PHILADELPHIA, FRIDAY, MAY 2, 2008

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

ALM

PROFESSIONAL CONDUCT

Waiting and Worrying: How Protected Are Confidential Communications?

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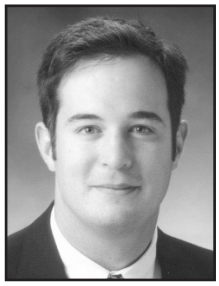
Special to the Legal

If you're like us, then your ethical quandaries seem to fall, for the most part, into two categories: conflicts and privilege. Privilege is a hot topic in Pennsylvania right now. In our last column, we wrote about the recent appeal to the Pennsylvania Supreme Court in *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. 2007). *Nationwide* raises the question of whether or not legal advice is privileged if it does not itself disclose confidential client communications with counsel. After our column was published, one of the attorneys involved in the *Nationwide* case politely drew our attention to the old, but venerable, precedent of *National Bank of West Grove v. Earle*, 196 Pa. 217, 221, 46 A. 268, 269 (Pa.1900). In that case, the Pennsylvania Supreme Court had this to say about the application of the privilege to advice to the client, in the context of a discovery dispute:

"As to the other defendant, Mr. Johnson, from whom a discovery is sought, because he was of counsel for the trustees in this and other proceedings, he has demurred, because 'a bill of discovery is not the proper method, if there be any proper method, to compel counsel to disclose the advice given to his clients.' ... (T)his averment ... is a complete answer to plaintiff's prayer. If it were not, then a man ... 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."



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Thus, more than 100 years ago, the Supreme Court acknowledged the importance of confidentiality on both sides of the attorney-client relationship. The importance of these principles was echoed many years later by the U.S. Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) when it said that the attorney-client "privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice." (449 U.S. at 390.)

However, it may be, as the Superior Court found, that the applicable Pennsylvania statute, 42 Pa. C.S. Section 5928, does not afford protection to advice from the attorney to the client if the advice does not reveal a client confidence. Absent a bright-line rule affording privilege protection to the provision of legal advice by attorney to client, attorneys will be forced to navigate treacherous waters in deciding how, whether, and to what extent they should provide legal advice to clients.

In *Nationwide*, the Superior Court emphasized in its opinion that its analysis did not address the work-product doctrine as a basis for protection from disclosure of the attorney communication at issue. (*Nationwide*, 924 A.2d 1259, at fn. 3.) So now we turn to that question: What is the scope of the work-product doctrine and can attorneys use it to protect communications from lawyer to client?

The work-product doctrine is broader than the privilege and protects "any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation." (*Harsh v. Petroll*, 840 A.2d 404, 434 (Pa. Cmwlth. Ct. 2003; internal citations omitted.)) The underlying purpose of the work-product doctrine is to shield "the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." (*Lepley v. Lycoming County Court of Common Pleas*, 393 A.2d 306, 310 (Pa. 1978.))

Moreover, while the attorney-client privilege is codified and has existed, in one form or another, as part of our common law since Pennsylvania was a colony of the British Crown, the work-product doctrine is of more recent vintage, and is set out in the Rules of Civil Procedure as an exception to general discovery rules. Rule 4003.3 of the Pennsylvania

Rules of Civil Procedure, which embodies the work-product doctrine under Pennsylvania law, provides, in pertinent part, 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. ... 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. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics."

PA. RULES OF CIVIL PROCEDURE

The federal work-product doctrine is codified in Federal Rule of Civil Procedure (Rule) 26(b)(3). The rule provides that a party may only obtain discovery of relevant documents and tangible things that were "prepared in anticipation of litigation or for trial by or for another party or by or for its representative ... [if] 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."

Unlike the attorney-client privilege, which belongs to the client, work product immunity is held by the lawyer, although either the client or the lawyer may assert it. In federal court, two kinds of work product are protected: tangible or fact work product and intangible or opinion work product. Under the federal rules, tangible work product may be subject to discovery if the opposing party can demonstrate a substantial need and an inability to otherwise obtain the information without undue hardship; opinion work product, on the other hand, receives almost absolute protection. In contrast, Pennsylvania's version of work product immunity under Pa. R. Civ. P. 4003.3 does not distinguish between fact and opinion work product and provides the same high level of protection to both. However, where work product itself is at issue in a case, such as in a legal malpractice action or where a defense of reliance on legal advice is raised, work product will not serve to insulate the mental impressions of counsel from disclosure.

According to the Superior Court in *Nationwide*, the protection of the attorney-client privilege depends upon the confidential nature of communications made to the attorney by the client. No such limitation applies to the work-product doctrine. Moreover, rule 4003.3 makes no distinction based upon disclosure of the attorney's "mental impressions" to his client — they are protected from disclosure in discovery regardless.

In addition, while the privilege applies only to communications between attorney and client, the work-product doctrine also extends to the mental impressions of representatives of a party other than the party's attorney concerning "the value or merit of a claim or defense or respecting strategy or tactics." (Rule 4003.3.) This extension of protection, however, is itself made subject to Rules 4003.4 and 4003.5, which permit discovery of any party or witness statements concerning the action as well as the "facts known and opinions held by" experts expected to be called at trial and, upon a proper showing of hardship, even experts not expected to be called at trial.

The work-product doctrine is limited in another important respect. By its terms, Rule 4003.3 applies only to the parties, their attorneys and representatives. Thus, an attorney for an individual or entity not a party to an action would be ill advised to rely solely upon Rule 4003.3 to avoid producing work-product responsive to a subpoena or third party discovery request.

The doctrine protects only the mental impressions of attorneys made "in anticipation of litigation." The courts have, however, tended to view this requirement in flexible terms, and at least one reported case openly called it into question. In *Sedat Inc. v. Department of Environmental Protection* Res., 641 A.2d 1243 (Pa. Cmwlth Ct. 1994), the Commonwealth Court considered a motion to compel production of a memorandum prepared by a DER attorney analyzing a Superior Court decision in a related action. Denying the motion to compel, the Commonwealth Court stated "[t]he Rule's protection of an attorney's mental impressions is unqualified" and held 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." (Sedat, 641 A.2d at 1245.)

Whether you are representing individuals or corporations, in cases small or large, simple or complex, your clients are relying on you for advice and advocacy; it is a weighty responsibility. The attorney-client privilege and the work-product doctrine provide us with a measure of comfort, a space in which we can feel free to think and plan. But that comfort and freedom requires certainty, and right now we don't have it. We must know in advance whether and to what extent our communications with our clients will be protected from disclosure by the attorney-client privilege. The Pennsylvania Supreme Court in *Nationwide* will, we hope and expect, bring much-needed clarity to that issue. •