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Future of Attorney-Client Privilege Rests on Pa. Supreme Court

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Special to the Legal

The multiple hats worn by in-house counsel can sometimes create confusion around the issue of when the attorney-client privilege can be asserted to protect in-house legal advice. However, the traditional wisdom has been that when an in-house counsel serves as attorney, business adviser, manager and/or compliance officer, the attorney-client privilege is nevertheless preserved as strictly legal advice. This tradition may be about to change drastically in Pennsylvania, depending on how the state Supreme Court rules on a pending appeal in *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259 (Pa. Super 2007). In fact, the Supreme Court's eventual ruling may change the nature of attorney-client privilege in Pennsylvania for all lawyers.

In *Nationwide*, the Pennsylvania Superior Court held that the privilege is not a two-way street protecting confidential communications from the client and resulting advice from the lawyer. The court ruled that a memorandum drafted by senior in-house counsel about a pending litigation, sent to some of the company's high-level officers and executives, was not privileged because the document did not reveal any "confidential facts communicated by Nationwide to counsel."

During the course of litigation, Nationwide produced in discovery a memorandum entitled "Document 529." Because Nationwide believed that Document 529 was protected from disclosure by the

attorney-client privilege, it produced a version with the memorandum's substantive text redacted.

Counsel for defendants in the case moved for permission to review Document 529 in camera to determine if it had been properly classified as falling under the attorney-client privilege. At the subsequent hearing, the defense argued that Nationwide had voluntarily waived the privilege with respect to Document 529 by disclosing two other privileged documents on the same subject matter. Claiming that Nationwide was attempting to use the attorney-client privilege to selectively disclose favorable documents while withholding unfavorable documents, the defendants argued that this improper selective disclosure should result in the waiver of the attorney-client privilege as to all documents concerning the same subject matter. Nationwide claimed that the other documents at issue were not protected by the attorney-client privilege because they were simply routine business communications, nothing more.

The judge rejected Nationwide's arguments concerning the other documents, and found that Nationwide had improperly attempted to use the attorney-client privilege as sword and shield. Document 529 was privileged but was nevertheless discoverable as a result of the subject matter waiver.

Nationwide appealed. On appeal, the Superior Court held that the trial court's application of the subject matter waiver was in error: The other documents were not privileged, and so their production



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could not form the basis for a subject matter waiver of the attorney-client privilege as to Document 529. The Superior Court did not stop its analysis with the subject matter waiver, however; the court went on to consider whether the attorney-client privilege applied to Document 529 itself.

In Pennsylvania, the attorney-client privilege is codified at 42 Pa. C.S.A. Section 5928, which 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 dis-

close the same, unless in either case this privilege is waived upon trial by the client.” In addition, as the *Nationwide* court noted, Pennsylvania law requires that four factors be met to successfully invoke the privilege:

- the asserted holder of the privilege is or sought to become a client;
- the person to whom the communication was made is a member of the bar of a court, or his subordinate;
- 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; and
- the privilege has been claimed and is not waived by the client.

Discussing the scope and requirements of the attorney-client privilege in Pennsylvania, the Superior Court in *Nationwide* found that “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.” Accordingly, the court reasoned, 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.” Thus, according to the Superior Court, the privilege “protects confidential communications from an attorney only to the extent that such communications contain and would reveal confidential communications from the client.”

Applying this statutory definition, the Superior Court went on to determine that Document 529 was not privileged because the memorandum did not reveal any “confidential communications made by the client to counsel.” Stressing that *Nationwide* had not invoked the work product doctrine, the Superior Court limited its analysis to attorney-client privilege and concluded that Document 529 was discoverable. *Nationwide* appealed the Superior Court’s holding; the Supreme Court granted allocatur, and

briefs were submitted in mid-December.

The Superior Court’s ruling elicited strong reactions in the legal community, particularly from groups representing the interests of in-house and corporate counsel. For example, the amici curiae brief submitted on behalf of the Association of Corporate Counsel, the Pennsylvania and Philadelphia bar associations and others, describes the Superior Court Opinion as “an unjustified and dangerous restriction on the traditional scope of the attorney-client privilege” that will leave “in house lawyers ... unable to discern a clear path that allows them to predict when their communications provided for the purpose of rendering legal services will be privileged.” Similarly, the amicus curiae brief submitted on behalf of the Pennsylvania Defense Institute sees the Superior Court opinion’s impact as a “chilling” curtailment of the attorney-client privilege that “will discourage frank and open communications from the client to the attorney, and deter, if not prevent, the attorney from providing the client with thorough, objective professional advice.”

While the Superior Court’s interpretation of 42 Pa. C.S.A. Section 5298 has appeal on a textual basis (as the court pointed out, “the very title of the relevant statutory provision” is “Confidential communications to attorney,” *Nationwide*, 924 A.2d at 1268), this interpretation potentially conflicts with the Pennsylvania Rules of Professional Conduct and with our common understanding of the confidentiality of all aspects of the attorney-client relationship. Rule 1.6, which governs confidentiality of communications, covers all information relating to the representation of a client, regardless of the source of that information or its disclosure by others.

We have commented before in these pages that there is a distinction between the attorney’s duty of confidentiality and the testimonial privilege. However, the court’s holding that advice which reveals confidential communications is still privileged creates an exception that swallows the rule: The facts on which the advice

depends can be inferred from the advice itself. Sometimes, even the fact that advice was given on a certain topic reveals confidential information. Further, in-house counsel may not be preparing documents in response to specific information but working from an organic, intimate knowledge of years of accumulated client confidences. It seems unclear how any counsel, in-house or not, will be able to predict when the advice they give will be subject to discovery.

Given the current unsettled state of the attorney-client privilege in Pennsylvania, what can counsel, in-house or otherwise, do to try to ensure they protect client communications and meet their ethical obligations, such as the confidentiality provisions of Rule 1.6 and Rule 2.1’s directive to render candid advice?

Until the Pennsylvania Supreme Court reveals the clear path to privilege protection, it may be advisable for counsel to include with any memorandum, letter or other document that renders legal advice some mention, summary or other description of the confidential client communications which prompt the advice. Doing so could make explicit the fact that counsel’s advice is necessarily based on her client’s confidential communications, and any disclosure of counsel’s advice would necessarily reveal those confidential communications — a sort of derivative protection for attorney-to-client communications. This strategy may afford counsel a valid avenue through which to meet her ethical obligation to provide candid advice, as required by Rule 2.1, while taking steps to protect client confidences, as required under Rule 1.6. In addition, protect attorney advice through work-product protection jurisprudence whenever possible. In litigation, it may be possible for both sides to enter into an agreement that broadens the scope of what will be considered subject to the privilege.

Nationwide will be a closely followed case and its outcome will have a significant effect on practice for all attorneys in Pennsylvania. In the meantime, we’ll be driving very carefully down that one-way street. •

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