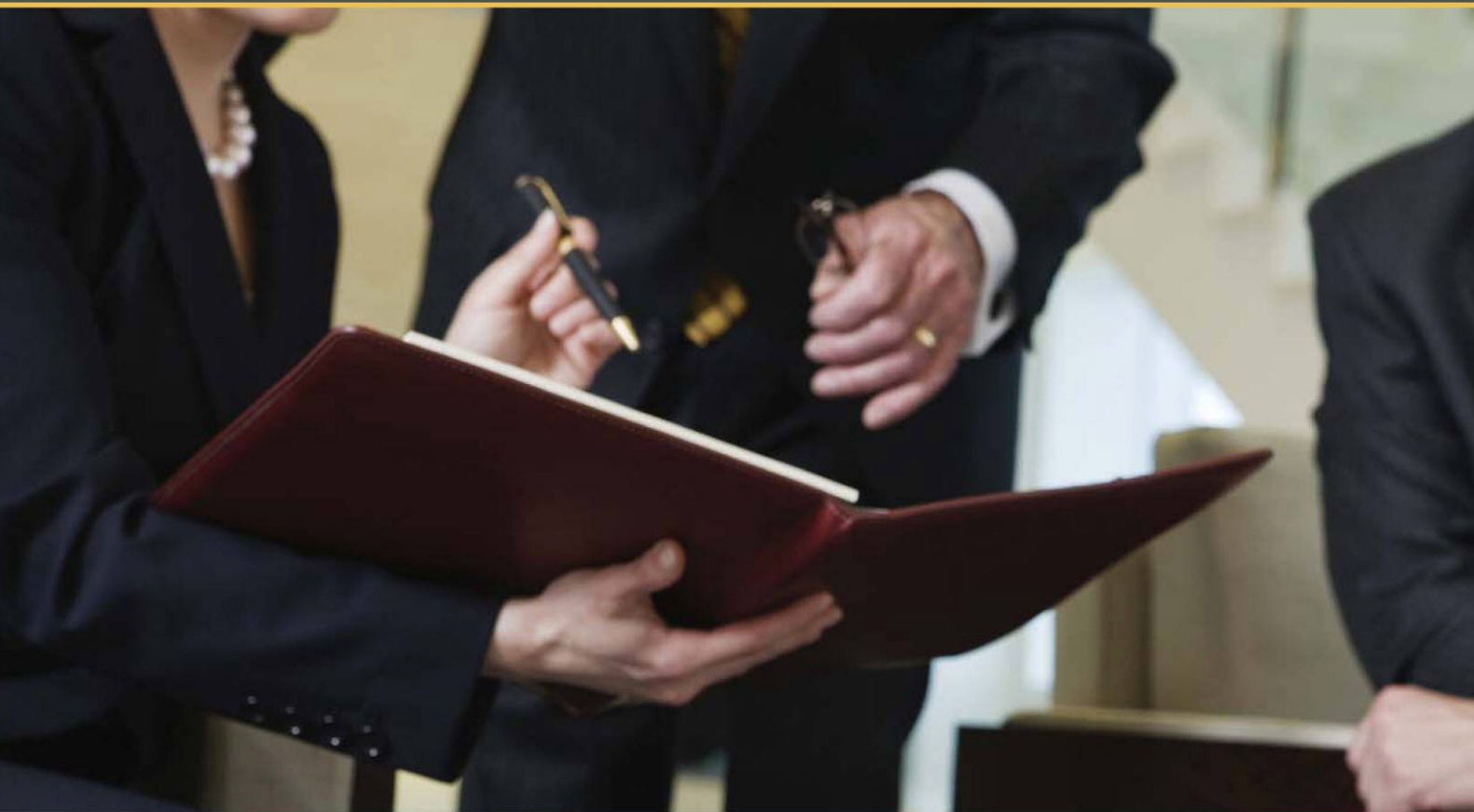


# Pennsylvania Supreme Court Clarifies Attorney-Client Privilege

*Ruling in Gillard Supports 'Two-Way' Communication Position of PBA, Local Bar Associations*

By Geoff Yuda



**T**he Pennsylvania Supreme Court's recent ruling in *Gillard v. AIG Insurance Co.*, No. 10 EAP 2010 (Pa. Feb. 23, 2011), provides much-needed clarification on the scope of the attorney-client privilege in Pennsylvania. The court accepted the position put forward in the amici curiae brief filed on behalf of the Pennsylvania

Bar Association, Philadelphia and Allegheny County Bar Associations, the Association of Corporate Counsel and the Chamber of Commerce of the United States. The ruling aligns the commonwealth with federal law in protecting confidential communications both to *and from* an attorney and his or her client. In *Gillard*, the court expressly held that the attorney-client privilege "operates in a two-way fashion."



*Gillard* also resolves the uncertainty over the scope of the attorney-client privilege left by the Pennsylvania Superior Court's May 2007 decision in *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. Ct. 2007). In *Fleming*, the Superior Court narrowly construed Pennsylvania's privilege statute, 42 Pa.C.S. § 5928, to protect only communications from client to attorney but not from attorney to client, although that court did

acknowledge the possibility of derivative protection when attorney communications encompassed prior confidential client-to-attorney communications. The amici brief urged that *Fleming* be reversed and that the Supreme Court provide "a clear statement that communications made within the lawyer/client relationship are privileged when made for the purpose of soliciting or providing legal advice."

Reacting to *Gillard*, PBA President Gretchen A. Mundorff said, "We are grateful to have clarification of an issue that has raised a host of ethical questions and concerns in Pennsylvania's legal community. The Supreme Court has provided valuable guidance to legal practitioners throughout the state on the issue of the proper application of the privilege, fostering the confidence and openness in communication between attorneys and their clients that is so critical to the legal process." Counsel for the amici parties included former Commonwealth Court Judge Robert L. Byer of the Pittsburgh office of Duane Morris L.L.P. and PBA Vice President Thomas G. Wilkinson of the Philadelphia office of Cozen O'Connor.

"The Supreme Court's decision frees Pennsylvania lawyers to again represent businesses to the highest level, within the bounds of established ethics," said Byer. "Lawyers can and should be proactive with their advice, and this ruling protects both lawyers and clients by confirming that the attorney-client privilege applies to such proactive lawyering. Under the Superior Court's incorrect view of the privilege, an in-house or outside counsel who pointed to a potential risk or potential problem risked creating evidence that an adverse party could discover and use against the client in litigation. The work-product protection was not sufficient because clients benefit from lawyers being proactive even without actual or contemplated litigation, which is what the work-product doctrine protects. Because of the



PBA President  
Gretchen A. Mundorff



Former Commonwealth  
Court Judge  
Robert L. Byer



PBA Vice President  
Thomas G. Wilkinson

Supreme Court's ruling, clients will benefit from having the candid advice of their lawyers, and this also will further the goal of corporate compliance programs because lawyers will be free to identify and advise clients concerning potential issues on their own, without first having to wait for the client to provide information concerning the issue."

According to Wilkinson, "there is widespread support for broad privilege protection among the organized bar." He said such unity indicated "the importance of this ruling in protecting two-way communications for a range of counsel, including in-house corporate and nonprofit staff counsel and government lawyers, all lawyers who are expected to be proactive in counseling their organizations on compliance with governing law and regulations."

Justice Thomas G. Saylor authored the majority 5-2 decision in *Gillard*, in which documents were sought from the law firm representing several insurance companies in the handling of an uninsured motorist claim. Saylor weighed appellee's "very limited" view that "privilege is, in fact, a 'one-way street' and must be strictly contained [to confidential communications initiated by the client] to minimize interference with the truth-determining process" vs. appellants' argument that "[t]o encourage candid disclosure ... both client- and attorney-initiated communications must enjoy protection." The opinion observed that the appellee's restricted view raised practical difficulties over acknowledged "derivative protection," wherein "certain lawyer-initiated communications *might* contain information originating with the client and, accordingly, *may* be privileged." [Emphasis added.]

Noting "material ambiguity in the scope of the universally-recognized (but legislatively unstated) derivative protection," Saylor explained that the majority justices "are not of the view that the Legislature designed the [privilege] statute to require 'surgical separations' and generate the 'inordinate practical difficulties' which would flow from a strict approach to derivative protection." The court found the limited derivative approach taken by the Superior Court in *Fleming* was impractical and that "existing practices, procedures, and limitations ... and the boundaries ascribed to the privilege ... are sufficient to provide the essential checks" against potential abuses. The court definitively concluded 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."

Joining Justice Saylor in the majority were Chief Justice Ronald D. Castille and Justices Max Baer, Joan Orié Melvin and Debra McCloskey Todd. Justices J. Michael Eakin and Seamus P. McCaffery each filed a dissenting opinion. The majority opinion in *Gillard* is posted on the Unified Judicial System of Pennsylvania website at [www.aopc.org/OpPosting/Supreme/out/J-58-2010mo.pdf](http://www.aopc.org/OpPosting/Supreme/out/J-58-2010mo.pdf), with Eakin's dissenting opinion at [www.aopc.org/OpPosting/Supreme/out/J-58-2010do1.pdf](http://www.aopc.org/OpPosting/Supreme/out/J-58-2010do1.pdf) and McCaffery's dissenting opinion at [www.aopc.org/OpPosting/Supreme/out/J-58-2010do2.pdf](http://www.aopc.org/OpPosting/Supreme/out/J-58-2010do2.pdf). The amici brief of the PBA and the other parties is at [www.acc.com/vl/public/AmicusBrief/upload/Gillard-v-AIG-Amicus.pdf](http://www.acc.com/vl/public/AmicusBrief/upload/Gillard-v-AIG-Amicus.pdf). ♦

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Geoff Yuda is editor of *The Pennsylvania Lawyer* magazine and the PBA website, [www.pabar.org](http://www.pabar.org).

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