07

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WILLIAM GILLARD, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AIG INSURANCE COMPANY and AIG and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KEY AUTO INSURANCE PLAN and AIG CLAIMS SERVICES, Appellants	:	NO. 1065 EDA 2007

Appeal from the Order Entered April 16, 2007
In the Court of Common Pleas of PHILADELPHIA County
CIVIL at No(s): June Term, 2005 - No. 864

BEFORE: MUSMANNO, PANELLA, and DANIELS, JJ.

MEMORANDUM: Filed: January 4, 2008

Appellants, AIG Insurance Company, AIG, The Insurance Company of the State of Pennsylvania, Key Auto Insurance Plan, and AIG Claims Services (collectively "the insurance companies"), appeal from the order entered on April 16, 2007, by the Honorable Jacqueline Allen, Court of Common Pleas of Philadelphia County, which required them to produce documents in discovery that they claim are protected from disclosure by the attorney-client privilege.[1] After careful review, we affirm.

Appellee, William Gillard, instituted this civil action by filing a praecipe for a writ of summons on June 10, 2005. Gillard subsequently filed a

[1] The insurance companies' interlocutory appeal from the trial court's order is permitted under the collateral order doctrine. ***See*** Pa.R.A.P., Rule 313, 42 PA.CONS.STAT.ANN.; ***PECO Energy Co. v. Ins. Co. of North America***, 852 A.2d 1230, 1233 (Pa. Super. 2004); ***Gocial v. Independence Blue Cross***, 827 A.2d 1216, 1220 (Pa. Super. 2003); ***McGovern v. Hospital Service Ass'n of Northeastern Pennsylvania***, 785 A.2d 1012, 1013 n.1 (Pa. Super. 2001).

complaint on July 19, 2005, in which he alleged statutory bad faith and breach of contract stemming from the insurance companies' handling of an uninsured motorist claim. The insurance companies filed their answer to the complaint on September 27, 2005. The parties then proceeded with discovery.

During discovery, Gillard sought production of all documents from the file of the law firm that represented AIG in the underlying uninsured motorist claim, Marks, O'Neil, O'Brien & Courtney, P.C. The insurance companies maintained that certain documents created by counsel and sent to AIG were privileged as attorney-client communications and withheld production. Gillard then filed a motion to compel production of those documents.

The trial court held a hearing on the discovery dispute on March 29, 2007. At the hearing, the insurance companies maintained "that the attorney-client privilege would encompass both information from the client to attorney and from attorney to client...." N.T., Hearing, 3/29/07, at 5. The insurance companies summarized Gillard's position as "the attorney-client privilege can only relate to information coming from a client to an attorney." ***Id.*** The insurance companies informed the trial court that "if the [c]ourt were to decide ... that [Gillard's] view is a correct view, that everything [the insurance companies] have identified as an attorney-client privilege document" would "be not within the attorney-client privilege." ***Id.***, at 5-6.

The trial court ruled that "[a]ccording to the Pennsylvania statute, the attorney-client protection only applies to communications made by the client. That's my ruling." ***Id.***, at 8. Given the trial court's ruling, the insurance companies noted that it "obviate[d] the need to go through a number of documents that are communications from attorney to client ... [as] those communications are, pursuant to the [c]ourt's ruling, not going to be within the scope of the attorney-client privilege." ***Id.***, at 8-9. The trial court agreed. The trial court subsequently ordered the production of documents. This timely appeal followed.

On appeal, the insurance companies raise only one issue for our review:

> Whether the trial court erred in ruling that the attorney-client privilege only protects communications from the client to the attorney, and therefore, does not protect communications from an attorney to the client which contain the advice, analysis and/or the opinions of such attorney directed to the client.

Appellants' Brief, at 4.

The resolution of the issue presented on appeal presents a question of law to which our standard of review is *de novo* and our scope of review is *plenary*. ***See Kopko v. Miller***, 586 Pa. 170, 177, 892 A.2d 766, 770 (2006).

The attorney-client privilege is codified in Pennsylvania as follows:

> **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.CONS.STAT.ANN. § 5928.

Communications from an attorney to a client receive only a strictly limited privilege as this Court explained in ***Nationwide Mut. Ins. Co. v. Fleming***, 924 A.2d 1259, 1263 (Pa. Super. 2007), ***appeal granted***, ___ Pa. ___, ___ A.2d ___, 2007 WL 3196486 (filed October 31, 2007). In ***Fleming***, a panel of this Court explained the parameters of the protection of such communication as follows:

> The privilege extends to communications *from an attorney* to his or her client *if and only if* the communications fall within the general statutory definition. Under Section 5928, counsel cannot testify as to confidential communications made to him or her by the client, unless the client has waived the privilege. Consistent with this statute, the privilege protects confidential communications from an attorney to his or her client only to the extent that such communications contain and would thus reveal confidential communications from the client.

Id., at 1264 (emphasis in original; citations omitted).[2]

---

[2] As noted above, our Supreme Court has granted appeal in ***Fleming*** limited to the following issue:

> Whether the Superior Court erred as a matter of law in holding that the attorney-client privilege did not apply to a confidential memorandum written by Petitioners' in-house senior counsel to its senior executives and attorneys which related to pending and future litigation and reflects confidential information previously shared by the client with the attorney, as well as the attorney's legal advice?

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*. As stated in their issue presented on appeal, the attorney communications in this case[3] apparently consist only of "the advice, analysis and/or the opinions of such attorney directed to the client." Appellants' Brief, at 4. It seems that the insurance companies are undaunted by this Court's holding in ***Fleming***, as they describe in their brief what is "needed" in the case law:

> What appears to be needed is a clear articulation of the scope of the attorney-client privilege vis-à-vis the above noted statute [*i.e.*, 42 PA.CONS.STAT.ANN. § 5928] such that communications from attorneys to clients which contain advice, analysis and/or legal opinions are within the scope of the privilege and thus should enjoy the protection of that privilege. To the extent that the appellate waters are somewhat muddy on this point, there is now the opportunity for clarification.

Appellants' Brief, at 18.

Despite the insurance companies' assertion to the contrary, ***Fleming*** makes it clear that communications from an attorney to a client are protected pursuant to the attorney-client privilege under the following guidelines: "Communications *from* counsel to a client may be protected under Section 5928, but *only* to the extent that they reveal confidential

---

___ Pa. ___, ___ A.2d ___, 2007 WL 3196486 (filed October 31, 2007). As a published Opinion, unless and until the Supreme Court overrules ***Fleming***, it is controlling on this Court.

[3] The disputed communications are not in the certified record.

communications previously made by the client to counsel for the purpose of obtaining legal advice." 924 A.2d at 1269 (emphasis in original; citations omitted). Given the fact that the insurance companies do not assert that the attorney communications to the client would reveal confidential communications *from the client*, they are not entitled to relief. ***See id.***

Order affirmed. Jurisdiction relinquished.

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LEXSEE 2007 PHILA. CT. COM. PL. LEXIS 159

Caution
As of: Jan 05, 2011

WILLIAM GILLARD, Plaintiff v AIG INSURANCE CO., KEY AUTO INS. PLAN and AIG CLAIMS SERVICES, Defendants

No.: 0864

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2007 Phila. Ct. Com. Pl. LEXIS 159

June 5, 2007, Decided

SUBSEQUENT HISTORY: Affirmed without opinion by *Gillard v. AIG Ins., 2008 Pa. Super. LEXIS 504 (Pa. Super. Ct., Jan. 4, 2008)*

PRIOR HISTORY: [*1]
SUPERIOR COURT. 1065 EDA 2007.

JUDGES: ALLEN, J.

OPINION BY: ALLEN

OPINION

MEMORANDUM OPINION PURSUANT TO *Pa. R.A.P. 1925(b)*

The issue is whether attorney-client privilege, as provided by *42 Pa. C.S. § 5928* [1], protects communication from the attorney to his client. On March 29, 2007, this court held that, "According to the Pennsylvania statute, the attorney-client protection only applies to communications made by the client." Transcript, p. 8, ll. 16-18 (03/29/07).

> 1 *§ 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.

PROCEDURAL HISTORY

Defendants filed an appeal on April 23, 2007. On May 16, 2007, this court issued an Order directing defendants to "file of record ... and serve on the trial judge a detailed statement of matters complained of on appeal" within 14 days of entry of the order. On May 25, 2007, defendants complied. The Statement contains two issues:

> 1. Whether this Honorable Court erred or abused its discretion in entering the order dated March 29, 2007 **[*2]** and entered on April 16, 2007 requiring appellants to disclose communications from counsel to their client's claims representatives that had been withheld on the basis of the attorney-client privilege.
>
> 2. Whether this Honorable Court erred or abused its discretion in entering the order dated March 29, 2007 and en-

tered on April 16, 2007 that incorporated the court's ruling made at an in camera inspection on March 29, 2007, that included the following ruling of the court:

> THE COURT: All right. According to the Pennsylvania statute, the attorney-client protection only applies to communications made by the client. That's my ruling.

DISCUSSION

A. COMMUNICATION FROM CLIENT TO ATTORNEY

In addition to the statutory language, which clearly indicates the protections afforded to information flowing from the client to the attorney, the court also examined case law and the policy reasoning in support of the attorney-client privilege.

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, **[*3]** relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the 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; -- that the attorney shall not be permitted, without the consent of his client, -- and much less will he be compelled -- to reveal or disclose communications made to him under such circumstances.

Slater v. Rimar, Inc., 462 Pa. 138, 148, 338 A.2d 584 (Pa. 1975) quoting 2 Mecham on Agency, 2d Ed., § 2297 (emphasis added); *Commw. v. Maguigan, 511 Pa. 112, 131, 511 A.2d 1327 (1986)* ("the purpose for confidentiality is to assure the full and satisfactory maintenance of the relationship between the attorney and the client. *It is thus limited to confidential communications and disclosures made by the client to his legal advisor* for the purpose of obtaining his professional **[*4]** aid or advice") [2] (emphasis added).

> 2 This case examines the criminal statute providing attorney-client privilege. See *42 Pa. C.S. § 5916*, "In a criminal proceeding 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 policy reasons for the protection of confidential communication flowing from the client to the attorney do not exist in reverse as legal counsel cannot provide a client with confidential information for the purposes of securing legal advice. Generally, a client lacks the foundation to provide legal analysis based upon the facts.

CONFIDENTIAL COMMUNICATION

Additionally, defendant fails to assert, allege or otherwise indicate that the communications at issue contained confidential information disclosed by the client.

> 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 **[*5]** the attorney in connection with providing legal services.

In re Estate of Wood, 2003 Pa. Super. 72, P11, 818 A.2d 568 (2003). "Whether a communication is to be considered as confidential depends upon its character as well as upon the relation of the parties. It is essential that it should be made in confidence and with the intention that it should not be divulged." *Seitz v. Seitz, 170 Pa. 71, 74, 32 A. 578, 36 Week. Notes Cas. 553 (1895)*. The ability to make such a determination was denied this court.

CONCLUSION

For the above stated reasons, the court's ruling that *42 Pa. C.S. § 5928* protects confidential communication revealed by the client to his attorney only.

BY THE COURT: **DATE**

ALLEN, J.

June 5, 2007

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LEXSEE

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY AND COLONIAL INSURANCE COMPANY OF WISCONSIN F.K.A. COLONIAL INSURANCE COMPANY OF CALIFORNIA, Appellants v. JOHN FLEMING, JOSHUA MEEDER, MEEDER FLEMING & ASSOCIATES, INC., MORAINE GROUP, INC., MARY LOU FLEMING, ANDREA MEEDER, ROBERT DEAN, JOHN WILLIAMS, BARBARA REDDICK, RAY KOOSER, SANDY KOOSER, DAVID COLLEY, CONNIE TAYLOR, MICHELE DAUGHERTY, LON MCALLISTER, AND LON MCALLISTER AGENCY, Appellees

No. 32 WAP 2007

SUPREME COURT OF PENNSYLVANIA

605 Pa. 484*; *992 A.2d 74*; *2010 Pa. LEXIS 44

March 6, 2008, Argued
January 29, 2010, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: *Nationwide Mut. Ins. Co. v. Fleming, 605 Pa. 468, 992 A.2d 65, 2010 Pa. LEXIS 40 (Pa., Jan. 29, 2010)*

OPINION
[**1]

[*74] **ORDER**

PER CURIAM

AND NOW, this 29th day of January, 2010, the Resubmission Order of January 4, 2010, having been vacated, all ancillary matters are hereby rendered MOOT.

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H
Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Supreme Court of Pennsylvania.
NATIONWIDE MUTUAL INSURANCE COMPANY, Nationwide Mutual Fire Insurance Company, Nationwide General Insurance Company, Nationwide Property & Casualty Insurance Company and Colonial Insurance Company of Wisconsin f.k.a. Colonial Insurance Company of California,
Appellants
v.
John FLEMING, Joshua Meeder, Meeder Fleming & Associates, Inc., Moraine Group, Inc., Mary Lou Fleming, Andrea Meeder, Robert Dean, John Williams, Barbara Reddick, Ray Kooser, Sandy Kooser, David Colley, Connie Taylor, Michele Daugherty, Lon McAllister, and Lon McAllister Agency, Appellees.

Argued March 6, 2008.
Decided Jan. 29, 2010.

No. 32 WAP 2007, Appeal from the Order of Superior Court entered May 21, 2007 at No. 207 WDA 2005, affirming the Order of the Butler County Court of Common Pleas entered January 25, 2005 at No. EQ 99-50018. 924 A.2d 1259 (Pa.Super.2007).

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

ORDER

PER CURIAM.

AND NOW, this 29th day of January, 2010, the January 4, 2010 Resubmission Order is hereby **VACATED.** The Court being equally divided, the order of the Superior Court is **AFFIRMED.**

Justice EAKIN files an Opinion in Support of Affirmance, which is joined by Justice BAER.

Justice SAYLOR files an Opinion in Support of Reversal, which is joined by Chief Justice CASTILLE . Justice TODD and Justice McCAFFERY did not participate in the consideration or decision of this matter.

OPINION IN SUPPORT OF AFFIRMANCE

Justice EAKIN.

Appellants, Nationwide Mutual Insurance Company, *et al.,* sued several former agents and their respective insurance agencies, collectively appellees, for breach of contract and intentional interference with contractual relations. Appellants asserted appellees accessed confidential policyholder information on appellants' computer network and provided the information to competitors upon leaving appellants' employ. Appellees argued they were merely participating in permissible post-termination competition, and appellants did not have any proprietary interest in the information. On this basis, appellees counterclaimed, contending appellants brought suit in bad faith. A bench trial ensued.

During trial, appellees' counsel questioned appellants' former president regarding several documents appellants produced during discovery, including Document 529, which they sought to introduce to support their counterclaim. Appellants contended the attorney-client privilege protected Document 529, and only disclosed its recipient list, date, and subject line; they redacted the substantive content. The privileged nature of Document 529 is the issue underlying this ***66** appeal; it was filed under seal and remains sealed.

An attorney from appellants' general counsel authored Document 529 and sent it to 15 of appellants' employees, including officers, managers, and three other attorneys. Generally, Document 529 contains this counsel's assessment of the agent defections and appellants' strategy underlying the lawsuits against its former agents. It further states appellants cannot reasonably expect the lawsuits to succeed, and states the "primary purpose" of the lit-

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igation is to send a message to current employees contemplating defection.

The trial court held an *in camera* hearing to determine whether the attorney-client privilege applied to Document 529. Appellees argued appellants waived any privilege when they disclosed Documents 314 and 395, also regarding agent defections. Like Document 529, Document 314 was authored by an attorney from appellants' general counsel office; it outlined why appellants severed their relationship with certain agents and noted the necessity of obtaining information from defecting agents in order to consider appellants' legal options against them and their new employers. It was addressed to seven of appellants' employees, including two other attorneys in appellants' general counsel office. Document 395 was authored by appellants' agency administration director. It set forth additions and changes to the "Reflex Action Plan," appellants' policy for dealing with agent defections, and was sent to 35 of appellants' employees and officers.

The trial court held the voluntary disclosure of Documents 314 and 395 waived the attorney-client privilege with respect to Document 529. It determined appellants used the privilege to their advantage by producing communications in support of their position, but withheld Document 529 as privileged because it did not support their position; the court stated "the attorney-client privilege cannot be used as both a shield and a sword." Trial Court Opinion, 2/16/05, at 4.

Appellants appealed and requested a stay, which the trial court granted. The Superior Court granted appellees' motion to quash the appeal for lack of jurisdiction. By *per curiam* order, this Court granted review, vacated the Superior Court's order, and remanded to the Superior Court for further proceedings. *Nationwide Mutual Insurance Company v. Fleming,* 586 Pa. 622, 896 A.2d 565 (2006) (*Nationwide I*).

The Superior Court affirmed the trial court's decision regarding Document 529 on alternative grounds. *Nationwide Mutual Insurance Company v. Fleming,* 924 A.2d 1259, 1269 (Pa.Super.2007) (*Nationwide II*).[FN1] Citing codification of the attorney-client privilege, 42 Pa.C.S. § 5928, the court determined it protects only confidential communications from a client to an attorney "made in connection with the providing of legal services or advice." *Nationwide II,* at 1264 (citations omitted). Communications from attorney to client are privileged only to the extent they contain and would reveal confidential communications from the client. *Id.*

FN1. Justice McCaffery, then a Superior Court Judge, authored the opinion.

The court initially set forth Pennsylvania's two-part inquiry for determining whether the attorney-client privilege applies to preclude disclosure: whether the privilege applies to a communication, and if it does, whether client waiver or an exception applies to overcome the privilege and allow disclosure. *Id.,* at 1265-66. The Superior Court also held the client can waive the privilege by disclosing the communication***67** at issue to a third party. *Id.,* at 1265. Additionally, federal decisions have held that when a communication protected by the privilege is voluntarily disclosed, the privilege is waived "for *all* communications pertaining to the same subject matter." *Id.* (emphasis in original).

The court noted Document 529 was a communication from counsel to a corporate client, addressing agent defections. Since the privilege only protects attorney-to-client communications containing and revealing confidential client-to-attorney communications, and Document 529 neither contained nor revealed such communications, the court concluded it did not satisfy the requirements for the privilege's protection. *Id.,* at 1268.

We granted allowance of appeal on the following question:

> Whether the Superior Court erred as a matter of law in holding that the attorney-client privilege

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did not apply to a confidential memorandum written by [appellants]' in-house senior counsel to its senior executives and attorneys which related to pending and future litigation and reflects confidential information previously shared by the client with the attorney, as well as the attorney's legal advice?

Nationwide Mutual Insurance Company v. Fleming, 594 Pa. 311, 935 A.2d 1270 (2007). Since the privilege is codified at 42 Pa.C.S. § 5928, this is a question of statutory interpretation, and a pure question of law. *Commonwealth v. Bortz,* 589 Pa. 431, 909 A.2d 1221, 1223 (2006). Questions of law are subject to a *de novo* standard of review, and our scope of review is plenary. *Craley v. State Farm Fire and Casualty Company,* 586 Pa. 484, 895 A.2d 530, 539 n. 14 (2006). "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). "When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent." *Chanceford Aviation Properties, L.L.P. v. Chanceford Township Board of Supervisors,* 592 Pa. 100, 923 A.2d 1099, 1104 (2007) (citation omitted). We address only the privilege as applied to attorney-to-client communications and emphasize this case does not involve the work-product doctrine; appellants have claimed only the attorney-client privilege. Neither party has challenged the enactment of an attorney-client privilege statute on the grounds it is a procedural rule in violation of Article V, § 10(c) of the Pennsylvania Constitution.[FN2]

FN2. The relevant portion of Article V, § 10(c) provides:

> (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, ... if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.
>
> Pa. Const. art. V, § 10(c).

Appellants argue the Superior Court's holding chills, if not negates, the attorney-client privilege's purpose-to foster confidence and dialogue between attorney and client to benefit the administration of justice, citing *In re: Investigating Grand Jury of Philadelphia County No. 88-00-3503,* 527 Pa. 432, 593 A.2d 402, 406 (1991). Appellants also claim the court's decision is at odds with *National Bank of West Grove v. Earle,* 196 Pa. 217, 46 A. 268 (1900) , holding the privilege applies to all *68 attorney-to-client communications. *Id.,* at 269. The Superior Court did not mention *Earle;* appellants ask this Court to reaffirm *Earle*'s vitality, though it has not been cited by this Court since it was decided. Appellants contend, pursuant to the Statutory Construction Act, 1 Pa.C.S. § 1922(4),[FN3] the reenactment of 28 P.S. § 321 at 42 Pa.C.S. § 5928, without substantive changes, evidenced an intent for the codification to be construed as in *Earle.*

FN3. Section 1922(4) provides:

> That when 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.
>
> 1 Pa.C.S. § 1922(4).

Appellees argue the Superior Court's holding correctly applied § 5928 and Pennsylvania's case law. Appellees first assert Document 529 does not contain or reveal confidential client-to-attorney

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communications, but contains only legal advice. If this document is found to be privileged, they contend appellants waived the privilege by selectively disclosing similar subject matter in an attempt to gain a tactical advantage. Appellees cite *Murray v. Gemplus International,* 217 F.R.D. 362 (E.D.Pa.2003) (where party attempts to utilize privilege as weapon, via selectively disclosing communications, party waives privilege), and *Minatronics v. Buchanan Ingersoll,* 23 Pa. D. & C.4th 1, 18-21 (Allegheny Co.1995) (voluntary disclosure of confidential information to gain tactical advantage waives attorney-client privilege for all communications involving same subject matter). Appellees finally assert legal opinions are discoverable where they are directly relevant to a cause of action.

The purpose of the attorney-client privilege 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." *Upjohn Company v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *see also In re: Investigating Grand Jury of Philadelphia County,* at 406 (recognizing privilege's purpose is to create atmosphere encouraging confidence and dialogue between attorney and client, and intended beneficiary is not client so much as administration of justice). *Upjohn* further provided, "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn,* at 389, 101 S.Ct. 677.

Pennsylvania codified the privilege in 1887. *See* Act of May 23, 1887, P.L. 158, § 5d (formerly 28 P.S. § 321). This privilege statute was reenacted in 1976 without substantive changes and states, "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.

"[O]nce the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." *Joe v. Prison Health Services, Inc.,* 782 A.2d 24, 31 (Pa.Cmwlth.2001). Like the trial court, I would find this matter turns on waiver. The trial court relied on *Minatronics,* an Allegheny County Court of Common Pleas decision, for the proposition voluntarily disclosing confidential communications "waive[s] the privilege as to every confidential communication ... involving the same subject matter." *Minatronics,* at 18; *see* Trial Court Opinion, 2/16/05, at 3. The issue in *Minatronics* was whether the inadvertent disclosure of confidential communications***69** waived the privilege as to other confidential communications containing the same subject matter. The *Minatronics* court also noted significant support for the position that such disclosure does not waive the privilege "where there is no apparent prejudice to the party seeking further disclosure[,]" because "where it is clear that the limited disclosure is not being used [as a sword and a shield], there is no justification for applying a subject matter waiver." *Minatronics,* at 19-20. The court held the inadvertent disclosures at issue did not waive the attorney-client privilege, and further opined, "the law should not discourage parties from voluntarily disclosing confidential communications (unless made for the purpose of achieving a tactical advantage) by adopting a rule of law that causes voluntary disclosures to operate as a waiver of other confidential communications involving the same subject matter." *Id.,* at 20-21.

The trial court also relied on *Murray,* a United States District Court decision from the Eastern District of Pennsylvania, holding the defendant waived its attorney-client privilege as to intentionally disclosed documents and their subject matter. *Murray,* at 367. The *Murray* court noted the defendant "seems to have produced only the documents that are most beneficial to its defense...." *Id.,* at 366. *Murray* found "the argument that when one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party's case, the party waives its attorney-client privilege

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with respect to the subject-matter of the disclosed communications" persuasive. *Id.*, at 367.

The reasoning in *Murray* and *Minatronics* is instructive. Appellants never alleged Documents 314 and 395 are privileged or were unintentionally disclosed. Rather, appellants claim Documents 314 and 395 are business communications which do not contain confidential communications made in connection with providing legal services or advice. Read together, however, Documents 314, 395, and 529 contain the same subject matter-appellants' response to agent defections. Document 529 contains counsel's opinion-based outline regarding the ongoing activities for dealing with the defections, specifically, litigation efforts in Pennsylvania and New York. In Document 529, counsel states the litigation's primary purpose-to send a message to current employees contemplating defection-and concedes the likelihood of receiving a damages award is remote. Counsel notes his office's participation in modifying the Reflex Action Plan, and suggests edits for appellants' no-compete contract.

Like Document 529, Document 314 was authored by an attorney in appellants' general counsel office and the words "privileged and confidential" appear in its heading. Documents 314 and 529 contain counsel's understanding of the agent defections. Like Document 529, Document 395 discusses the Reflex Action Plan. Document 395 explains modifications to the Reflex Action Plan in order to efficiently deal with a large agent defection, a product of counsel's advice and input, as noted by counsel in Document 529.

Thus, the disclosure of Documents 314 and 395 form the basis of subject matter waiver of the attorney-client privilege regarding Document 529, the scope of which extends to Document 529 because it contains the same subject matter. What distinguishes Document 529 from Documents 314 and 395 is counsel's unflattering concessions regarding the litigation's purpose and prospect of succeeding. As in *Murray*, appellants seem to have produced only the documents beneficial to their case by disclosing Documents 314 and 395, and withholding Document 529 based on its *70 privileged nature. I believe appellants waived the attorney-client privilege with respect to the subject of agent defections upon disclosing Documents 314 and 395, and cannot claim the privilege applies to a document containing the same subject matter, as well as potentially damaging admissions. Because I conclude this matter turns on waiver, I would decline to address the merits.

Justice BAER joins this Opinion in Support of Affirmance.

OPINION IN SUPPORT OF REVERSAL

Justice SAYLOR.

I respectfully differ with the determination of the Justices favoring affirmance that, because Appellants voluntarily disclosed Documents 314 and 395, they waived the attorney-client privilege with respect to Document 529. *See* Opinion in Support of Affirmance, at 69-70.

As a preliminary matter, I recognize that this case presents a threshold issue of first impression, specifically, whether the same subject matter waiver doctrine should be adopted by this Court, as it has been in the federal arena. *See* Fed.R.Evid. 502(a) & advisory committee notes.[FN1] Notably, federal courts have supplied factors for courts to consider when applying the doctrine. *See, e.g., Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349-50 (Fed.Cir.2005) ("There is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the nature of the legal advice sought[,] and the prejudice to the parties of permitting or prohibiting further disclosures." (citation omitted)).

> FN1. The Pennsylvania Rules of Evidence do not contain a similar rule. *See* Pa. R. Evid. 101, *et seq.*

Applying such a subject matter litmus, it seems that Appellants have not waived the attorney-client

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privilege with respect to Document 529, because Documents 314 and 395, which were disclosed, do not appear to contain the same subject matter as Document 529. As a general principle, when assessing whether a party has implicitly waived the attorney-client privilege,

> we start with the unarguable proposition that the attorney-client privilege is highly valued. Accordingly, courts should be cautious about finding implied waivers. Claims of implied waiver must be evaluated in light of principles of logic and fairness. That evaluation demands a fastidious sifting of the facts and a careful weighing of the circumstances. Considering the need for this precise, fact-specific [examination], it is not surprising that the case law reveals few genuine instances of implied waiver.

In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 23 (1st Cir.2003) (citations omitted).

Facially, Documents 314, 395, and 529 pertain to the "same subject matter," in the broadest sense of the phrase, as they all deal with some aspect of agent defections. *See* Opinion in Support of Affirmance, at 69-70. Document 395 describes the Reflex Action Plan (the practices that Appellants' agencies should follow when agents defect), Document 314 includes counsel's understanding regarding the defection of certain agents, and Document 529 summarizes the legal actions taken by Appellants concerning agent defections. *See* R.R. 31a-62a.

***71** However, a closer examination of the communications highlights their differences. Document 395 is a comprehensive business manual detailing the various practices that should be applied when dealing with defecting agents. *See id.* at 32a-62a. Document 314 is a one-page e-mail drafted by an in-house attorney that specifies, by way of four bullet points, his understanding of the defection of four agents in Pennsylvania. *See id.* at 31a. Notably, Document 314 states, *inter alia,* that, "[O]ur office will begin assessing and preparing to execute our legal options, both against the agents and possibly the companies they are moving to, and will advise management of those options for a decision." R.R. at 31a.

By contrast, although it is also written by in-house counsel, Document 529 describes, among other things, the present litigation in several states involving Appellants, their former agents, and their new companies. Namely, it discusses the nature of these suits, the money damages sought, the purpose behind the litigation, Appellants' likelihood of success, and the other remedies available to Appellants against defecting agents. It also includes counsel's recommendations regarding Appellants' use of specific contract provisions, as well as the possibility of filing complaints with the insurance departments of certain states. Accordingly, given the principle that courts should be cautious in finding an implied waiver of the attorney-client privilege, and the contents of the communications, it seems that Appellants did not waive the attorney-client privilege with respect to Document 529 by disclosing Documents 314 and 395.

In addressing the scope of the attorney-client privilege, I agree with the Justices favoring affirmance that Document 529 reveals confidential client communications. *See* Opinion in Support of Affirmance, at 68-69. For example, in the opening passage of the memorandum, the in-house-attorney author relates the collective knowledge held by management and in-house counsel regarding the operational impact of agent defections and a business-related judgment, which apparently had been made concerning the necessity of all reasonably possible responsive action. This passage both reveals information apparently communicated by management and, more generally, reflects in-house counsel's knowledge apparently derived from familiarity with business aspects. The memorandum proceeds to detail strategies that appear to reflect prior decisions made by management upon legal consultation, rather than pure legal advice.

I agree with *amici curiae,* The Association of

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Corporate Counsel, Pennsylvania Bar Association, Philadelphia Bar Association, Chamber of Commerce of the United States of America, and Pennsylvania Chamber of Business and Industry, that Document 529 exemplifies the substantial difficulty with a narrow approach to the attorney-client privilege rigidly centered on the identification of specific client communications, in that attorney advice and client input are often inextricably intermixed. *See* Brief for *Amici* The Ass'n of Corporate Counsel, *et al.* at 20 ("[T]he communication clearly was made for the purpose of providing legal advice and necessarily draws on, and cannot be separated from[,] the Appellants' communications with counsel. If analysis and legal opinions such as that expressed by counsel in Document 529 were not deemed privileged, in-house counsel would be prevented from effectively performing the professional duties for which they were hired and their clients would not be afforded the protection of lawyer-client confidentiality that *72 they have a right to expect.").[FN2] As succinctly explained by *amici curiae* Energy Association of Pennsylvania and Pennsylvania Telephone Association:

> FN2. These *amici* correctly recognize the attorney-client privilege does not protect a client from an investigation of the facts in a given matter; rather, it is limited to communications made within the client/lawyer relationship. *See* Brief for *Amici* The Ass'n of Corporate Counsel, *et al.* at 21.

> [Many business enterprises] conduct their businesses in highly regulated environments, and they rely on their counsel-particularly those in their own legal departments-to monitor changes in statutes and 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 *Amici* Associations' 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 Superior Court's holding is based on a narrow, formalistic view of attorney/client communications that is unrealistic. It fails to account for the full panoply of responsibilities lawyers-particularly "in-house" lawyers-have to counsel their corporate clients about an increasingly broad array of ever-changing legal requirements. The Superior Court's holding, if not reversed, is likely to create unnecessary impediments to the counseling of clients and could undermine one of the important goals of the privilege: frank communication to aid in compliance with the law and otherwise to provide necessary legal representation. Because businesses must operate in an increasingly complex legal environment, a closer, rather than more formal and distant relationship should be encouraged between client and counsel. 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 *Amici* Energy Ass'n of Pa. and Pa. Tel.

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Ass'n at 1-3.[FN3]

FN3. *Accord* Brief for *Amici* The Ass'n of Corporate Counsel, *et al.* at 8-9 ("In a business and regulatory environment that demands corporate accountability, in-house counsel must be proactive in ensuring compliance with the law and cannot simply react to communications and questions from their corporate clients, many of whom may have difficulty keeping pace with or understanding the vast number and complexity of regulations and liabilities that may impact their work. A significant part of the job of any in-house lawyer is to provide confidential legal advice based on what the lawyer observes directly from within a company."); *id.* at 14 ("[T]he communication of legal advice on the lawyer's own initiative in this context cannot be divorced from the totality of the confidential information that the lawyer knows about the client."); *id.* ("[T]he nature of the relationship between in-house counsel and corporate clients makes it all but impossible for communications related to the provision of legal advice *not* to reveal, implicitly or explicitly, client confidences exchanged during the course of the professional relationship. The legal services provided by in-house counsel are particularly valuable to businesses precisely because they draw on counsel's experience, observations, and ongoing communications with a corporate client."). *See generally In re LTV Secs. Litig.*, 89 F.R.D. 595, 602 (N.D.Tex.1981) ("Whatever the conceptual purity of [a rule centered on specific revelation of client communications], 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.").

*73 According to the above *amici,* the Superior Court's opinion "poses inordinate practical difficulties" that make it administratively and judicially unworkable. Brief for *Amici* The Ass'n of Corporate Counsel, *et al.* at 15 (quoting *Spectrum Sys. Int'l Corp. v. Chem. Bank,* 78 N.Y.2d 371, 575 N.Y.S.2d 809, 581 N.E.2d 1055, 1061 (1991)); *see also id.* ("Because the Superior Court's holding rests on an unrealistic dichotomy between confidential client communications and a lawyer's providing of legal services, lawyers, clients, and judges will vary widely in their determinations of what attorney communications are privileged and the application of the privilege will become uncertain."). The argument continues:

> The practical difficulties of determining when a lawyer's communications incorporate or otherwise tacitly refer to a client's communications "lead[s] to uncertainty as to when the privilege will apply." [*LTV Secs. Litig.*, 89 F.R.D. at 603]. Yet, "if 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." *Upjohn [Co. v. United States],* 449 U.S. [383,] 392 [101 S.Ct. 677, 66 L.Ed.2d 584] (1981). 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. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393 [101 S.Ct. 677].

Brief for *Amici* The Ass'n of Corporate Counsel, *et al.* at 16.

While I 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, I would remain with the pragmatic

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approach reflected in *Nat'l Bank of West Grove v. Earle,* 196 Pa. 217, 221, 46 A. 268, 269 (1900). Although this may inevitably extend some degree of overprotection, I 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 reenactments. *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.").[FN4] Moreover, the approach*74 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. I 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. [FN5]

> FN4. As Appellants explain, in 1976, the Legislature reenacted the privilege statute which was in effect as of the issuance of *Earle* without making any substantive changes to it. *See* Act of July 9, 1976, P.L. 586, No. 142, § 2 (codified at 42 Pa.C.S. § 5928).
>
> FN5. For example, the sole allusion to the attorney-client privilege in *Slater v. Rimar, Inc.,* 462 Pa. 138, 338 A.2d 584 (1975), is in the form of a passing reference to a prominent treatise. *See id.* at 148 n. 8, 338 A.2d at 589 n. 8. Otherwise, *Slater* concerned asserted violations of the Canons of Professional Ethics and the procedures employed to redress them.

For the above reasons, I would reverse the order of the Superior Court.

Chief Justice CASTILLE joins this Opinion in Support of Reversal.

Pa.,2010.
Nationwide Mut. Ins. Co. v. Fleming
992 A.2d 65

END OF DOCUMENT

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7

924 A.2d 1259, 2007 PA Super 145
(Cite as: 924 A.2d 1259)

Superior Court of Pennsylvania.
NATIONWIDE MUTUAL INSURANCE COMPANY, Nationwide Mutual Fire Insurance Company, Nationwide General Insurance Company, Nationwide Property & Casualty Insurance Company and Colonial Insurance Company of Wisconsin F.K.A. Colonial Insurance Company of California, Appellants
v.
John FLEMING, Joshua Meeder, Meeder Fleming & Associates, Inc., Moraine Group, Inc., Mary Lou Fleming, Andrea Meeder, Robert Dean, John Williams, Barbara Reddick, Ray Kooser, Sandy Kooser, David Colley, Connie Taylor, Michele Daugherty, Lon Mcallister, and Lon McAllister Agency, Appellees.

Argued Sept. 20, 2006.
Filed May 21, 2007.

Background: Insurer brought action against former agents and their employers to recover for breach of contract and intentional interference with contractual relations. Defendants counterclaimed alleging bad faith. Insurer claimed attorney-client privilege for memorandum. The Court of Common Pleas, Butler County, Civil Division, No. EQ 99-50018, Doerr and S. Michael Yeager, JJ., 2005 WL 5006540, ordered disclosure. Insurer appealed. The Superior Court, No. 207 WDA 2005, quashed appeal for lack of jurisdiction. Appeal was allowed. The Supreme Court, 586 Pa. 622, 896 A.2d 565, vacated and remanded.

Holdings: On remand, the Superior Court, McCaffery, J., held that:
(1) attorney-client privilege did not protect e-mail memoranda disclosed by insurer;
(2) disclosing unprivileged documents could not form the basis for waiver of the privilege with respect to document on same subject matter; but
(3) the privilege did not protect memorandum on same subject matter of agent defections.

Affirmed.

West Headnotes

[1] Privileged Communications and Confidentiality 311H ⚿177

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk175 Determination
311Hk177 k. Questions of Law or Fact. Most Cited Cases
(Formerly 410k223)
Whether attorney-client privilege protects a particular communication from disclosure is a question of law. 42 Pa.C.S.A. § 5928.

[2] Privileged Communications and Confidentiality 311H ⚿106

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk106 k. Purpose of Privilege. Most Cited Cases
(Formerly 410k198(1))
The attorney-client privilege is designed to foster confidence between attorney and client, leading to a trusting, open dialogue; it derives from the recognition that full and frank communication between attorney and client is necessary for sound legal advocacy and advice, which serve the broader public interests of observance of law and administration of justice. 42 Pa.C.S.A. § 5928.

[3] Privileged Communications and Confidentiality 311H ⚿102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Defini-

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tion. Most Cited Cases
(Formerly 410k198(1))

Four elements must be satisfied in order to successfully invoke the protections of attorney-client privilege: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court or a subordinate; (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services, or assistance in a legal matter, and not for the purpose of committing a crime or tort; (4) the privilege has been claimed and is not waived by the client. 42 Pa.C.S.A. § 5928.

[4] Privileged Communications and Confidentiality 311H ⚿102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Definition. Most Cited Cases
(Formerly 410k198(1))

The 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. 42 Pa.C.S.A. § 5928.

[5] Privileged Communications and Confidentiality 311H ⚿132

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk132 k. Communications from Client to Attorney and from Attorney to Client. Most Cited Cases
(Formerly 410k198(1))

The attorney-client privilege extends to communications from an attorney to his or her client if and only if the communications fall within the general statutory definition. 42 Pa.C.S.A. § 5928.

[6] Privileged Communications and Confidentiality 311H ⚿132

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk132 k. Communications from Client to Attorney and from Attorney to Client. Most Cited Cases
(Formerly 410k198(1))

The attorney-client privilege protects confidential communications from an attorney to his or her client only to the extent that such communications contain and would thus reveal confidential communications from the client. 42 Pa.C.S.A. § 5928.

[7] Privileged Communications and Confidentiality 311H ⚿154

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk154 k. Criminal or Other Wrongful Act or Transaction; Crime-Fraud Exception. Most Cited Cases
(Formerly 410k201(2))

The crime-fraud exception to the attorney-client privilege results in loss of the protections when the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity. 42 Pa.C.S.A. § 5928.

[8] Privileged Communications and Confidentiality 311H ⚿100

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk100 k. In General. Most Cited Cases
(Formerly 410k198(1))

The attorney-client privilege may be forfeited if its exercise will only frustrate the interests of justice. 42 Pa.C.S.A. § 5928.

[9] Privileged Communications and Confidentiality 311H ⚿168

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311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
The client can waive the protection afforded by attorney-client privilege, for example by disclosing the communication at issue to a third party. 42 Pa.C.S.A. § 5928.

[10] Privileged Communications and Confidentiality 311H ⚿176

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk175 Determination
311Hk176 k. In General. Most Cited Cases
(Formerly 410k223)
The precept that no claimant of a testimonial privilege can be the final arbiter of his own claim applies to a party invoking attorney-client privilege as surely as it applies to those who invoke other evidentiary privileges. 42 Pa.C.S.A. § 5928.

[11] Privileged Communications and Confidentiality 311H ⚿173

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk171 Evidence
311Hk173 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 410k222)
The party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, e.g., because the privilege has been waived or because some exception applies. 42 Pa.C.S.A. § 5928.

[12] Privileged Communications and Confidentiality 311H ⚿173

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk171 Evidence
311Hk173 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 410k222)
If the party asserting the attorney-client privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under attorney-client privilege. 42 Pa.C.S.A. § 5928.

[13] Privileged Communications and Confidentiality 311H ⚿131

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk128 Professional Character of Employment or Transaction
311Hk131 k. Particular Cases. Most Cited Cases
(Formerly 410k200)

Privileged Communications and Confidentiality 311H ⚿141

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk135 Mode or Form of Communications
311Hk141 k. E-Mail and Electronic Communication. Most Cited Cases
(Formerly 410k204(2))
E-mail memorandum by insurer's director of agency administration concerning action plan to deal with agent defections was not protected by attorney-client privilege, even though some recipients were attorneys; the memo was a routine business communication and was not sent for the purpose of

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securing legal services, legal assistance, or a legal opinion. 42 Pa.C.S.A. § 5928.

[14] Privileged Communications and Confidentiality 311H ⚿131

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk128 Professional Character of Employment or Transaction
311Hk131 k. Particular Cases. Most Cited Cases
(Formerly 410k200)

Privileged Communications and Confidentiality 311H ⚿141

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk135 Mode or Form of Communications
311Hk141 k. E-Mail and Electronic Communication. Most Cited Cases
(Formerly 410k204(2))
E-mail memorandum by insurer's attorney on agent defections was not protected by attorney-client privilege, even though some recipients were attorneys; the memo was a routine business communication reciting attorney's understanding of insurer's business decisions with respect to termination of the four agents' relationships. 42 Pa.C.S.A. § 5928.

[15] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Disclosing unprivileged documents could not form the basis for waiver of attorney-client privilege with respect to document on same subject matter. 42 Pa.C.S.A. § 5928.

[16] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Subject matter waiver of attorney-client privilege cannot be based on the disclosure of non-privileged documents. 42 Pa.C.S.A. § 5928.

[17] Privileged Communications and Confidentiality 311H ⚿121

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk120 Parties and Interests Represented by Attorney
311Hk121 k. In General. Most Cited Cases
(Formerly 410k199(2))
Memorandum by insurer's attorney on agent defections and likely outcome of current and pending litigation was not protected by attorney-client privilege; the memo was not a communication from a corporate client to counsel, but was sent by corporate counsel to managers of a corporate client, and it did not disclose any confidential communications by insurer to counsel. 42 Pa.C.S.A. § 5928.

[18] Privileged Communications and Confidentiality 311H ⚿132

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk132 k. Communications from Client to Attorney and from Attorney to Client. Most Cited Cases
(Formerly 410k198(1))

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Communications from counsel to a client may be protected by attorney-client, but only to the extent that they reveal confidential communications previously made by the client to counsel for the purpose of obtaining legal advice. 42 Pa.C.S.A. § 5928.

[19] Privileged Communications and Confidentiality 311H ⚿132

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk132 k. Communications from Client to Attorney and from Attorney to Client. Most Cited Cases
(Formerly 410k198(1))

Counsel's general opinion as to what is likely achievable via litigation is protected by attorney-client privilege only in so far as necessary to protect from disclosure the client's confidential communications. 42 Pa.C.S.A. § 5928.

[20] Appeal and Error 30 ⚿854(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k854 Reasons for Decision
30k854(1) k. In General. Most Cited Cases

Appeal and Error 30 ⚿856(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k856 Grounds for Sustaining Decision Not Considered
30k856(1) k. In General. Most Cited Cases

An appellate court may uphold a decision of the trial court if there is any proper basis for the result reached; thus, the appellate court is not constrained to affirm on the grounds relied upon by the trial court.

***1261** Lee A. Montgomery, Butler, for Nationwide, appellant.

***1262** Robert O. Lampl, Pittsburgh, for Fleming, appellee.

BEFORE: TODD, BENDER and McCAFFERY, JJ.

OPINION BY McCAFFERY, J.:

¶ 1 Appellants, Nationwide Mutual Insurance Company and related entities (collectively "Nationwide"), appeal from the trial court order requiring production of a document that Nationwide claims is protected from disclosure by attorney-client privilege. Nationwide specifically asks us to determine whether the trial court erred in finding that Nationwide had waived attorney-client privilege with respect to this document via production of two other documents pertaining to the same subject matter. After careful review of the certified record and the applicable law, we conclude that the trial court did indeed err in finding subject matter waiver applicable to the document in question. However, we also conclude that the document is *not* protected by attorney-client privilege. Hence, we affirm, although on grounds different from those on which the trial court based its decision.

¶ 2 The facts and procedural history underlying this appeal are as follows. Nationwide brought an action sounding in breach of contract and intentional interference with contractual relations against Appellees, who are former Nationwide agents and their respective insurance agencies. Specifically, Nationwide alleged that Appellees accessed confidential policyholder information from Nationwide's internal computer system and then provided that information to Nationwide's competitors. In response,

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Appellees argued that their agreement with Nationwide permitted post-termination competition and that Nationwide did not maintain any proprietary interest in policyholder information. Furthermore, Appellees brought a counterclaim, in which they alleged, *inter alia,* that Nationwide's claim had been brought in bad faith. A bench trial commenced on January 10, 2005, before the Honorable Thomas J. Doerr.

¶ 3 On the second day of trial, defense counsel questioned Galen Barnes, the president of Nationwide from 1999 until 2003, with respect to several Nationwide documents which had been produced during discovery, including a memorandum labeled "Document No. 529" (hereinafter Document 529). Nationwide had asserted that this document was protected by attorney-client privilege, and therefore had redacted the entire substantive text, although the author, recipient list, date, and subject line of the memorandum were disclosed. Document 529 was written on July 29, 1999, by Tom Dietrich, who was a member of Nationwide's general counsel's office. It was sent to a total of 15 individuals, all of whom appear to have been Nationwide officers, managers, or attorneys. The subject line of Document 529 read "Agent Defections." Appellees moved the court to review the document *in camera* and determine if it had been properly classified as protected under attorney-client privilege. (Notes of Testimony ("N.T."), January 11, 2005, at 87).

¶ 4 At Judge Doerr's request, another judge, the Honorable S. Michael Yeager, conducted a hearing and examined Document 529 *in camera* to determine if it was protected from discovery by attorney-client privilege, as asserted by Nationwide. At the hearing, Appellees argued that, even if Document 529 satisfied the criteria for protection under attorney-client privilege, Nationwide had waived the privilege with respect to this document by voluntarily having disclosed two other privileged documents on the subject of agent defection, specifically, Documents 314 and 395. In other words, in Appellees' view, Nationwide was attempting to use the attorney-***1263** client privilege as "both a sword and a shield" by selectively disclosing privileged documents on the subject of agent defections that were favorable to its position, while withholding as privileged those documents that were unfavorable. (Appellees' Brief at 3). Such selective disclosure is improper and, Appellees argued, should result in Nationwide's waiver of attorney-client privilege for *all* documents dealing with the same subject matter, including Document 529.

¶ 5 In response to Appellees' advancement of a subject matter waiver argument, Nationwide took the position that Documents 314 and 395 were *not* protected from disclosure under attorney-client privilege because they were merely routine business communications devoid of any confidential communications made by Nationwide for the purpose of obtaining legal advice. Therefore, Nationwide argued, disclosure of these documents could *not,* as a matter of law, waive attorney-client privilege with respect to Document 529, even though the subject matter of all the documents was similar.

¶ 6 Judge Yeager did not accept Nationwide's arguments and held that by having voluntarily produced Documents 314 and 395, Nationwide had waived attorney-client privilege with respect to Document 529. More specifically, Judge Yeager determined that Nationwide had improperly attempted to use attorney-client privilege as a sword as well as a shield by disclosing communications on the topic of agent defection that furthered its efforts in the on-going litigation, while attempting to withhold other documents on the same subject. Therefore, Judge Yeager held, Document 529 was discoverable. (Trial Court Opinion, dated February 16, 2005, at 4).

¶ 7 Nationwide appealed Judge Yeager's ruling to our Court, and also asked the trial court for a stay during the pendency of the appeal. The stay was granted. Appellees then filed a motion to quash for lack of appellate jurisdiction, which this Court granted on September 19, 2005. Nationwide successfully petitioned for allowance of appeal. Our

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Supreme Court vacated the quashal and remanded the matter to this Court.

Nationwide now raises the following two issues for our consideration:

> I. Whether the lower court erred in concluding that two documents produced by Nationwide to Appellees during discovery were privileged attorney-client communications and, by their production, Nationwide waived the attorney [ ]client privilege as it applies to an undisputedly privileged document.
>
> II. Whether the lower court erred by invoking the subject matter waiver doctrine to compel Nationwide's production to Appellees of an undisputedly privileged document.
>
> (Nationwide's Brief at 4).

LEGAL PRINCIPLES

[1] ¶ 8 Whether attorney-client privilege protects a particular communication from disclosure is a question of law. *In re Estate of Wood,* 818 A.2d 568, 571 (Pa.Super.2003), *appeal denied,* 584 Pa. 696, 882 A.2d 479 (2005). For any question of law our standard of review is *de novo* and our scope is plenary. *Kopko v. Miller,* 586 Pa. 170, 177, 892 A.2d 766, 770 (2006).

[2] ¶ 9 The attorney-client privilege has deep historical roots and indeed is the oldest of the privileges for confidential communications in common law. *See Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). It is designed to foster confidence between attorney and client, leading to a trusting, open dialogue. *Slusaw v. Hoffman,* 861 A.2d 269, 273 (Pa.Super.2004); *Estate of Wood, supra* at 571. The privilege derives ***1264** from the recognition that full and frank communication between attorney and client is necessary for sound legal advocacy and advice, which serve the broader public interests of "observance of law and administration of justice." *Upjohn Co., supra* at 389, 101 S.Ct. 677.

¶ 10 In Pennsylvania, the attorney-client privilege is codified under the following statute:

> **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.A. § 5928.

[3] ¶ 11 Pursuant to this statute, four elements must be satisfied in order to successfully invoke the protections of attorney-client privilege:

> 1) The asserted holder of the privilege is or sought to become a client.
>
> 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
>
> 3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
>
> 4) The privilege has been claimed and is not waived by the client.

Commonwealth v. Mrozek, 441 Pa.Super. 425, 657 A.2d 997, 998 (1995) (citation omitted); *see also Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.,* 32 F.3d 851, 862 (3d Cir.1994) (reciting the same elements in an application of Pennsylvania law on attorney-client privilege).

[4] ¶ 12 In sum, 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

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services or advice. *Slusaw, supra* at 273; *Estate of Wood, supra* at 571.

[5][6] ¶ 13 The privilege extends to communications *from an attorney* to his or her client *if and only if* the communications fall within the general statutory definition. Under Section 5928, counsel cannot testify as to confidential communications made to him or her by the client, unless the client has waived the privilege. Consistent with this statute, the privilege protects confidential communications from an attorney to his or her client only to the extent that such communications contain and would thus reveal confidential communications from the client. *Slusaw, supra* at 273 (holding that subpoenaed invoices were not protected by attorney-client privilege "to the extent that they do not disclose confidential communications which [the client] disclosed to [his][a]ttorneys" and concluding that any references to such confidential communications could be redacted); *Birth Center v. St. Paul Companies, Inc.,* 727 A.2d 1144, 1164 (Pa.Super.1999), *disapproved of on other grounds in Mishoe v. Erie Insurance Co.,* 573 Pa. 267, 824 A.2d 1153 (2003) (concluding that two letters prepared by a party's counsel concerning the potential for a bad faith claim were not protected under attorney-client privilege because the letters contained no protected communications from the party to its counsel); *see also Coregis Insurance Co. v. Law Offices of Carole F. Kafrissen,* 186 F.Supp.2d 567, 569-72 (E.D.Pa.2002) (reviewing Pennsylvania statutory and case law on attorney-client privilege and concluding that the courts have crafted a corollary to the general***1265** rule governing communications from client to attorney that "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").

[7][8] ¶ 14 Protection under attorney-client privilege is subject to limits, exceptions, and waiver. For example, the crime-fraud exception results in loss of the privilege's protections when the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity. *In re Investigating Grand Jury of Philadelphia County No. 88-00-3503,* 527 Pa. 432, 441-42, 593 A.2d 402, 406-07 (1991); *Brennan v. Brennan,* 281 Pa.Super. 362, 422 A.2d 510, 515 (1980). Furthermore, the privilege may be forfeited if its exercise will only frustrate the interests of justice. *Brennan, supra* at 515.

[9] ¶ 15 The client can waive the protection afforded by attorney-client privilege, for example by disclosing the communication at issue to a third party. *Loutzenhiser v. Doddo,* 436 Pa. 512, 518-19, 260 A.2d 745, 748 (1970); *Joe v. Prison Health Services, Inc.,* 782 A.2d 24, 31 (Pa.Cmwlth.2001). In another, related type of waiver, the federal courts have held that, under some circumstances, voluntary disclosure of a communication protected by attorney-client privilege may result in waiver of the privilege for *all* communications pertaining to the same subject matter ("subject matter waiver"). *Murray v. Gemplus International, S.A.,* 217 F.R.D. 362, 367 (E.D.Pa.2003); *Katz v. AT & T Corp.,* 191 F.R.D. 433, 439 (E.D.Pa.2000); *see also Minatronics Corp. v. Buchanan Ingersoll, P.C.,* 23 Pa. D. & C.4th 1, 10-12 (Allegheny Cty.1995) (Wettick, J.) (applying the principles of subject matter waiver of attorney-client privilege, although finding no Pennsylvania appellate court opinions on the matter).[FN1] Subject matter waiver of attorney-client privilege is based on considerations of fairness, which preclude a party from disclosing only those privileged materials that support its position, while simultaneously concealing as privileged those materials that are unfavorable to its position. *Katz, supra* at 439. A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse. *See Murray, supra* at 367 (reiterating that "attorney-client privilege is a shield used to protect [privileged] communications, not a sword wielded

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to gain advantage in litigation").

> FN1. In *LaValle v. Office of General Counsel of Commonwealth of Pa.*, 564 Pa. 482, 500 n. 16, 769 A.2d 449, 460 n. 15 (2001), our Supreme Court declined to undertake an assessment of subject matter waiver as applied to the work product doctrine.

[10] ¶ 16 Whether attorney-client privilege protects a particular communication from disclosure is a question of law to be decided by the court. *See Estate of Wood,* 818 A.2d at 571. The precept that "no claimant of a testimonial privilege can be the final arbiter of his own claim" applies to a party invoking attorney-client privilege as surely as it applies to those who invoke other evidentiary privileges. *See Commonwealth v. Hess,* 270 Pa.Super. 501, 411 A.2d 830, 833 (1979) (applying precept to spousal privilege).

¶ 17 In case law from our Supreme Court and from this Court, a two-part inquiry has been used to resolve disputes over disclosure of communications for which attorney-client privilege has been asserted. The first part of the inquiry is whether attorney-client privilege does indeed apply to a particular communication. If the court holds that the privilege does ***1266** apply, then the court must engage in the second part of the inquiry: whether an exception or waiver applies, thereby overcoming the privilege and permitting disclosure. *See Investigating Grand Jury of Philadelphia County,* 527 Pa. at 440, 593 A.2d at 406; *Brennan,* 422 A.2d at 517.

¶ 18 For example, in *Investigating Grand Jury of Philadelphia County,* 527 Pa. at 440-43, 593 A.2d at 406-07, our Supreme Court first addressed whether a client's handwritten notes, taken during a meeting with his counsel, fell within the scope of attorney-client privilege. After determining that the notes did indeed fall within the scope of the privilege, the Court went on to determine whether the notes should be disclosed anyway, under the crime-fraud exception to the privilege. At this second stage of the inquiry, it was the Commonwealth's burden to produce *prima facie* evidence that the crime-fraud exception applied, and thus that disclosure was proper despite the privileged nature of the communication. Similarly, in *Brennan,* 422 A.2d at 517, a child custody case, this Court initially addressed whether attorney-client privilege could operate to preclude a court from compelling an attorney to disclose his client's address when the client had specifically requested confidentiality with respect to that information. Based on a review of relevant statutes and case law from this Commonwealth and other jurisdictions, our Court first concluded that, under the circumstances presented, attorney-client privilege was properly invoked to protect the client's address from disclosure. Then, the court went on to determine whether the party seeking the disclosure had *overcome* the privilege by establishing a *prima facie* case that the crime-fraud exception applied or that exercise of the privilege would frustrate the interests of justice.

[11] ¶ 19 The structure of *Investigating Grand Jury* and *Brennan,* as well as other Pennsylvania decisions, thus imposes a shifting burden of proof in disputes over the disclosure of communications alleged to be protected under attorney-client privilege. The party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, *e.g.,* because the privilege has been waived or because some exception applies. *See also In re Subpoena No. 22,* 709 A.2d 385, 388 (Pa.Super.1998) (applying the principles of attorney-client privilege to psychotherapist-client privilege and concluding that "[o]nce the party asserting a privilege shows that the privilege is properly invoked, the burden shifts to the party seeking the disclosure to show that disclosure of the information will not violate the accorded privilege").

[12] ¶ 20 The Commonwealth Court has articulated the same principles as to the shifting burdens

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of proof in an attorney-client privilege inquiry. *See Joyner v. Southeastern Pennsylvania Transportation Authority,* 736 A.2d 35, 38 n. 3 (Pa.Cmwlth.1999) (concluding that our Supreme Court's holding in *Commonwealth v. Maguigan,* 511 Pa. 112, 125, 511 A.2d 1327, 1334 (1986), establishes that "the party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked" and only then does the burden shift to "the other party to prove why the applicable privilege would not be violated by the disclosure, e.g., the privilege was waived, an exception to the privilege exists and is applicable, etc."); *Joe v. Prison Health Services, Inc.,* 782 A.2d at 31 (stating that "[t]he party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked, and the party seeking to overcome the *1267 privilege has the burden to prove an applicable exception to the privilege"). If the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under attorney-client privilege. *Joyner,* supra at 38 n. 3.[FN2]

> FN2. We recognize that we are not bound by the holdings of the Commonwealth Court, but we find that Court's articulation of the structure of the attorney-client privilege analysis to be cogent as well as consistent with case law from the Superior Court.

SUBJECT MATTER WAIVER

¶ 21 Mindful of all the principles discussed above, we turn now to the specific circumstances of the case *sub judice,* addressing first whether the trial court erred in holding that Nationwide had waived attorney-client privilege with respect to the memorandum in dispute, *i.e.,* Document 529, by having produced in discovery two other privileged documents pertaining to the subject of agent defections, *i.e.,* Documents 314 and 395. Nationwide contends that Documents 314 and 395 were *not* protected by attorney-client privilege and therefore, as a matter of law, they could not form the basis for a subject matter waiver of attorney-client privilege with respect to Document 529. After careful analysis of Documents 314 and 395, we agree with Nationwide's contention, for the reasons set forth below.

[13] ¶ 22 Document 395 is an e-mail memorandum that is dated June 24, 1999; was authored by Robert M. Leo, Nationwide's director of agency administration; and was sent to 35 Nationwide employees and officers. The subject of the memo is identified in the subject line as "Reflex Action Plan-Defecting Agencies." (Document 395 at 1). "Reflex Action Plan" was Nationwide's term for its uniform, coordinated response to agent defections to other companies. The memo addresses Nationwide's perceived need "to quickly respond to a large defection [of agents] within a short time." (*Id.* at 1). It summarizes additions and changes to the Reflex Action Plan, specifically delineating some of the responsibilities of numerous Nationwide departments and employees. There is no indication from the document itself or from the record that this information was confidential. Furthermore, although a few of the 35 memo recipients were attorneys, there is not the slightest suggestion that the information was being conveyed to the attorneys for the purpose of securing legal services, legal assistance, or a legal opinion. Nationwide asserts that Document 395 is a routine business communication, not protected by attorney-client privilege (Nationwide's Brief at 17), and we agree.

[14] ¶ 23 The other relevant document produced in discovery by Nationwide is Document 314, an e-mail memorandum authored by Randall L. Orr, an attorney in Nationwide's office of general counsel. The recipients of Document 314 were seven Nationwide employees, including Mr. Leo, who was the author of Document 395; Nationwide's sales manager and state officer for Pennsylvania; and two attorneys in Nationwide's office of general counsel. The subject of Document 314 is

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"[Pennsylvania] agent defections," and the memorandum outlines Mr. Orr's understanding of Nationwide's business decision to sever relationships with several agents (Document 314 at 1; Nationwide's Brief at 16). The memorandum, in abbreviated and summary fashion, specifically addresses matters concerning four agents: two who had already left Nationwide and two who were to be confronted and then cancelled. The memorandum expresses the need to obtain as much information as possible ***1268** about these four defecting agents, from the agents themselves or through investigation, in order to begin to assess legal options against them and the companies to which they were moving or had moved. It is not at all clear from either the memorandum itself or from the record that Nationwide had provided the information recited in the memorandum to its counsel in confidence for the purpose of obtaining legal advice or a legal opinion. To the contrary, Nationwide asserts that Document 314 does *not* contain any confidential communication, but merely recites Attorney Orr's understanding of business decisions that had been made by Nationwide with respect to termination of the four agents' relationships. (Nationwide's Brief at 16). Thus, Nationwide asserts that Document 314, like Document 395, is a routine business communication, not protected by attorney-client privilege (*Id.* at 17). We agree with Nationwide's characterization.

[15][16] ¶ 24 Based on the above analysis, we accept Nationwide's argument and conclude that neither Document 395 nor Document 314 satisfies the requirements for protection under attorney-client privilege. Therefore, we must also conclude that, since neither of these documents is privileged, neither can form the basis for subject matter waiver of attorney-client privilege with respect to Document 529. As asserted by Nationwide, subject matter waiver of attorney-client privilege cannot be based on the disclosure of non-privileged documents. *See Murray, supra* at 367; *Katz, supra* at 439. Thus, we determine that the trial court erred in holding that Nationwide had waived attorney-client privilege protection with respect to Document 529 as a result of subject matter waiver from Nationwide's prior production of Documents 314 and 395.

ATTORNEY-CLIENT PRIVILEGE ANALYSIS APPLIED TO DOCUMENT 529

[17] ¶ 25 Although we have concluded that the trial court erred in finding subject matter waiver of attorney-client privilege with respect to Document 529, our analysis is not yet complete because we have not considered whether attorney-client privilege does, indeed, apply to Document 529. As we discussed above, the trial court resolved the case on the basis of *waiver* of attorney-client privilege. Therefore, the trial court clearly had concluded that attorney-client privilege applied to Document 529, but the trial court did not present the reasoning that had led to this conclusion. In other words, the trial court conducted the second part of the above-described legal analysis-whether a waiver or exception to attorney-client privilege exists-without explaining its reasoning as to the first part of the analysis-whether the privilege actually covers the document in question. *See supra.* After careful review of Documents 529, 314, and 395; the certified record; and relevant decisional and statutory law, we conclude that Document 529, like Documents 314 and 395, does not satisfy all the requirements for protection under attorney-client privilege and thus must be disclosed.[FN3]

FN3. We stress that Nationwide has invoked *only* attorney-client privilege as a bar to disclosure of Document 529. Accordingly, we have limited our analysis to attorney-client privilege.

¶ 26 Document 529 is a memorandum on the subject of "Agent Defections," dated July 29, 1999, and authored by Tom Dietrich, who was a member of Nationwide's general counsel's office. The recipients of the memorandum were the following 15 individuals: Tom Crumrine, who was the president of Nationwide Exclusive Agencies, the department of Nationwide dealing with its agencies nationally; three of the associates in Mr. Crumrine's department; Galen Barnes, the president of Nationwide;

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***1269** Nationwide's sales managers for Pennsylvania, New York, and Ohio; Nationwide's state officers for the same states and a supervisor; and three attorneys in Nationwide's office of general counsel.[FN4] Thus, Document 529 is not a communication from a corporate client to counsel, but rather is a communication *from counsel to* a group of managers of a corporate client.

> FN4. The subject, date, author, and recipient list of Document No. 595 were apparent even from the redacted version. Recognizing that the document remains confidential at this point, we have taken care to discuss its substantive content in general terms.

[18] ¶ 27 In claiming attorney-client privilege for Document 529, Nationwide neglects to consider that, under this privilege, protection is available *only* for confidential communications made *by the client* to counsel. The very title of the relevant statutory provision specifies what is protected: "Confidential communications *to* attorney." 42 Pa.C.S.A. § 5928 (emphasis added). Communications *from* counsel to a client may be 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. *See Slusaw,* 861 A.2d at 273; *Birth Center,* 727 A.2d at 1164; *Coregis Insurance Co.,* 186 F.Supp.2d at 569-72.

¶ 28 Document 529, which was written by counsel, does not disclose any confidential communications made by Nationwide, the client, to its counsel. Document 529 stresses Nationwide's need to respond to agent defections and summarizes in a general way the activities from the office of general counsel contributing to Nationwide's overall effort in this regard. The perceived problem of agent defections and Nationwide's response were also addressed in Documents 314 and 395, which Nationwide voluntarily disclosed as non-privileged business decisions. Documents 314 and 395 make abundantly clear that Nationwide was devising a multi-faceted process to deal with agent defections and that legal claims against the defecting agents and their companies were being considered as an aspect of that process. Document 529 reveals no confidential communication concerning these efforts from Nationwide to its counsel for the purpose of obtaining legal advice or a legal opinion.

[19] ¶ 29 In addition to discussing on-going efforts to manage agent defections, Document 529 also outlines, again in general terms, counsel's opinion as to the likely outcome of current and pending litigation. Counsel's general opinion as to what is likely achievable via litigation is protected by attorney-client privilege *only* in so far as necessary to protect from disclosure the *client's confidential communications.* Since Document 529 reveals no confidential facts *communicated by Nationwide* to counsel, it is not protected from disclosure by attorney-client privilege. We stress that because Nationwide has invoked *only* attorney-client privilege to protect Document 529 from disclosure, we have limited our analysis to attorney-client privilege.

[20] ¶ 30 In summary, after careful and comprehensive review, we conclude that Document 529 does not satisfy the requirements for protection under attorney-client privilege and is thus discoverable. Therefore, we affirm the order of the trial court, although on different grounds.[FN5]

> FN5. As an appellate court, we may uphold a decision of the trial court if there is any proper basis for the result reached; thus we are not constrained to affirm on the grounds relied upon by the trial court. *Jones v. Harleysville Mutual Insurance Co.,* 900 A.2d 855, 858 (Pa.Super.2006); *In re Adoption of R.J.S.,* 889 A.2d 92, 98 (Pa.Super.2005).

¶ 31 Order affirmed.

Pa.Super.,2007.
Nationwide Mut. Ins. Co. v. Fleming
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924 A.2d 1259, 2007 PA Super 145
(Cite as: 924 A.2d 1259)

END OF DOCUMENT

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8

LEXSEE

Analysis
As of: Jan 05, 2011

Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity

1856 MDA 2009

SUPERIOR COURT OF PENNSYLVANIA

2010 Pa. Super. LEXIS 3833

November 19, 2010, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]
Filed: September 16, 2010.
Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 2010 PA Super 170, 5 A.3d 404, 2010 Pa. Super. LEXIS 3229 (Pa. Super. Ct., 2010)

OPINION

THE OPINION BY JUDGE OLSON FILED ON SEPTEMBER 16, 2010 HAS BEEN WITHDRAWN.

Petition for Reargument Granted November 19, 2010.

9

2010 PA Super 170

CARL J. BARRICK and BRENDA L. BARRICK,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
HOLY SPIRIT HOSPITAL OF THE SISTERS OF CHRISTIAN CHARITY, individually and doing business as HOLY SPIRIT HOSPITAL, SODEXHO MANAGEMENT, INC., SODEXHO OPERATIONS, LLC, and LINDA J. LAWRENCE,	:	
Appellees	:	No. 1856 MDA 2009

Appeal from the Order entered October 16, 2009, in the Court of Common Pleas of Cumberland County, Civil Division, at No. 07-3604.

BEFORE: MUSMANNO, LAZARUS and OLSON, JJ.

OPINION BY OLSON, J.: FILED: September 16, 2010

Appellants, Carl J. Barrick (Mr. Barrick) and Brenda L. Barrick, appeal from the order entered on October 16, 2009, directing the discovery and production of correspondence between counsel for Appellants and Dr. Thomas Green (Dr. Green), Mr. Barrick's treating physician and designated expert witness at trial. Upon careful consideration, we affirm.

The factual and procedural history of this case may be summarized as follows. Appellants filed suit against Appellees after Mr. Barrick was allegedly injured when a chair collapsed underneath him in the cafeteria at the Holy Spirit Hospital. Dr. Green, an orthopedic surgeon at Appalachian

Orthopedic Center (Appalachian), began treating Mr. Barrick shortly thereafter. Following the institution of the action, Appellants designated Dr. Green as an expert witness at trial.

During discovery, Appellees served Appalachian with a subpoena for Mr. Barrick's medical file. Appalachian disclosed Mr. Barrick's treatment records. Subsequently, Appellees filed a motion to enforce the subpoena, maintaining that they were denied access to electronic mail and written correspondence between Appellants' counsel and Dr. Green which pertained to Dr. Green's role as Appellants' designated expert in this case. Appellants responded by asserting that any documents between their counsel and Dr. Green were privileged attorney work-product. Following argument and subsequent agreement between the parties, the trial court conducted an *in camera* review of the correspondence contained in Dr. Green's file to determine whether it was privileged. On October 16, 2009, the trial court entered an order granting Appellees' motion to enforce the subpoena and directing Dr. Green and Appalachian to turn over the requested documents. Appellants' timely appeal followed.[1] By agreement of the parties, the documents at issue were certified to this Court under seal.

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[1] Discovery orders involving privileged material are immediately appealable collateral orders. Pa.R.A.P. 313(a); ***T.M. v. Elwyn, Inc.***, 950 A.2d 1050, 1056 (Pa. Super. 2008). Appellants filed a notice of appeal on October 28, 2009. On November 4, 2009, the trial court ordered Appellants to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellants timely complied and the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on December 15, 2009.

Appellants present a single issue for our review:

> Is it error for the court below to order [Mr. Barrick's] treating physician, who will also be testifying as his expert witness, to disclose letters and emails between the physician and counsel for [Appellants] that addressed the strategy as to how to frame the physician's expert opinions where all of the treatment records of [Mr. Barrick] have been disclosed to [Appellees]?

Appellants' Brief at 3 (complete capitalization omitted). [2]

Before examining the merits of the claim presented, we must first address Appellees' contention that Appellants waived the right to object to the subpoenas served upon Appalachian. Appellees argue that they served Appellants with notice to serve a subpoena upon Appalachian pursuant to Pa.R.C.P. 4009.21, but Appellants did not object within 20 days as required. Appellees' Brief at 8-10. Appellees then served the subpoena and received Mr. Barrick's medical records from Appalachian. Appellees also assert that they followed up with a notice of a second subpoena to include all correspondence. Appellees maintain that counsel for Appellants again failed to object and actually signed a waiver pursuant to Pa.R.C.P. 4019.21(c). ***Id.*** Appellees further assert that Appellants never objected to the subpoena nor filed a motion for a protective order under Pa.R.C.P. 4009.21(d)(2). ***Id.*** at 11.

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[2] The Pennsylvania Association for Justice filed an amicus curiae brief in support of Appellants. The Pennsylvania Defense Institute filed one in support of Appellees.

Appellants respond that the issued subpoenas "expressly focused, in bold print, upon [Mr. Barrick's] medical records." Appellants' Reply Brief, at 4. Thus, they "could not have anticipated" that the subpoenas were "intended to embrace the privileged communications between [Appellants'] counsel [] and Dr. Green in his capacity as an expert witness []." ***Id.*** at 5. Citing our decision in ***McGovern v. Hospital Service Association***, 785 A.2d 1012 (Pa. Super. 2001), Appellants argue that they had the right to object to written discovery of privileged communications at any time. ***Id.*** at 5-6.

We agree with Appellants. In ***McGovern***, plaintiffs brought suit against two health care organizations for breach of contract and tortious interference after the organizations terminated an agency agreement. Plaintiffs served the organizations with a discovery request for the production of documents. The organizations failed to object to the request within the requisite time period. Later, the organizations invoked the attorney-client privilege and plaintiffs argued that the defendants' objections were waived. The trial court ordered disclosure of the requested documents. On appeal this Court reversed, concluding the trial court was required to first consider: "(1) the nature and severity of the discovery violation; (2) the defaulting party's willfulness or bad faith; (3) prejudice to the opposing party; and (4) the ability to cure the prejudice." ***McGovern***, 785 A.2d at 1019.

McGovern focused on the appropriate remedy for an alleged discovery violation in failing to respond to a document request, while in the present case the issue is whether certain materials are immune from production in response to a subpoena because of their privileged status. Nevertheless, our rationale in ***McGovern*** is instructive on the waiver issue presently before us:

> Pa.R.C.P. 4003.1 clearly states that subject to the provisions of Rules 4003.2 to 4003.5, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." Pa.R.C.P. 4003.1 (emphasis added). We are unaware of any case law that suggests a trial court may order the discovery of privileged material as a sanction let alone without any balancing. Accordingly, **we are extremely reluctant to affirm any order that compels full discovery when the information being sought may be privileged. We therefore find that failure to file objections within the thirty-day time period does not automatically waive the right to object.**

Id. at 1018-1019 (emphasis added).

Here, the record belies Appellees' assertion that Appellants never objected to the subpoenas. Appellants, in their answer to Appellees' motion to enforce, "object[ed] to discovery of communications between Appalachian [] and counsel for [Appellants] respecting the role of Appalachian [] as an expert witness for [Appellants]." Appellants' Answer to Motion to Enforce Subpoena, ¶ 4. Accordingly, it is clear that Appellants objected when they realized that privileged information was a potential target of Appellees'

request. Moreover, this is not an instance where Appellants are raising an objection for the first time on appeal in contravention of Pa.R.A.P. 302. In this case, the issue of privilege was squarely before the trial court and, based upon ***McGovern***, we decline to find waiver.

We now turn to the merits of Appellants' claim. Appellants contend that correspondence between Appellants' counsel and Dr. Green, in his capacity as an expert in this matter, dealt with legal theories, trial strategy, and tactics "as to how the opinions of Dr. Green will be framed for the purposes of negotiation and trial [and] are beyond the scope of permissible discovery." Appellants' Brief at 8. According to Appellants, Appellees were provided with all of Mr. Barrick's medical records, and, therefore, "[a]ll of the facts that bear upon [Dr. Green's] opinions have been disclosed in the treatment records." ***Id.*** at 6. Appellants claim that the trial court's decision to compel discovery of the correspondence is beyond "the scope of [Pennsylvania] Rules [of Civil Procedure] 4003.3 and 4003.5" because those rules do not "afford the defense privy to such discussions between counsel and the expert." ***Id.*** at 10. Appellants argue that this is so because Dr. Green is Appellants' representative. ***Id.*** at 13. The ultimate effect of the trial court's ruling, as suggested by Appellants, "would be that such communications would be discoverable if they were in writing, but not discoverable if they were oral." ***Id.*** at 11. Appellants maintain that instead of adopting a bright-line rule requiring the disclosure of pre-trial

communications between an expert and counsel, *in camera* trial court inspection and attendant redaction is a practical solution. ***Id.*** at 14-15. Finally, Appellants maintain that should this Court adopt a bright-line rule, such rule should apply prospectively and not to this matter. ***Id.*** at 16-17.

Our standard of review is as follows:

> Generally, in reviewing the propriety of a discovery order, our standard of review is whether the trial court committed an abuse of discretion. However, to the extent that we are faced with questions of law, our scope of review is plenary.

Gormley v. Edgar, 995 A.2d 1197, 1202 (Pa. Super. 2010) (citation omitted).

As the parties and the trial court acknowledge, the question presented is one of first impression.[3] Thus, a review of the relevant Pennsylvania Rules of Court pertaining to discovery is warranted.

Underpinning all of discovery in civil cases is the notion that the permissible scope of discovery is broad. Pursuant to Pa.R.C.P. 4003.1 "a party may obtain discovery regarding any matter, not privileged, which is

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[3] Initially, we note that the parties direct our attention to Federal Rule of Civil Procedure 26, the federal counterpart to the Pennsylvania Rules of Civil Procedure at issue. Federal Rule 26 has recently been amended to prohibit disclosure of drafts of expert reports and an expert's communications with counsel. The amendments to Federal Rule 26 do not become effective, however, until December 2010. Moreover, "Pennsylvania state court trials are not bound by federal court procedural rules." ***London v. City of Philadelphia***, 194 A.2d 901, 902 (Pa. 1963). Additionally, as the explanatory comment to Pa.R.C.P 4003.3 makes clear, Rule 4003.3 "differs materially from Fed.R.Civ.P. 26(b)(3)." Thus, we disavow any reliance upon Fed.R.C.P. 26.

relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ...". Pa.R.C.P. 4003.1. The scope of discovery under Rule 4003.1 is "[s]ubject to the provisions of Rules 4003.2 to 4003.5 inclusive[.]" ***Id.***

Rule 4003.3 limits the scope of discovery of an attorney's trial preparation materials 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.C.P. 4003.3.

Additionally:

> The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. However, the work-product privilege is not absolute and items may be deemed discoverable if the product sought becomes a relevant issue in the action.

T.M. v. Elwyn, Inc., 950 A.2d 1050, 1062 (Pa. Super. 2008), *citing* ***Gocial v. Independence Blue Cross***, 827 A.2d 1216 (Pa. Super. 2003).

By comparison, Rule 4003.5 permits "[d]iscovery of facts known and opinions held by an expert" that are "acquired or developed in anticipation of litigation or for trial[.]" Pa.R.C.P. 4003.5(a). The Rule requires that the identified expert, through written discovery, "state the subject matter on which [he/she] is expected to testify" as well as "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion[.]" Pa.R.C.P. 4003.5(a)(1)(a), (b). This may be accomplished by furnishing an expert report. Pa.R.C.P. 4003.5(a)(1)(b).

As this appeal demonstrates, there is conflict between Rules 4003.3 and 4003.5. The former Rule prohibits discovery of the mental impressions of a party's representative,[4] including an attorney, in preparation for litigation; whereas, the latter Rule requires disclosure of the substance of the facts and opinions underlying a testifying expert's conclusions, which ostensibly would include communications with an attorney.[5] In reconciling

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[4] We reject Appellants' argument that a testifying expert is a party's representative. The clear language of Rule 4003.3 states a party's representative includes, "his or her attorney, consultant, surety, indemnitor, insurer, or agent." Pa.R.C.P. 4003.3. "Expert witness" is not included in this definition.

[5] The Rules of Civil Procedure distinguish between an expert who will testify at trial and an expert who serves as a consultant only and will not testify. As the explanatory comment to Pa.R.C.P. 4003.5 makes clear "[i]f the expert is not expected to be called at trial, the situation is quite different. The special procedures listed [in Rule 4003.5(a)(1)] will not be applicable."

this conflict, we are compelled to find that if an expert witness is being called to advance a party's case-in-chief, the expert's opinion and testimony may be impacted by correspondence and communications with the party's counsel; therefore, the attorney's work-product doctrine must yield to discovery of those communications.

In this case, the trial court examined two conflicting Common Pleas Court cases in rendering its decision to compel discovery of the correspondence between Dr. Green and Appellants' counsel. "We recognize that decisions of the Court of Common Pleas are not binding precedent; however, they may be considered for their persuasive authority." ***Hirsch v. EPL Technologies, Inc.***, 910 A.2d 84, 89 n.6 (Pa. Super. 2006). Thus, we will examine ***Shambach v. Fike***, 82 Pa. D. & C. 4th 535 (Lackawanna County 2006) and ***Pavlak v. Dyer***, 59 Pa. D. & C. 4th 353 (Pike County 2003).

In ***Shambach***, Shambach instituted suit against his employer for alleged injuries caused when Fike struck him with a forklift. Shambach designated his treating physician as an expert for trial. His employer sought to depose the physician. The ***Shambach*** court determined that Pa.R.C.P. 4003.5 requires that expert discovery other than written requests, i.e. oral discovery such as a deposition, requires cause shown; whereas, Pa.R.C.P.

Thus, discovery may be sought regarding the testifying expert's opinions and facts known while discovery of the consulting expert's opinions and known facts is prohibited unless the consulting expert is a medical expert as defined in Rule 4010(b) or by order of court. Pa.R.C.P. 4003.5(a)(1) and (a)(3).

4003.6 allows a party to depose a treating physician. Ultimately, the ***Shambach*** court concluded:

> Having examined the relevant Rules of Civil Procedure, applicable case law and considering the arguments of the parties as well as the production of the expert report written by Dr. Knobler for the plaintiff, we conclude that Dr. Knobler may act as both a treating physician and expert witness for purposes of this case. However, because he has acted in the past as a treating physician, only this information not prepared in anticipation of litigation is discoverable by defendants. Therefore, defendants are free to depose Dr. Knobler but only as to Dr. Knobler's capacity as a treating physician. Conversely, defendants are not authorized to depose Dr. Knobler regarding any professional opinions which have been developed in anticipation of litigation. While there may not be any bright line test to distinguish between these two areas, the date of the formulation of his report can certainly be a helpful guide.

Shambach, 82 Pa. D. & C. 4th at 544.

Pavlak involved a personal injury action following a car accident. Pavlak's treating physician was also designated his expert at trial. Pavlak objected to a subpoena for correspondence between Pavlak's counsel and the expert. More specifically, counsel for Pavlak "conceded at oral argument that the medical records were discoverable because plaintiff's physical condition [was] at issue, [but] objected to the discovery of attorney correspondence sent to his expert on the grounds that such letters constituted attorney work product." ***Pavlak***, 59 Pa. D. & C. 4th at 355. Ultimately, the ***Pavlak*** court determined that the defendant was entitled to

discovery of written correspondence between plaintiff's counsel and the designated expert. However, the court concluded that the attorney work-product contained within said documents should be redacted. In the exercise of caution, the trial court further required plaintiff's counsel to submit the original correspondence for *in camera* review.

Here, the trial court correctly determined that "this case is more akin, if not identical, to the situation faced by the court in ***Pavlak*** [...]." Trial Court Opinion, 12/15/2009, at 2. The trial court aptly noted that ***Shambach*** dealt with the scope of a deposition of an expert, rather than the disclosure of correspondence. ***Id.*** We agree and conclude that the rationale espoused in ***Pavlak*** provides some guidance. However, like the trial court, we do not believe redaction and *in camera* inspection are practical. Instead, we agree with the trial court that a "bright line" rule must be adopted. Hence, we conclude that attorney work-product must yield to the disclosure of the basis of a testifying expert's opinion.

In making this determination, we note that the attorney work-product privilege is not sacrosanct, particularly where it has become relevant to an issue in the pending action. ***Elwyn, Inc.***, 950 A.2d at 1062. Appellants' counsel could not reasonably expect his work-product to remain privileged when Appellees are entitled to discover "the substance of the facts and opinions to which the expert is expected to testify" as well as "the grounds for each opinion." Pa.R.C.P. 4003.5(b). The correspondence between

Appellants' counsel and Dr. Green is highly relevant to the action at hand. ***See Elwyn, Inc.***, 950 A.2d at 1062. To test the weight and veracity of Dr. Green's ultimate conclusions, Appellees are entitled to discover the extent of counsel's influence over Dr. Green's opinions and whether counsel directed Dr. Green to reach certain conclusions or to disregard certain facts or take other facts into consideration. In other words, Appellees are entitled to discover information which would enable them to ascertain whether Dr. Green's opinions are his own or whether he merely intended to parrot what he was told by counsel. As such, we reject the notion that Mr. Barrick's medical records contain all of the information upon which Dr. Green relied. We must assume that communications from counsel were reviewed by Dr. Green in the course of his work as an expert and, therefore, he may have relied on said communications in arriving at his opinion. Appellees cannot properly defend against Dr. Green's conclusions without knowing the entire basis for his opinion.

Moreover, we reject Appellants' assertion that the trial court's finding creates a disparity between: (1) written and oral communications between counsel and an expert, and (2) plaintiffs and defendants. An expert may still be cross-examined during trial about oral communications with counsel and said communications would not be protected. A party is merely prohibited from deposing the expert beforehand, unless permission is

granted. Pa.R.C.P. 4003.5; ***Shambach***, ***supra***. Additionally, the rules apply equally to both plaintiffs and defendants.

We also agree with the trial court that *in camera* review of correspondence between attorney and expert is unnecessary. We have previously determined that a "court **may** conduct *in camera* review of documents identified [] to be subject to a privilege, to better analyze the privilege issues, **as needed**." ***Elwyn, Inc.***, 950 A.2d at 1063 (emphasis added). However, because we have determined that attorney work-product must give way to discovery of trial preparation materials relied upon by a testifying expert, *in camera* inspection would be duplicative and a waste of judicial resources.

Finally, Appellants' argument that our decision should be prospective is waived due to Appellants' failure to cite authority in support of this claim. ***Giant Food Stores, LLC v. THF Silver Spring Dev., L.P.***, 959 A.2d 438, 444 (Pa. Super. 2008). The claim is otherwise without merit. This Court has previously determined that an appellate court decision announcing a rule of law will apply to the case in which it is announced and to all pending cases. ***Davis ex rel. Davis v. Government Employees Ins. Co.***, 775 A.2d 871, 874-874 (Pa. Super. 2001). "[P]urely prospective application [] is limited entirely to future cases, denying the benefit even to the parties in this case, in which the principle was first announced." ***American Trucking Associations, Inc. v. McNulty***, 596 A.2d 784, 789 (Pa. 1991). The

Pennsylvania Supreme Court has at times issued purely prospective decisions, albeit on rare occasions, determining that it would be inequitable to apply a change in the law even to benefit the party who successfully argued for the change. ***See id.*** Here, we are merely clarifying the incongruity between two rules, rather than instituting a complete change in the law. Because attorney work-product is not absolutely privileged, Appellants could reasonably anticipate discovery. Appellants' counsel undertook a risk in corresponding with Dr. Green. All of the law involved leads to this conclusion, and it is not inequitable to apply this decision to the parties involved herein.

Order affirmed.

Judgment Entered.

Deputy Prothonotary

Date: September 16, 2010

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COMMONWEALTH OF PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE
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December 14, 2010

Robert Szostak, Esquire
Co-Chair
State Civil Litigation Section
Rubin, Glickman, Steinberg and Gifford
2605 North Broad Street
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Lansdale, PA 19446

Re: Proposed Recommendation No. 248

Dear Mr. Szostak:

I am enclosing for your information a copy of Proposed Recommendation No. 248 which the Civil Procedural Rules Committee has issued to the bench and bar for comment.

Very truly yours,

Karla M. Shultz
Counsel

enclosure

DEC 16 2010

SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE

Proposed Recommendation No. 248

Proposed Amendment of Rule 4003.5 Governing Discovery of Expert Testimony

The Civil Procedural Rules Committee proposes that Rule of Civil Procedure 4003.5 governing discovery of expert testimony be amended as set forth herein. The proposed recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania.

All communications in reference to the proposed recommendation should be sent no later than **February 18, 2011** to:

Karla M. Shultz
Counsel
Civil Procedural Rules Committee
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Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

[(a)] **(A)** any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

[(b)] **(B)** **subject to the provisions of subdivision (a)(4),** the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to **[such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate]** **(1) the provisions addressing scope, and fees and expenses as the court may deem appropriate and (2) the provisions of subdivision (a)(4) of this rule**.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the

same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Note: For additional provisions governing the production of expert reports in medical professional liability actions, see Rule 1042.26 et seq. Nothing in Rule 1042.26 et seq. precludes the entry of a court order under this rule.

(4) A party may not discover the communications between another party's attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) regardless of the form of the communications.

* * *

Explanatory Comment

The Civil Procedural Rules Committee is proposing the amendment of Rule 4003.5 governing the discovery of expert testimony. Recent amendments to the Federal Rules of Civil Procedure have prohibited the discovery of communications between an attorney and his or her expert witness unless those communications (1) relate to compensation for the expert's study or testimony, (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. *See* FRCP 26(b)(4)(C), effective December 31, 2010.

Current practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert. The proposed amendment to Rule 4003.5 follows the federal rule in explicitly prohibiting the discovery of such communications. However, it does not include the exceptions in the federal rule to those communications because of the differences between the federal rules and the Pennsylvania rules governing the scope of discovery of expert testimony.

The federal rules of civil procedure permit an expert to be deposed after the expert report has been filed. The exceptions enumerated above simply describe some of the matters that may be covered in a deposition. However, in the absence of cause shown, the Pennsylvania rules of civil procedure do not permit an expert to be deposed. Thus, the exceptions within the federal rule are inconsistent with the restrictions of the Pennsylvania rules of civil procedure governing discovery of expert witnesses.

In Pennsylvania, questions regarding the compensation of the expert have traditionally been addressed at trial; there is no indication that this procedure is not working well.

In addition, the facts or data provided by the attorney that the expert considered, as well as the assumptions provided by the attorney that the expert relied on in forming his or her opinion, are covered by Rule 4003.5(a)(1)(b), which requires the expert to "state the substance of the facts and opinions to which the expert is expected to testify and summary of the ground for each opinion." If facts or data which the expert considered were provided by counsel or if the expert relied on assumptions provided by counsel, they must be included in the expert report. *See* Rule 4003.5(c) which provides that the expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of his or her testimony set forth in the report. If the expert report is unclear as to the facts upon which the expert relied, upon cause shown, the court may order further discovery including the filing of a supplemental expert report. *See* Rule 4003.5(a)(2).

By the Civil Procedural
Rules Committee

Robert C. Daniels
Chair

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LEXSTAT F. R. C. P. 26

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*** CURRENT THROUGH CHANGES RECEIVED DECEMBER 20, 2010 ***

FEDERAL RULES OF CIVIL PROCEDURE
TITLE V. DISCLOSURES AND DISCOVERY

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Review Court Orders which may amend this Rule.
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THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 3 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under *Federal Rule of Evidence 402* or *403*--is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent.*

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the

information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.