Volume 57 | Issue 2 Article 4

2012

# A Pennsylvania Road Construction Project Completed: The Attorney-Client Privilege in Pennsylvania Clarified as a Two-Way Street in Gillard v. AIG Insurance Co.

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# Notes

## A PENNSYLVANIA ROAD CONSTRUCTION PROJECT COMPLETED: THE ATTORNEY-CLIENT PRIVILEGE IN PENNSYLVANIA CLARIFIED AS A TWO-WAY STREET IN *GILLARD* v. *AIG INSURANCE CO.*

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### I. INTRODUCTION

Like most people who have driven on the Pennsylvania Turnpike, you have probably encountered road construction delays.[1] Indeed, the Pennsylvania Turnpike has been under some type of construction project since 1940.[2] While the purpose of many road construction projects is to promote safety and convenience, they often cause feelings of anger, frustration, and confusion.[3] Additionally, the long-term nature of many road construction projects, coupled with the pipeline of upcoming projects, can make drivers feel that Pennsylvania will never complete construction on its roads.[4]

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1. *See generally PennDOT Road Construction Season Under Way*, WPXI.COM (Pittsburgh), Apr. 4, 2011, http://www.wpxi.com/news/27422803/detail.html (noting several projects under way in 2011 and that each year there are many accidents in Pennsylvania due to road construction); Jon Schmitz, *Pennsylvania's $300 Million Construction Season Begins in Earnest Today*, PITTSBURGH POST-GAZETTE, Mar. 22, 2010, http://www.post-gazette.com/pg/10081/1044670-147.stm (discussing beginning of "construction season" in Pennsylvania and that PennDOT was planning to spend $300 million on road work in Allegheny County alone).

2. *See Through Seven Decades: A Brief History of the PA Turnpike*, PA. TURNPIKE, http://www.paturnpike.com/geninfo/70th_anniversary/turnpike70Years.aspx (last visited Mar. 1, 2012) (reviewing various expansions of turnpike by decade, beginning with 1940s); *see also* Construction Schedule, PA. TURNPIKE, http://www.paturnpike.com/improve/conschedule.aspx (last modified Mar. 30, 2012) (listing current road construction projects on Pennsylvania Turnpike).

3. *See Through Seven Decades: A Brief History of the PA Turnpike*, *supra* note 2 (stating that in expansion of highway during 2000s, "utmost attention has been given to the drivers' safety and comfort"); see also I'm Tired of Road Construction on Rt. 80 in Pennsylvania, FACEBOOK, http://www.facebook.com/group.php?gid=2395426050 (last visited Mar. 1, 2012) (expressing frustration with road construction on I-80 in Pennsylvania as illustrated by users creating Facebook group).

4. *See generally* PA. TURNPIKE COMM'N, ENHANCED FY 2012 TEN YEAR CAPITAL PLAN PROJECT LISTING (2011), *available at* http://www.paturnpike.com/geninfo/2012_Capital_Plan.pdf (showing, broken down by construction project, amount

For more than a century, Pennsylvania has been dealing with another type of "road" construction project: determining whether the attorney-client privilege is a one-way street—protecting only client-to-attorney communications—or a two-way street—protecting communications flowing in both directions.[5] Conflicting decisions among Pennsylvania courts have caused confusion for practitioners regarding the scope of the attorney-client privilege.[6] In 2010, the Supreme Court of Pennsylvania did little to alleviate the confusion when it issued a divided opinion in *Nationwide Mutual Insurance Co. v. Fleming*.[7] In the aftermath of *Fleming*, which held that the attorney-client privilege was a one-way street, the supreme court granted the appeal in *Gillard v. AIG Insurance Co.*[8] to determine the scope of the state's attorney-client privilege.[9] In *Gillard*, the court stated that this disagreement among Pennsylvania courts most likely arose from the "com-

budgeted by Pennsylvania Turnpike Commission for fiscal years 2012 through 2021). The plan is over nine pages long and budgets nearly six billion dollars for road construction projects alone. See id. Further, the Pennsylvania Turnpike Commission forecasts that many of the projects labeled "Roadway/Safety" will require at least two fiscal years to complete. *See id.*

5. The attorney-client privilege was codified in 1887. Act of May 23, 1887, § 5(d), 1887 Pa. Laws 158, 159 (codified as amended at 42 PA. CONS. STAT. § 5928 (2011). Since 1887, courts in Pennsylvania have issued conflicting decisions on its scope, in particular whether it protects both client-to-attorney and attorney-to-client communications. *Compare* Nat'l Bank of W. Grove v. Earle, 46 A. 268, 269 (Pa. 1900) (holding attorney-client privilege protects attorney's communication to client), *and* Sedat, Inc. v. Dep't of Envtl. Res., 641 A.2d 1243, 1245 (Pa. Commw. Ct. 1994) (holding attorney-client privilege protects legal advice given by attorney to client), *with* Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1264 (Pa. Super. Ct. 2007) (holding attorney-client privilege protects attorney-to-client communications only if those communications would reveal confidential communications originating with client), *aff'd on other grounds*, 992 A.2d 65 (Pa. 2010) (per curiam), *and* Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. Ct. 2003) (holding attorney-client privilege only protects communications from client-to-attorney).

6. *See* Gillard v. AIG Ins. Co., 15 A.3d 44, 56 (Pa. 2011) (stating court decided to hear appeal to clarify scope of attorney-client privilege).

7. 992 A.2d 65 (Pa. 2010) (per curiam). The superior court based its decision in *Fleming* on the notion that the attorney-client privilege is a one-way street protecting only client-to-attorney communications. *See Fleming*, 924 A.2d at 1264 (interpreting attorney-client privilege narrowly). The superior court did note, however, that attorney-to-client communications are protected if they would reveal the confidential communications. *See id.* The Supreme Court of Pennsylvania granted the appeal and, in a divided 2-2 opinion, affirmed the superior court's ruling. *See Fleming*, 992 A.2d at 65 (affirming Superior Court of Pennsylvania's narrow interpretation of attorney-client privilege). The opinion in support of affirmance found that the privilege had been waived and thus declined to decide the case on the merits. *See id.* at 70 (Eakin, J., in support of affirmance). However, the opinion in support of reversal argued for a more "pragmatic approach" to the privilege, similar to the Pennsylvania supreme court's decision in *Earle*. *See id.* at 73 (Saylor, J., in support of reversal).

8. 15 A.3d 44 (Pa. 2011).

9. *See id.* at 46 (explaining court's purpose for granting appeal). In *Gillard*, the superior court affirmed the decision of the court of common pleas, holding the attorney-client privilege applies only to client-to-attorney communications. *See*

peting interests-of-justice factors in play."[10] Further, the court reasoned that it could not give plain meaning to the language of the attorney-client privilege statute and also achieve its intended purpose.[11] The dissent, however, cautioned that a broad construction of the privilege creates the potential for abuse.[12] Nevertheless, the majority held that the attorney-client privilege in Pennsylvania is a two-way street protecting both client-to-attorney and attorney-to-client communications.[13]

This Note argues that the Supreme Court of Pennsylvania reached the correct result in *Gillard*.[14] Part II provides a general overview of the attorney-client privilege, from its adoption through its present-day application in other jurisdictions.[15] Part III discusses the history of the privilege in Pennsylvania.[16] Part IV examines the Pennsylvania supreme court's reasoning and analysis in *Gillard*.[17] Part V argues that the court had the authority to define the scope of the attorney-client privilege in the Commonwealth.[18] Finally, Part VI asserts that the court's decision is consistent with the privilege's intended purpose and that current limitations are sufficient to prevent future abuse of the privilege.[19]

## II. PAVING THE WAY: THE GENERAL HISTORY OF THE ATTORNEY-CLIENT PRIVILEGE

In order to understand the Supreme Court of Pennsylvania's decision in *Gillard*, it is essential to consider the history of the attorney-client privi-

Gillard v. AIG Ins. Co., 947 A.2d 836, 836 (Pa. Super. Ct. 2008) (unpublished table decision), *rev'd*, 15 A.3d 44.

10. *Gillard*, 15 A.3d at 57 (noting strong tension between goal of encouraging candid communications between attorney and client and ability of litigants to have full access to evidence).

11. *See id.* at 58 (implying expanded view of attorney-client privilege is required to fulfill its intended purpose).

12. *See id.* at 60 (Eakin, J., dissenting) (claiming broad attorney-client privilege could deny fact finder access to information that might be critical to claim). The majority, however, stated that the current procedures and practices in place are sufficient to protect from any potential abuse. *See id.* at 58 (majority opinion). For a further discussion of the current limitations to the attorney-client privilege in Pennsylvania, see *infra* notes 178-80 and accompanying text.

13. *See Gillard*, 15 A.3d at 59 (holding attorney-client privilege covers attorney-to-client communications to extent necessary to provide legal advice).

14. For an analysis of the Supreme Court of Pennsylvania's decision in *Gillard*, see *infra* notes 125-99 and accompanying text.

15. For a discussion of the general history of the attorney-client privilege, see *infra* notes 20-51 and accompanying text.

16. For a discussion of the history of the attorney-client privilege in Pennsylvania, see *infra* notes 52-80 and accompanying text.

17. For a discussion of the supreme court's reasoning and analysis in *Gillard*, see *infra* notes 81-124 and accompanying text.

18. For a discussion of the authority of the supreme court to define the scope of the attorney-client privilege, see *infra* notes 125-55 and accompanying text.

19. For a discussion of the outcome of the *Gillard* decision and its impact moving forward, see *infra* notes 156-99 and accompanying text.

lege.[20] The privilege traces a long road back to Elizabethan England, and possibly even ancient Rome.[21] The United States has recognized the attorney-client privilege since at least the nineteenth century.[22] This long road has not been smooth, but it paved the way and set the stage for the Pennsylvania supreme court's decision in *Gillard*.[23]

### A. *The Beginning of the Road: Origins of the Attorney-Client Privilege*

Like the Pennsylvania Turnpike among America's roadways, the attorney-client privilege is one of the oldest evidentiary privileges and has been recognized in English law since at least the Elizabethan Era.[24] In fact, the privilege may even trace its origins as far back as the Roman Empire.[25] The original purpose of the privilege was to prevent an "unethical act of betrayal" by the attorney against the client.[26] To prevent such unethical acts, courts prohibited attorneys from revealing information that clients communicated to their attorneys in confidence.[27] However, when courts

20. For a discussion of the history of the attorney-client privilege, see *infra* notes 24-51 and accompanying text.

21. For a discussion of the origins of the attorney-client privilege and its transition to the modern privilege, see *infra* notes 24-36 and accompanying text.

22. For a discussion of the history of the attorney-client privilege in the United States, see *infra* notes 37-51 and accompanying text.

23. For a discussion of the need for clarity in courts' interpretations of the attorney-client privilege, see *infra* notes 47-51 and accompanying text.

24. *See In re* Selser, 105 A.2d 395, 403 (N.J. 1954) (noting attorney-client privilege was recognized in England in 1577, but stating it may have been recognized as early as 1280); Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need For a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 266-67 (2011) (providing that English cases recognized attorney-client privilege as early as 1577, but that some commentators disagree about date privilege became "fully formed"). *See generally* James A. Gardner, *A Re-evaluation of the Attorney-Client Privilege (Part I)*, 8 VILL. L. REV. 279, 286-303 (1963) (discussing general history of attorney-client privilege, including its origins in English common law).

25. *See* Gardner, *supra* note 24, at 289-90 (noting privilege may have origins in Roman law, but that connection cannot be definitively proven). During the Roman Era, the law prohibited servants from providing testimony against their masters. *See id.* at 289. Further, Roman law did not permit "advocates" to be called to testify against their clients during a case. *See id.* at 290. Although it is likely impossible to prove that these rules were the foundation of the attorney-client privilege in English law, they might have had some influence. *See id.*

26. Imwinkelried & Amoroso, *supra* note 24, at 267; *accord* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 2 (1998) (stating original purpose for attorney-client privilege was to protect attorney's honor); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 48 (same).

27. *See* Fischel, *supra* note 26, at 2 (noting clients that wish to hide information will be less likely to hire attorneys). When the privilege was developed in England, parties were not able to testify on their own behalf; thus, negative disclosures were released only if someone else testified against them. *See id.* When the privilege first developed, society viewed an attorneys as "a man of business and the obedient servant of the [client]." Gardner, *supra* note 24, at 289. While attorneys were not servants in the classic English sense, they were not considered gentlemen. *See id.* Nevertheless, attorneys experienced a "powerful feeling that a servant must

first recognized the privilege, it "belonged" to attorneys, who had the power to waive it "as [they] saw fit."[28] Further, despite its seemingly noble purpose, courts did not universally accept the attorney-client privilege, with some courts even rejecting privilege claims because they prevented discovery of the truth.[29]

Over time, the original purpose of the attorney-client privilege fell out of favor and a new justification emerged that helped entrench the privilege in modern law.[30] This new justification reasoned that without protection from disclosure, clients would not fully disclose matters to their attorneys; thus, attorneys would not be able to adequately represent their clients.[31] This change had a significant impact on the attorney-client privilege, as it shifted from an attorney-centric privilege to a client-centric one.[32]

Today, the privilege remains extremely important and is often considered the most revered of all the evidentiary privileges.[33] Nevertheless, the privilege is not without limits.[34] Additionally, some critics have even

keep his master's secrets," creating an ethical duty prohibiting attorneys from revealing their clients' communications. *See id.*

28. Gardner, *supra* note 24, at 289.

29. *See* Leslie, *supra* note 26, at 48 (noting that courts did not universally adopt privilege and disputed its purpose until nineteenth century); *cf.* Gardner, *supra* note 24, at 291 (discussing change in justification for attorney-client privilege beyond attorney loyalty to client).

30. *See* Imwinkelried & Amoroso, *supra* note 24, at 267 (discussing emergence of "instrumental rationale" for attorney-client privilege, which American courts have adopted); Leslie, *supra* note 26, at 49 (noting by twentieth century, "instrumental justification" that client should be "'free[ ] of apprehension in consulting his legal adviser'" replaced "'honor' justification" (quoting 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 3194 (1905))).

31. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("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."); Costco Wholesale Corp. v. Superior Court, 219 P.3d 736, 740 (Cal. 2009) (stating purpose of privilege is to "'promote full and open discussion'" (quoting Mitchell v. Superior Court, 691 P.2d 642, 646 (Cal. 1984))); Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 969 (1999) (stating "simple" rationale for attorney-client privilege is that client will be "more open and candid" when assured that attorney will not disclose their communications).

32. *See generally* Gardner, *supra* note 24, at 290-92 (discussing change from eighteenth-century view of privilege based on attorneys' duty of loyalty to more modern approach focused on ensuring clients' confidence in their attorneys).

33. *See In re* Search Warrant B-21778, 521 A.2d 422, 440 (Pa. 1987) (referring to attorney-client privilege as "time honored"); Commonwealth v. Maguigan, 511 A.2d 1327, 1333 (Pa. 1986) (stating attorney-client privilege is "most revered of our common law privileges"); Cohen v. Jenkintown Cab Co., 357 A.2d 689, 691 (Pa. Super. Ct. 1976) (noting attorney-client privilege is oldest testimonial privilege).

34. *See, e.g.*, Rice, *supra* note 31, at 970 (noting attorney-client privilege protects communications from disclosure, but does not protect underlying facts). For

claimed that it only benefits the legal profession, not society or clients.[35] Despite these criticisms, the attorney-client privilege has become a critical component of the legal system and is recognized by the U.S. Supreme Court and all fifty states.[36]

### B. *Driving on the Right: The Modern Attorney-Client Privilege in the United States*

In the United States, evidentiary privileges, such as the attorney-client privilege, serve as exceptions to the presumption that most evidence is

a further discussion of the limits of the attorney-client privilege, see *infra* notes 178-79 and accompanying text.

35. *See, e.g.*, Fischel, *supra* note 26, at 3, 33 (arguing attorney-client privilege should be abolished because it is beneficial to attorneys, but not clients). Fischel stated that the privilege provides attorneys a competitive advantage over other professionals, such as accountants, which increases the demand for legal services. *See id.* at 4-5. Further, he argued that the privilege causes attorneys representing opposing parties to undertake duplicative efforts in litigation, which only serves to "funnel" more money to attorneys. *See id.* at 7. Additionally, he claimed that the privilege harms clients as a class because litigation is a "zero-sum game" and the benefits to one client will negatively impact another. *See id.* at 16-17. Thus, Fischel concluded society would be better off without the attorney-client privilege and that it should be abolished. *See id.* at 33. *But see* Gardner, *supra* note 24, at 304-05 (refuting Jeremy Bentham's attack on attorney-client privilege).

Bentham criticized the privilege and argued that it only protects the guilty because the innocent person does not fear disclosure of his communication. *See id.* at 304. However, Gardner stated that "Bentham obviously oversimplified the matter." *Id.* at 305. Further, Gardner noted that most of the legal profession embraces the privilege. *See id.*

36. *See Upjohn*, 449 U.S. at 389 (recognizing attorney-client privilege as part of U.S. law as interpreted by U.S. courts); *see also* Lynch v. Hamrick, 968 So. 2d 11, 14-15 (Ala. 2007) (noting attorney-client privilege is part of law in Alabama); Langdon v. Champion, 752 P.2d 999, 1001-02 (Alaska 1988) (stating Alaska attorney-client privilege protects advice that renders legal services); Buell v. Superior Court, 391 P.2d 919, 923 (Ariz. 1964) (noting Arizona legislature has codified attorney-client privilege); Holt v. McCastlain, 182 S.W.3d 112, 116 (Ark. 2004) (recognizing attorney-client privilege is part of Arkansas Rules of Evidence); *Costco Wholesale Corp.*, 219 P.3d at 742 (stating attorney-client privilege in California protects communications between client and attorney); Alliance Constr. Solutions, Inc. v. Dep't of Corr., 54 P.3d 861, 869 (Colo. 2002) (recognizing Colorado attorney-client privilege protects communications between contractor of government entity and that entity's attorney); Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14, 22 (Conn. 2000) (stating Connecticut Supreme Court has emphasized importance of attorney-client privilege in Connecticut); Moyer v. Moyer, 602 A.2d 68, 72 (Del. 1992) (recognizing attorney-client privilege protects communication between client and attorney in Delaware); Am. Tobacco Co. v. State, 697 So. 2d 1249, 1252-53 (Fla. Dist. Ct. App. 1997) (emphasizing importance of attorney-client privilege, but stating crime-fraud exception exists in Florida); Zielinski v. Clorox Co., 504 S.E.2d 683, 685 (Ga. 1998) (noting party claiming attorney-client privilege in Georgia has burden to show it applies); State v. Wong, 40 P.3d 914, 921 (Haw. 2002) (noting attorney-client privilege in Hawaii is codified in Hawaii Rules of Evidence); Skelton v. Spencer, 565 P.2d 1374, 1377 (Idaho 1977) (noting attorney-client privilege in Idaho is "a defensive shield and not an offensive sword"); Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982) (limiting attorney-client privilege in Illinois for corporate clients); Hayworth v. Schilli Leasing, Inc., 669 N.E.2d

165, 169 (Ind. 1996) (noting scope of attorney-client privilege in Indiana); Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004) (noting attorney-client privilege is recognized in Iowa by common law and statute); State v. Gonzalez, 234 P.3d 1, 10 (Kan. 2010) (stating attorney-client privilege in Kansas is statutory); 3M Co. v. Engle, 328 S.W.3d 184, 188 (Ky. 2010) (noting attorney-client privilege in Kentucky is part of Kentucky Rules of Evidence); State v. Green, 493 So. 2d 1178, 1179 (La. 1986) (recognizing existence of attorney-client privilege statute in Louisiana); Rich v. Fuller, 666 A.2d 71, 74 (Me. 1995) (recognizing attorney-client privilege in Maine); Greenberg v. State, 26 A.3d 955, 959 (Md. 2011) (noting attorney-client privilege is statutory in Maryland); Darius v. City of Boston, 741 N.E.2d 52, 55 (Mass. 2001) (noting clients can waive attorney-client privilege in Massachusetts); *In re* Estate of Dalton, 78 N.W.2d 266, 269 (Mich. 1956) (determining whether attorney-client privilege covers information received by attorney from third party in Michigan); Kahl v. Minn. Wood Specialty, Inc., 277 N.W.2d 395, 398 (Minn. 1979) (noting attorney-client privilege in Minnesota was codified in 1851); Flowers v. State, 601 So. 2d 828, 831 (Miss. 1992) (noting Mississippi recognizes attorney-client privilege in Mississippi Rules of Evidence); State *ex rel.* Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 382 (Mo. 1978) (en banc) (noting Missouri legislature has codified attorney-client privilege in recognition of common law); State v. Statczar, 743 P.2d 606, 610 (Mont. 1987) (stating attorney-client privilege in Montana is codified); State v. Spidell, 233 N.W.2d 900, 903 (Neb. 1975) (recognizing attorney-client privilege is statutory in Nebraska); Molina v. State, 87 P.3d 533, 539 (Nev. 2004) (noting attorney-client privilege is codified in Nevada); Riddle Spring Realty Co. v. State, 220 A.2d 751, 754 (N.H. 1966) (recognizing existence of attorney-client privilege in New Hampshire); *In re* Selser, 105 A.2d 395, 403 (N.J. 1954) (stating attorney-client privilege in New Jersey is part of state's common law); State v. Valdez, 618 P.2d 1234, 1236 (N.M. 1980) (stating New Mexico attorney-client privilege is defined by New Mexico Rules of Evidence); Hoopes v. Carota, 543 N.E.2d 73, 73 (N.Y. 1989) (recognizing attorney-client privilege in New York); State v. McIntosh, 444 S.E.2d 438, 441 (N.C. 1994) (noting attorney-client privilege is "well-established" in North Carolina); State v. Red Paint, 311 N.W.2d 182, 184 (N.D. 1981) (explaining requirements for attorney-client privilege under North Dakota Rules of Evidence); State *ex rel.* Nix v. City of Cleveland, 700 N.E.2d 12, 16 (Ohio 1998) (recognizing attorney-client privilege in Ohio protects communication between attorneys and their clients); Chandler v. Denton, 741 P.2d 855, 865 (Okla. 1987) (noting requirements for attorney-client privilege in Oklahoma); Goldsborough v. Eagle Crest Partners, Ltd., 838 P.2d 1069, 1071-72 (Or. 1992) (explaining Oregon attorney-client privilege as stated in Oregon Evidence Code); Gillard v. AIG Ins. Co., 15 A.3d 44, 58 (Pa. 2011) (stating attorney-client privilege is two-way street in Pennsylvania); Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995) (noting requirements for asserting attorney-client privilege in Rhode Island); State v. Doster, 284 S.E.2d 218, 219 (S.C. 1981) (stating "attorney-client privilege has long been recognized" in South Carolina); State v. Catch the Bear, 352 N.W.2d 640, 645 (S.D. 1984) (noting requirements for applying attorney-client privilege in South Dakota); State v. Buford, 216 S.W.3d 323, 326 (Tenn. 2007) (stating attorney-client privilege in Tennessee is codified in statute, but also recognized in common law); *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (recognizing attorney-client privilege in Texas); Gold Standard, Inc. v. Am. Barrick Res. Corp., 801 P.2d 909, 911 (Utah 1990) (stating attorney-client privilege in Utah is codified); Steinfeld v. Dworkin, 515 A.2d 1051, 1051 (Vt. 1986) (per curiam) (recognizing attorney-client privilege in Vermont); Commonwealth v. Edwards, 370 S.E.2d 296, 301 (Va. 1988) (noting requirements of attorney-client privilege in Virginia); Soter v. Cowles Publ'g Co., 174 P.3d 60, 75-76 (Wash. 2007) (en banc) (recognizing attorney-client privilege in Washington); State *ex rel.* Brison v. Kaufman, 584 S.E.2d 480, 488 (W. Va. 2003) (noting West Virginia Rules of Civil Procedure protects what is covered by traditional attorney-client privilege); Jax v. Jax, 243 N.W.2d 831, 835 (Wis. 1976) (stating privilege is

generally admissible.[37] The U.S. Supreme Court has recognized some form of the attorney-client privilege since at least the nineteenth century.[38] The Supreme Court's decision in *Hunt v. Blackburn*[39] recognized that the attorney-client privilege was necessary to aid lawyers in adequately assisting their clients.[40] Further, other federal courts noted that the social benefits obtained from the attorney-client privilege overcome any harm inflicted by the suppression of the evidence.[41]

The modern attorney-client privilege, as the *Restatement (Third) of Law Governing Lawyers* summarizes, involves "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."[42] This definition ensures that clients are able to speak to lawyers about their legal issues without fear of disclosure.[43] Also, the U.S. Supreme Court clarified its view of the attorney-client privilege in *Upjohn Co. v. United States*.[44] In *Upjohn*, the Court asserted that 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 pro-

codified in Wisconsin); Trusky v. State, 7 P.3d 5, 9 (Wyo. 2000) (recognizing attorney-client privilege in Wyoming).

37. *See* Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994) (stating evidentiary privileges are exceptions to general rule that evidence is admissible); *see also* Commonwealth v. Stewart, 690 A.2d 195, 197 (Pa. 1997) ("'[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'" (alteration in original) (quoting Hutchison v. Luddy, 606 A.2d 905, 908 (Pa. Super. Ct. 1992))).

38. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (noting attorney-client privilege exists and that it protects communications between client and attorney).

39. 128 U.S. 464 (1888).

40. *See id.* at 470 (explaining that purpose of privilege is to relieve client's apprehension so that attorney can provide client adequate assistance). However, the Court noted that the privilege "is that of the client alone, and no rule prohibits the latter from divulging his own secrets." *Id.*

41. *See, e.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (stating attorney-client privilege is necessary for "'administration of justice'" (quoting *Hunt*, 128 U.S. at 470)).

42. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68 (2000) (listing general requirements for satisfaction of attorney-client privilege under Restatement); *see also id.* § 68 cmt. a (stating § 68 is intended to represent the "general formulation of the attorney-client testimonial privilege"); *id.* § 68 cmt. c (acknowledging that privilege is intended to protect clients, not attorneys).

43. *See* Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 217 (2010) (stating § 68 "succinctly" sets out elements for modern attorney-client privilege). Sisk and Abbate asserted that the privilege allows clients to communicate freely with their legal counsel. *See id.* They also noted it is the client reaching out for legal advice from the attorney that "triggers the privilege." *Id.*

44. 449 U.S. 383 (1981).

tected."[45] Attempts to construe the privilege narrowly, however, have caused confusion and inconsistency in its application.[46]

Despite the call for clarity, courts have failed to interpret the attorney-client privilege consistently.[47] In particular, it is unclear whether the privi-

45. *Id.* at 393. Upjohn was a pharmaceutical company that discovered, during an independent audit, that one of its subsidiaries was making payments to foreign government officials in exchange for business. *See id.* at 386. The company conducted an internal investigation, during which its attorneys sent a questionnaire to several of its managers inquiring about potentially illegal payments made to foreign governments. *See id.* at 386-87. The managers were told to treat the questionnaire as "highly confidential" and not to disclose its content. *See id.* at 387.

The company voluntarily reported the questionable payments to the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS). *See id.* The IRS began an investigation and requested, among other things, the questionnaires sent to Upjohn's managers. *See id.* at 387-88. The company refused to produce the questionnaires, claiming they were protected under the attorney-client privilege. *See id.* at 388. Both the district court and the Sixth Circuit Court of Appeals found the privilege did not protect the questionnaires from disclosure. *See id.* The Sixth Circuit reasoned that if the privilege were construed broadly, upper management could hide "unpleasant facts and create too broad a 'zone of silence.'" *Id.*

On appeal, the U.S. Supreme Court acknowledged the long history of the attorney-client privilege and its purpose to "'encourage clients to make full disclosure to their attorneys.'" *Id.* at 389 (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)). The Court discussed the "control group test" used by the Sixth Circuit, which examines whether, in a corporate context, "'the employee making the communication . . . is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.'" *Id.* at 390 (quoting City of Phila. v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962)). If the employee was in such a position, then the attorney-client privilege would apply. *See id.*

The Court held that the "control group test . . . frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392. Further, the Court stated there must be a "degree of certainty" regarding whether communications will be protected in order for the privilege to function properly. *Id.* at 393. For those reasons, the Court found the attorney-client privilege protected the questionnaires. *See id.* at 396-97.

46. *See* 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, 1174 (1997) (asserting that "narrow parameters" adopted by courts construing attorney-client privilege creates "confusion, inconsistency and uncertainty"). Giesel argued that if clients are unsure whether their communications will be protected, "the efficacy of the privilege as an encourager of candor diminishes." *Id.* at 1173.

47. *See id.* at 1173-74 (discussing courts' inconsistency in applying requirement that communication "relate to the obtaining or rendering of legal advice, service, or assistance, and the related professional legal capacity requirement"); *see also* Rice, *supra* note 31, at 973-76 (noting that some jurisdictions have adopted derivative protection of attorney-to-client communications, while others have extended protection to all communication). *See generally* Sisk & Abbate, *supra* note 43, at 239-40 (arguing that to ensure lawyers and clients are able to freely communicate, scope of attorney-client privilege must be dynamic and not construed narrowly).

lege applies to communications from attorneys to their clients.[48] At least one commentator has argued that protecting attorney-to-client communications will "extend[ ] the privilege's protection far beyond what is necessary to further its limited goal."[49] However, the Third Circuit noted two reasons that support protecting the "two-way application": (1) it prevents the use of an attorney's statements to infer a confidential communication by a client; and (2) "legal advice given to the client should remain confidential."[50] Despite these fundamental disagreements, many jurisdictions have adopted at least some protection for attorney-to-client communications.[51]

48. *See* Commonwealth v. Maguigan, 511 A.2d 1327, 1337 (Pa. 1986) (stating attorney-client privilege is limited to communications from client to attorney); Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1264 (Pa. Super. Ct. 2007) (same), *aff'd on other grounds*, 992 A.2d 65 (Pa. 2010) (per curiam). *But see In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (stating attorney-client privilege protects attorney communications that involve confidential communication from client to attorney); Byrd v. State, 929 S.W.2d 151, 154 (Ark. 1996) (providing that attorney-client privilege protects communications by attorney and client to each other); Costco Wholesale Corp. v. Superior Court, 219 P.3d 736, 742 (Cal. 2009) (same).

49. Rice, *supra* note 31, at 974. Rice claimed that there is "no apparent reason" why clients would disclose less if the attorney-client privilege did not protect attorney-to-client communication. *Id.* Further, he asserted that judges have expanded the privilege for two reasons: (1) most attorney communications will reveal some content of the client's prior communications; and (2) it eliminates the requirement to prove two separate instances of the privilege. *See id.* at 976. However, he argued that judges have undertaken this "haphazard transformation" without considering all of the relevant implications. *See id.* at 1005. But, in conclusion, Rice stated that because the privilege is part of the common law, the "change, for better or for worse, will likely continue on a case-by-case basis." *Id.*

50. United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980). *Amerada Hess* involved lawsuits filed by the SEC and IRS against three corporations for potential improper treatment of foreign payments on their tax returns. *See id.* at 982. In the course of the investigation against Amerada Hess, the IRS sought production of a list of employees interviewed by Amerada Hess's outside legal counsel. *See id.* at 985. Amerada Hess claimed the attorney-client privilege, but the trial court found they were not protected because the privilege did not apply to attorney-to-client communication and the list was, in general, not privileged. *See id.*

The Third Circuit noted that federal courts have found that the attorney-client privilege covers "[l]egal advice or opinion from an attorney to his client." *Id.* at 986. Thus, the court determined that the trial court was incorrect to conclude that the privilege does not apply to attorney-to-client communications. *See id.* However, the court agreed with the trial court that a simple list of employees interviewed by outside counsel is not the kind of communication that the privilege covers. *See id.*

51. *See, e.g.*, *id.* at 986 (stating legal advice from attorney has been long protected under attorney-client privilege in federal courts); *Byrd*, 929 S.W.2d at 154 (noting privilege protects statements made by both attorney and client); Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1061 (N.Y. 1991) (providing that attorney-client privilege protects attorney-to-client communications made for purpose of providing legal advice to client).

## III. A LONG-TERM CONSTRUCTION PROJECT: THE HISTORY OF THE ATTORNEY-CLIENT PRIVILEGE IN PENNSYLVANIA

Pennsylvania recognized the attorney-client privilege even before the founding of the United States.[52] Additionally, the General Assembly of Pennsylvania (General Assembly) codified the privilege in the nineteenth century and again in the mid-twentieth century.[53] Despite the General Assembly's best intentions, the courts of the Commonwealth were unable to agree on the scope of the privilege.[54] These disagreements turned the attorney-client privilege into a long term "construction project" that created confusion within the Pennsylvania legal community.[55]

### A. *Laying Down the Groundwork: Adoption and Statutory Codification in Pennsylvania*

The attorney-client privilege has been a part of the law of Pennsylvania since its founding as a colony in 1681.[56] In 1887, the General Assembly passed a statute codifying the privilege in the Commonwealth.[57] Additionally, the Supreme Court of Pennsylvania has long recognized the importance of the privilege in ensuring candid attorney-client communications.[58] In Pennsylvania, the privilege is intended to protect the client, and it is the client's right to assert the privilege.[59] The Pennsylvania su-

52. For a discussion of the initial recognition of the attorney-client privilege in Pennsylvania, see *infra* notes 56-62 and accompanying text.

53. For a discussion of the statutory codification of the attorney-client privilege in Pennsylvania, see *infra* notes 57-62 and accompanying text.

54. For a discussion of the disagreement among Pennsylvania courts regarding the scope of the attorney-client privilege, see *infra* notes 68-80 and accompanying text.

55. For a discussion of the confusion created by the disagreement among Pennsylvania courts, see *infra* notes 68-80 and accompanying text.

56. *See* Gocial v. Independence Blue Cross, 827 A.2d 1216, 1221 (Pa. Super. Ct. 2003) (noting that Pennsylvania has recognized attorney-client privilege since colony's founding); Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa. Super. Ct. 1995) ("The attorney-client privilege has been part of Pennsylvania law since the founding of the Pennsylvania colony . . . .").

57. Act of May 23, 1887, § 5(d), 1887 Pa. Laws 158, 159 (codified as amended at 42 PA. CONS. STAT. § 5928 (2011)). The 1887 statute stated: "Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client." *Id.* Further, the statute essentially codified the common law principle. *See* Eisenman v. Hornberger, 44 Pa. D. & C.2d 128, 129 (Pa. Ct. Com. Pl. 1967) (discussing attorney-client privilege statute).

58. *See* Nat'l Bank of W. Grove v. Earle, 46 A. 268, 269 (Pa. 1900) ("If the secrets of the professional relation can be extorted from counsel . . . by the antagonist of his client, the client will exercise common prudence by avoiding counsel."); Beltzhoover v. Blackstock, 3 Watts 20, 28 (Pa. 1834) ("Without such a privilege the confidence between client and advocate, so essential to the administration of justice, would be at an end.").

59. *See* Appeal of McNulty, 19 A. 936, 938 (Pa. 1890) ("It is the privilege of the client to object, and not of a stranger, even if the testimony objected to was a privileged communication."); Cohen v. Jenkintown Cab Co., 357 A.2d 689, 691

preme court further emphasized this client-centric approach by placing the burden on the party seeking disclosure to show that the disclosure would not violate the privilege.[60]

Reaffirming the importance of the attorney-client privilege, the General Assembly re-codified the privilege for both civil and criminal actions in 1976.[61] The statute for civil actions 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."[62] To determine whether the statutory requirements are met, several Pennsylvania courts adopted a four-part test, which appears to limit the privilege to client communications to their attorneys.[63] However, not all Pennsylvania courts applied this test.[64]

Shortly after the statute's re-codification, the Pennsylvania Supreme Court of Pennsylvania noted "that the privilege is not concerned with prejudice [or] the better ascertainment of the truth[,] . . . [but rather] its purpose is to foster a confidence between client and advocate that will lead to a trusting and open attorney-client dialogue."[65] Furthering the

(Pa. Super. Ct. 1976) (implying privilege, after eighteenth century, was intended to protect clients); Commonwealth v. McKenna, 213 A.2d 223, 226 (Pa. Super. Ct. 1965) (noting attorney-client privilege is client's right to assert).

60. *See* Commonwealth v. Maguigan, 511 A.2d 1327, 1334 (Pa. 1986) (providing that party seeking disclosure of information has burden of proving lack of violation of attorney-client privilege); Moore v. Bray, 10 Pa. 519, 524-25 (Pa. 1849) ("The general rule is, that all professional communications are sacred. If the particular case form an exception, it must be shown by him who would withdraw the seal of secrecy, and, I think, should be clearly shown."); Brennan v. Brennan, 422 A.2d 510, 515 (Pa. Super. Ct. 1980) (noting party seeking disclosure has burden of proof).

61. *See* 42 PA. CONS. STAT. § 5916 (2011) (codifying attorney-client privilege in Pennsylvania for criminal matters); *id.* § 5928 (codifying privilege for civil matters).

62. *Id.* § 5928.

63. *See, e.g.*, Commonwealth v. Mrozek, 657 A.2d 997, 998 (Pa. Super. Ct. 1995) (stating four general requirements are necessary to protect communications under attorney-client privilege). The four requirements are:

> 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.

*Id.*

64. *See, e.g.*, Slusaw v. Hoffman, 861 A.2d 269, 273 (Pa. Super. Ct. 2004) (allowing for derivative protection for attorney-to-client communications to extent such communications would disclose confidential information originally communicated by client).

65. Estate of Kofsky, 409 A.2d 1358, 1362 (Pa. 1979) (citations omitted). The court noted that the language of the statute "makes it clear that the statute pros-

cause, the Pennsylvania Rules of Professional Conduct state that an attorney cannot reveal confidential communications without the client's consent.[66] However, the privilege is not without limitations, which often must be addressed based on the facts of each case.[67]

### B. *Causing a Traffic Jam: Disagreement Regarding the Scope of the Attorney-Client Privilege Among Pennsylvania Courts*

Pennsylvania courts have been interpreting the scope of the attorney-client privilege since its original statutory codification in the nineteenth century.[68] The Supreme Court of Pennsylvania's 1900 decision in *National Bank of West Grove v. Earle*[69] stated that courts cannot force attorneys to disclose advice that they provided to their clients.[70] This early interpreta-

cribes not only giving evidentiary consideration to confidential communications, but also their very disclosure." *Id.* Thus, the damage occurs when the confidence for open communication between attorney and client is broken and "not when the evidence is given substantive consideration." *Id.*

66. *See* PA. RULES OF PROF'L CONDUCT R. 1.6(a) (2004) ("A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation . . . ."). Comment 2 to Rule 1.6 states that clients need to be able to "communicate fully and frankly" with their attorneys. *Id.* R. 1.6 cmt. 2. Additionally, comment 3 to the Rule notes "[a] lawyer may not disclose [confidential client communications] except as authorized or required by the Rules of Professional Conduct or other law." *Id.* R. 1.6 cmt. 3.

67. *See In re* Search Warrant B-21778, 521 A.2d 422, 428 (Pa. 1987) (noting court must consider facts of individual cases to determine whether privilege is properly invoked).

68. *See, e.g.*, Commonwealth v. Maguigan, 511 A.2d 1327, 1334 (Pa. 1986) (explaining that party seeking disclosure of information has burden of proof to show no violation of attorney-client privilege); Alexander v. Queen, 97 A. 1063, 1064 (Pa. 1916) (holding attorney-client privilege protects communications between attorney and client even if "'a professional person may deem [them] unimportant to the controversy'" (quoting Moore v. Bray, 10 Pa. 519, 524 (Pa. 1849))); Nat'l Bank of W. Grove v. Earle, 46 A. 268, 269 (Pa. 1900) (finding attorney-client privilege applied to legal advice given by attorney to his client); Cohen v. Jenkintown Cab Co., 357 A.2d 689, 692 (Pa. Super. Ct. 1976) (determining attorney-client privilege does not prevent testimony of client's attorney where "the client's rights or interests cannot be adversely affected thereby"); Commonwealth v. Brown, 175 A. 748, 756 (Pa. Super. Ct. 1934) (concluding attorney-client privilege protects attorney communications to client).

69. 46 A. 268 (Pa. 1900).

70. *See id.* at 269 (holding attorney-client privilege protected advice from attorney-to-client). *Earle* involved settling the debts of a decedent who owned most of the stock in a publishing company. *See id.* at 268-69. National Bank was a creditor of the decedent and had agreed to a plan with several of the decedent's other creditors, by which the decedent's unsecured creditors were to receive repayment. *See id.* at 268. Earle and another defendant were the proposed managers for the plan, but they were also trustees for two of the decedent's other creditors. *See id.*

The plaintiff filed suit, alleging that the defendants had personal interests in the plan and had acted in bad faith. *See id.* at 269. The plaintiff sought the removal of the defendants and their answers "to certain interrogatories," and the defendants denied any wrongdoing or bad faith. *See id.* The court dismissed the case as it related to the two trustees. *See id.* Importantly, the court stated that it

tion established a protection of attorney-to-client communications; however, in subsequent cases regarding the scope of the privilege, Pennsylvania courts largely ignored the decision.[71]

Over time, many courts in Pennsylvania adopted a narrower construction of the privilege that protects client-to-attorney communication, but not attorney-to-client communication.[72] Nevertheless, not all Pennsylvania courts adopted this narrow standard; instead, some adopted a derivative construction protecting attorney-to-client communication that would reveal previous communications made by the client to the attorney.[73] Additionally, several Pennsylvania decisions went even further and afforded full protection under the statute to attorney-to-client communications.[74]

These conflicting decisions created confusion in the Commonwealth about whether the attorney-client privilege is a proverbial one-way or two-way street.[75] In 2007, the Supreme Court of Pennsylvania addressed this confusion in *Nationwide Mutual Insurance Co. v. Fleming*.[76] In an evenly

would be improper to obtain discovery from the attorney, because if discovery were allowed, "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." *Id.*

71. *See, e.g.*, Amici Curiae Brief of the Ass'n of Corporate Counsel et al. in Support of Reversal at 13, Gillard v. AIG Ins. Co., 15 A.3d 44 (Pa. 2011) (No. 10 EAP 2010), 2010 WL 4969915 [hereinafter Amici Curiae Brief of the Ass'n of Corporate Counsel et al.] (criticizing superior court's decision in *Fleming* for failing to discuss or mention Supreme Court of Pennsylvania's decision in *Earle*). *But see Gillard*, 15 A.3d at 55-56 (noting appellant did not cite *Earle* "as a legitimate reconciliation" of broad interpretation of attorney-client privilege statute).

72. *See, e.g.*, *Maguigan*, 511 A.2d at 1337 (stating attorney-client privilege only protects communications from client to attorney for purpose of obtaining legal advice); Commonwealth v. Hetzel, 822 A.2d 747, 757 (Pa. Super. Ct. 2002) (same); Eisenman v. Hornberger, 44 Pa. D. & C.2d 128, 129 (Pa. Ct. Com. Pl. 1967) (same).

73. *See* Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1264 (Pa. Super. Ct. 2007) (finding attorney-client privilege statute protects attorney-to-client communications that would "reveal confidential communications from the client"), *aff'd on other grounds*, 992 A.2d 65 (Pa. 2010) (per curiam); Slusaw v. Hoffman, 861 A.2d 269, 273 (Pa. Super. Ct. 2004) (same).

74. *See* Alexander v. Queen, 97 A. 1063, 1064 (Pa. 1916) (recognizing that "'all professional communications are sacred'" (quoting Moore v. Bray, 10 Pa. 519, 524 (Pa. 1849))); Sedat, Inc. v. Dep't of Envtl. Res., 641 A.2d 1243, 1245 (Pa. Commw. Ct. 1994) (explaining that attorney-client privilege protects legal advice provided by attorneys to clients); Commonwealth v. Brown, 175 A. 748, 756 (Pa. Super. Ct. 1934) (same).

75. *See Gillard*, 15 A.3d at 56 (acknowledging that Pennsylvania courts have not consistently interpreted scope of attorney-client privilege).

76. *See Fleming*, 992 A.2d at 67 (Eakin, J., in support of affirmance) (noting purpose of appeal was to determine whether superior court erred in determining attorney-client privilege was one-way street). The Supreme Court of Pennsylvania addressed whether the attorney-client privilege protected a document prepared by Nationwide's general counsel and sent to "officers, managers, and three other attorneys." *See id.* at 65-66. Nationwide originally brought suit against several former employees for accessing policy-holder information and providing it to competitors.

divided decision, the court found that the appellants waived the privilege and—because it was equally divided—affirmed the superior court's decision without addressing the scope of the privilege.[77] The justices supporting reversal of the superior court's decision asserted that the court should have adopted the more "pragmatic approach" from *Earle* because the standard in place caused confusion and was difficult to apply.[78] This split decision did little to clear up the confusion among the Pennsylvania legal community.[79] However, shortly after *Fleming*, the Pennsylvania supreme court accepted the appeal in *Gillard* to clarify the scope of the attorney-client privilege in the Commonwealth.[80]

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*See id.* at 65. The employees brought a counter-claim stating that Nationwide filed the suit in bad faith. *See id.* The employees sought the document because it "contain[ed] counsel's assessment of the agent defections and [Nationwide's] strategy underlying the lawsuits." *Id.* at 66.

77. *See id.* at 69-70 (finding appellants waived privilege by disclosing attorney-client communications to third party). The opinion in support of affirmance noted that Nationwide previously disclosed two other documents that discussed a similar subject matter and never claimed those documents were privileged. *See id.* at 68. Because the court determined that all three documents were of a similar subject matter, it held that Nationwide waived any attorney-client privilege. *See id.* Thus, the two justices in favor of affirmance declined to decide the case on the merits. *See id.* at 70.

78. *See id.* at 72-74 (Saylor, J., opinion in support of reversal) (disagreeing with two justices in favor of affirmance that Nationwide waived attorney-client privilege because it disclosed two other documents of similar nature). Justice Saylor and Chief Justice Castille agreed the documents dealt with the same subject matter, but found they were not similar when closely examined. *See id.* at 71. The justices noted the two documents disclosed were an e-mail that stated the basic understanding of the reasons for the former employees' defections and a manual that detailed the practices Nationwide should follow when employees defect. *See id.* at 70-71.

The justices further agreed that the document contained confidential client communications. *See id.* at 71. However, they also agreed with amici curiae that the superior court's decision in *Fleming* "'poses inordinate practical difficulties' that make it administratively and judicially unworkable." *See id.* at 73 (quoting AMICI Curiae Brief of the Ass'n of Corporate Counsel et al., *supra* note 71, at 19. The justices concluded that there was "unavoidable intertwining" of communications between an attorney and a client, and thus the court should follow the "pragmatic approach" of *Earle*. *See id.* at 73. Thus, Justice Saylor and Chief Justice Castille stated they would have reversed the decision of the superior court. *See id.* at 74.

79. *See, e.g.*, *Pennsylvania Supreme Court Leaves in Limbo Applicability of Attorney-Client Privilege to Communications from Attorney to Client*, LITIG. LAWFLASH (Morgan, Lewis & Bockius LLP, Phila., Pa.), Mar. 9, 2010, *available at* http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/d412f9b4-341d-4bca-b22d-c2d64254269f (noting Pennsylvania supreme court affirmed superior court's "controversial" decision in *Fleming*, but also noting supreme court could resolve confusion by hearing *Gillard* appeal).

80. *See Gillard*, 15 A.3d at 46 ("In this appeal, we consider whether, and to what degree, the attorney-client privilege attaches to attorney-to-client communications.").

## IV. *GILLARD V. AIG INSURANCE CO.*: PAVING A NEW TWO-WAY STREET IN PENNSYLVANIA

In *Gillard*, the plaintiff attempted to obtain documents from AIG that involved communications from AIG's outside counsel to its claim representatives.[81] The Superior Court of Pennsylvania decided that Pennsylvania's attorney-client privilege statute did not cover those communications.[82] However, the Supreme Court of Pennsylvania reversed the superior court's decision over two dissenting justices, and held that the attorney-client privilege is a two-way street.[83]

### A. *Facts and Procedure*

The Pennsylvania supreme court accepted the appeal in *Gillard* to determine whether the attorney-client privilege protects attorney-to-client communications in Pennsylvania.[84] The case arose from a bad faith suit involving AIG's handling of an uninsured motorist claim.[85] During discovery, Gillard requested all relevant documents from the law firm representing AIG, including documents that contained communications from the law firm to AIG's claim representatives.[86]

Based on the court's previous statement that the attorney-client privilege applies to only client communications, the court of common pleas ordered AIG to "serve on the trial judge a detailed statement of matters complained of on appeal."[87] AIG filed the statement, claiming the prior court abused its discretion by requiring AIG to disclose the documents.[88] The court of common pleas, however, concluded that the attorney-client

81. For a further discussion of the facts in *Gillard*, see *infra* notes 84-95 and accompanying text.

82. For a discussion of the Superior Court of Pennsylvania's decision in *Gillard* and the complaints on appeal, see *infra* notes 90-95 and accompanying text.

83. For a further discussion of the Supreme Court of Pennsylvania's decision in *Gillard*, see *infra* notes 96-124 and accompanying text.

84. *See Gillard*, 15 A.3d at 46 (describing Pennsylvania supreme court's purpose for accepting appeal).

85. *See id.* (noting specifics of underlying case involved bad-faith and breach-of-contract claim). Because the parties settled the underlying claim for uninsured motorist benefits, Gillard filed only the bad-faith claim against AIG. *See* Brief Amicus Curiae on Behalf of the American Insurance Ass'n et al. at 8, *Gillard*, 15 A.3d 44 (No. 10 EAP 2010), 2010 WL 4969914 (describing claims at issue).

86. *See* Gillard v. AIG Ins. Co., No. 0864, 2007 WL 2024787 (Pa. Ct. Com. Pl. June 5, 2007) (considering whether court abused its discretion by ordering disclosure of documents by AIG), *aff'd*, 947 A.2d 836 (Pa. Super. Ct. 2008) (unpublished table decision), *rev'd*, 15 A.3d 44.

87. *See id.* (internal quotation marks omitted).

88. *See id.* (noting two arguments offered by AIG). AIG's two complaints were: (1) that the trial court abused its discretion by requiring them to disclose the communications from their attorney to the claims representatives and (2) that the court erred or abused its discretion by including its ruling that the attorney-client privilege is only a one-way street. *See id.*

privilege protects only client-to-attorney communications.[89] AIG ultimately appealed to the Superior Court, which affirmed the decision of the court of common pleas.[90] AIG then appealed to the Supreme Court of Pennsylvania, which granted the petition for appeal.[91]

On appeal, Gillard again claimed that AIG was not seeking limited, derivative protection of an underlying client-to-attorney communication, but rather the creation of a two-way street.[92] Gillard argued that the court should continue to "effectuate the will of the General Assembly" by holding that the privilege is a one-way street.[93] In contrast, AIG noted that the purpose of the attorney-client privilege is to protect and promote free exchange between attorney and client.[94] In order to support this purpose, AIG argued that the privilege must protect both attorney-to-client and client-to-attorney communications.[95]

### B. *Lessons for PennDOT: How the Supreme Court of Pennsylvania Paved the Two-Way Street*

The Supreme Court of Pennsylvania noted that the superior court adopted a "'strictly limited'" view of the privilege, which was consistent

89. *See id.* (stating that policy reasons for attorney-client privilege do not warrant protection of attorney-to-client communications).

90. *See Gillard*, 947 A.2d 836, *aff'g* 2007 WL 2024787, *rev'd*, 15 A.3d 44.

91. *See* Gillard v. AIG Ins. Co., 990 A.2d 1147 (Pa. 2010) (per curiam) (granting Petition for Allowance of Appeal from decision of superior court to determine scope of attorney-client privilege).

92. *See Gillard*, 15 A.3d at 46 (outlining Gillard's argument that AIG was seeking unjustified expansion of attorney-client privilege). AIG's argument focused on the historical perspective of the privilege. *See id.* at 50. AIG claimed that narrowly construing the privilege would "inhibit[ ] free and open communications" between clients and attorneys. *See id.* at 51. AIG pointed to the *Restatement (Third) of the Law Governing Lawyers* for the notion that the privilege should cover all communications between attorneys and clients. *See id.* at 52 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 (2000)). AIG stated they were seeking a "clear articulation from [the Supreme Court of Pennsylvania] endorsing the broader approach to the privilege." *Id.* at 53.

93. *See id.* at 47 (stating Gillard's argument rested on premise that court should not interfere with "truth-determining process"). Gillard conceded that Pennsylvania recognizes derivative protection, but insisted it only covers comments that would reveal previous communication from a client. *See id.* at 48. Further, Gillard argued that the General Assembly intended a narrow approach to the privilege and thus the court should not "substitute its own policy." *See id.* at 55 (citation omitted) (internal quotation marks omitted). Gillard also argued that *Earle* was not relevant and had been displaced because it had not been cited in 110 years and also because the legislature re-enacted the attorney-client privilege statute in 1976. *See id.* Moreover, Gillard pointed to several decisions of the Supreme Court of Pennsylvania that have construed the privilege narrowly. *See id.* at 56.

94. *See id.* at 47 (noting AIG emphasized underlying purpose of attorney-client privilege).

95. *See id.* (providing that AIG's argument required broad interpretation of attorney-client privilege). For a further discussion of AIG's argument, see *supra* note 92 and accompanying text.

with the Superior Court's previous decision in *Fleming*.[96] Further, it acknowledged that the superior court entered its decision in *Gillard* before the supreme court affirmed the decision in *Fleming*.[97] However, the court later said that the Opinion in Support of Affirmance from its decision in *Fleming* did not solve the "tension" that existed between a broad interpretation of the privilege and the narrow focus of the statute.[98] Additionally, the court noted that the opinion supporting reversal in *Fleming* stated a "'narrow approach to the attorney-client privilege rigidly centered on the identification of specific client communications' was unworkable" because communications between an attorney and client are "'often inextricably intermixed.'"[99]

The Pennsylvania supreme court acknowledged that Pennsylvania courts were inconsistent when discussing the scope of the attorney-client privilege.[100] Additionally, the court noted that Pennsylvania, like other jurisdictions, adopted a derivative protection approach to the privilege because of the difficulty in separating attorney advice from client input.[101] The court further stated it was not clear that the General Assembly intended to impose strict restrictions on derivative protection.[102] The majority dismissed the dissent's argument that an expansion of the privilege would be an act of judicial legislation, noting that Pennsylvania appellate courts "consistently recognized the need" for such protection and that it would be impossible to interpret the statute literally and still fulfill its intended purpose.[103]

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96. *See Gillard*, 15 A.3d at 48 (quoting Gillard v. AIG Ins. Co., No. 1065 EDA 2007, slip op. at 4, (Pa. Super. Ct. Jan. 4, 2011)) (noting Superior Court of Pennsylvania recognized derivative protection for attorney-to-client communications). Despite the superior court's recognition of the derivative protection, the supreme court noted that the superior court limited the extension to attorney-to-client communications that would reveal confidential communications originally made by the client. *See id.*

97. *See id.* at 49 (implying superior court might have decided *Gillard* differently had supreme court decided *Fleming* earlier).

98. *See id.* (stating lead opinion in *Fleming* found attorney-client privilege was waived). For a further discussion of the Supreme Court of Pennsylvania's decision in *Fleming*, see *supra* notes 76-78 and accompanying text.

99. *Gillard*, 15 A.3d at 49 (quoting Nationwide Mutual Ins. Co. v. Fleming, 992 A.2d 65, 71 (Pa. 2010) (Saylor, J., in support of reversal)).

100. *See id.* at 57 (stating "disharmony" is created because of "competing interests-of-justice factors in playnamelythe encouragement of trust and candid communication between lawyers and their clients and the accessibility of material evidence to further the truth-determining process" (citation omitted)).

101. *See id.* (noting that courts in all jurisdictions, including U.S. Supreme Court, now recognize derivative protection under attorney-client privilege).

102. *See id.* at 58 (stating legislature most likely did not intend courts to make "'surgical separations'" (quoting Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991))).

103. *See id.* at 57-58 (citation omitted) (internal quotation marks omitted) (asserting that dissent recognized attorney-client privilege statute cannot be read literally and still give effect to its purpose).

Further, the court stated that to determine the proper scope of the privilege, it must look to the privilege's underlying purpose: to promote open and candid communication between attorneys and clients.[104] The court asserted that the legislature did not intend courts to perform "'surgical separations'" of attorney and client communications.[105] Additionally, the court agreed with amici that it has authority to determine the proper scope of such privileges under Pennsylvania's constitution.[106] While the court acknowledged that an expanded attorney-client privilege could lead to abuse of the privilege, it stated that the existing limitations were "sufficient to provide the essential checks."[107] Thus, the court held that the attorney-client privilege is a two-way street that protects both client-to-attorney *and* attorney-to-client communications.[108]

Two justices filed separate dissenting opinions.[109] Justice Eakin did not agree with the majority's assertion that a separate "blanket" protection exists under the statute.[110] He stated that the majority's decision was "well-reasoned," but argued that the extension of the privilege was too broad.[111] Additionally, he noted that the attorney-client privilege "is a

104. *See id.* at 58 (noting that looking to statute's purpose is "consistent with logic and established principles of statutory construction").

105. *Id.* (quoting *Spectrum*, 581 N.E.2d at 1060).

106. *See id.* (agreeing with amici that court has power beyond construction of statutes, but declining to determine scope of this power because it was beyond opinion).

107. *See id.* at 52 n.8, 58 (explaining that privilege protects communications regarding legal advice). The court referred to the "'ruse abuse'" as an example of the feared abuse of the privilege. *See id.* at 58 (citing Sisk & Abbate, *supra* note 43, at 230-35). The fear associated with the ruse abuse stems from the potential that an expanded attorney-client privilege, covering communications with in-house counsel, would allow corporations to funnel important company documents through their in-house counsel in order to claim protection under the attorney-client privilege. *See* Sisk & Abbate, *supra* note 43, at 231 (describing ruse abuse). However, according to Sisk and Abbate, "[c]ourts understandably and appropriately refuse to accept the expediency of copying the lawyer on routine business correspondence and memoranda as sufficient to raise the shield of privilege over the entire content of such ordinary business documents." *Id.* at 232. Further, they concluded that the current requirements for the privilege are sufficient to prevent abuse, and courts do not need to narrowly confine the scope of the privilege. *See id.* at 232-33.

108. *See Gillard*, 15 A.3d at 59 (declaring privilege is limited to protect communications providing "professional legal advice").

109. *See id.* (providing that four justices joined main opinion, while Justices Eakin and McCaffery filed dissenting opinions).

110. *See id.* (Eakin, J., dissenting) (agreeing attorney-client privilege has derivative protection for attorney-to-client communication, but that it does not cover situations where such communication does not reveal information communicated by client and is "relevant to the legal rights at issue in a separate and distinct action").

111. *See id.* at 59-60 (claiming broad privilege denies fact finder access to evidence that could be relevant). Justice Eakin used an example where an attorney tells a client that there is "no legal basis" for denying an insurance claim or for withholding payment, but the client refuses to pay "until . . . made to do so." *See id.* at 60. He explained that the client's reply would be privileged, but expressed that

limited evidentiary privilege, and privileges are exceptions to normal evidentiary concepts and rules."[112] He further claimed that the statute is worded unambiguously and thus the court must interpret it according to its plain language.[113] Because the evidentiary privileges are narrow and the language of the statute is clear, he asserted that the majority's construction of the privilege was improper.[114] In addition, he stated that if the privilege were to be expanded, it may be done either by the court "after publication and comment" of the case or by the General Assembly through statutory amendment.[115]

In the second dissent, Justice McCaffery asserted that the majority "acted in a legislative capacity."[116] He also claimed that the language in the statute is clear and only protects communications from clients to attorneys.[117] The justice acknowledged the derivative protection provided to attorney communications, but only to the extent it protects communication originating with the client.[118] He argued that the majority essentially removed the requirements of the statute by extending the privilege to

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he did not see why the attorney's original communication should be privileged. *See id.* He stated it is assumed that if the client does not pay, it is because the attorney gave the client legal advice when there was no requirement to do so. *See id.* The communication from the attorney would show that the client did not act in good faith, but Justice Eakin questioned whether the client could "still assert good faith while hiding this fact under a claim of privilege." *Id.*

112. *Id.* at 60. Justice Eakin cited a previous decision in which the court asserted that the privilege must be strictly construed and applied "'only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* (quoting Commonwealth v. Spetzer, 813 A.2d 707, 717 (Pa. 2002)). Additionally, other courts recognized that the privilege is limited and should be narrowly construed. *See, e.g.*, *In re* LTV Sec. Litig., 89 F.R.D. 595, 600 (N.D. Tex. 1981) (acknowledging that privilege is exception to rule of "entitlement to every man's evidence" and it should only be construed to achieve its purposes); *In re* Selser, 105 A.2d 395, 405 (N.J. 1954) ("[T]he privilege is not absolute, but rather an exception to a more fundamental policy.").

113. *See Gillard*, 15 A.3d at 60 (Eakin, J., dissenting) (asserting that 1 PA. CONS. STAT. § 1921(b) (2006) requires court to interpret statute based on text and not on spirit). For a further discussion of the requirements of § 1921, see *infra* notes 133-35 and accompanying text.

114. *See Gillard*, 15 A.3d at 60 (Eakin, J., dissenting) (acknowledging arguments made for expanding privilege, but denying that majority's approach is appropriate way to facilitate such expansion).

115. *See id.* at 60-61 (arguing that there are more appropriate alternative avenues available to expand attorney-client privilege).

116. *Id.* at 61 (McCaffery, J., dissenting). Justice McCaffery continues: "[T]he majority reads a provision not enacted by the General Assembly into the Pennsylvania attorney-client privilege statute." *Id.*

117. *See id.* (referencing several Supreme Court of Pennsylvania decisions asserting that attorney-client privilege protects only client-to-attorney communications).

118. *See id.* (stating Pennsylvania courts have recognized need for derivative protection of attorney-to-client communication when it protects communications originating with client).

cover all attorney-to-client communications.[119] Further, he dismissed the majority's claim that interpretations of the statute by Pennsylvania courts were "inconsistent," instead claiming there was little disagreement among those courts.[120]

Additionally, the Justice McCaffery asserted that the language of the statute made it clear that the legislature intended a strict construction of the statute.[121] Thus, he claimed that the majority's expansion of the privilege's scope violated the rules of statutory construction in Pennsylvania, including the requirement to give meaning to the plain language of an unambiguous statute.[122] Further, he dismissed the majority's assertion that by acknowledging the derivative protection he recognized a "material ambiguity" in the statute.[123] Thus, he concluded that the court should have affirmed the decision of the superior court because, among other reasons, the majority's decision was not consistent with the statutory text.[124]

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119. *See id.* at 62 ("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' . . . .").

120. *See id.* (internal quotation marks omitted) (arguing that sentences from prior Pennsylvania decisions taken "out of context" support expansion, but that closer examination reveals "little inconsistency or disharmony in judicial understanding or application of the attorney-client privilege").

121. *See id.* at 63 (declaring he is "perplexed" how majority concluded legislature did not intend courts to strictly construe statute). Justice McCaffery cited the statutory language that "'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.'" *Id.* (quoting 42 PA. CONS. STAT. § 5928 (2011)). He claimed the language of the statute is "unmistakably clear" that it only covers client-to-attorney to communications. *See id.*

122. *See id.* (explaining that rules of statutory construction require court to give meaning to "the text and the letter of the statute"). Justice McCaffery acknowledged the majority's assertion that statutory interpretation can often require courts to make assumptions about the legislature's intent. *See id.* at 64. However, he stated that under rules of statutory construction, the "occasion and necessity for a statute's enactment are to be considered *only* when the words of a statute are not explicit." *Id.* For a further discussion of § 1921, see *infra* notes 133-35 and accompanying text.

123. *See Gillard*, 15 A.3d at 64 (McCaffery, J., dissenting) (internal quotation marks omitted) (asserting that court has long recognized derivative protection, which is not comparable to expansion of attorney-client privilege authorized by majority). Justice McCaffery claimed that the derivative protection is necessary because, otherwise, an attorney could simply restate or write down the client's communications and they would not be protected. *See id.* Thus, he argued that recognizing the derivative protection is consistent with the privilege because not protecting such communications "would render the statute absurd." *See id.* Further, he asserted that recognizing the derivative protection is not equivalent to the broad expansion of the majority or to recognizing "'material ambiguity'" in the statute. *See id.*

124. *See id.* (dissenting from majority's expansion of attorney-client privilege). Justice McCaffery also concluded that the work product doctrine addresses the policy concerns of amici. *See id.* He noted that the Pennsylvania provisions of the work product doctrine state "'discovery shall not include disclosure of the mental

## V. THE SUPREME COURT OF PENNSYLVANIA ACTED WITHIN ITS AUTHORITY WHEN "PAVING" THE TWO-WAY STREET

In declaring that the attorney-client privilege is a two-way street, the Supreme Court of Pennsylvania's decision in *Gillard* was consistent with principles of statutory construction and the Pennsylvania constitution.[125] Despite the dissenters' contention, the majority in *Gillard* concluded that the attorney-client privilege statutes were ambiguous, and thus the court was justified in reviewing past cases and the potential consequences of a narrow interpretation of the statute.[126] Further, the Pennsylvania constitution grants the supreme court authority to govern rules of procedure in the courts of the Commonwealth.[127]

### A. *The Supreme Court of Pennsylvania Acted Within Its Statutory Authority*

The attorney-client privilege was first given statutory force in Pennsylvania in the late nineteenth century.[128] However, courts in the Commonwealth recognized the privilege long before its 1887 enactment.[129] In fact, even before the original codification, the Supreme Court of Pennsylvania stated that communications between an attorney and client are sacred.[130] The General Assembly was presumably aware of this history when it re-codified the privilege in 1976, and by choosing not to substantively change the statute, they acquiesced in the court's prior interpretations.[131]

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impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.'" *Id.* (quoting PA. R. CIV. P. 4003.3). Despite agreeing with the majority that the scope of the work product doctrine was beyond the scope of the case, he stated, "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." *Id.*

125. For a discussion of the Supreme Court of Pennsylvania's decision in *Gillard* and its consistency with principles of statutory construction and the Pennsylvania constitution, see *infra* notes 128-55 and accompanying text.

126. For a discussion of how the *Gillard* decision is consistent with principles of statutory construction in Pennsylvania, see *infra* notes 128-45 and accompanying text.

127. For a further discussion of the Supreme Court of Pennsylvania's authority under the Pennsylvania constitution to prescribe rules of procedure in the Commonwealth, see *infra* notes 146-55 and accompanying text.

128. Act of May 23, 1887, § 5(d), 1887 Pa. Laws 158, 159 (codified as amended at 42 PA. CONS. STAT. § 5928 (2011)).

129. *See, e.g.*, Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa. Super. Ct. 1995) (noting that Pennsylvania has recognized attorney-client privilege since its founding as colony). For a further discussion of the history of the attorney-client privilege in Pennsylvania, see *supra* notes 52-80 and accompanying text.

130. *See* Moore v. Bray, 10 Pa. 519, 524 (Pa. 1849) (providing that all professional communications are sacred and person contesting applicability of privilege has burden to show communications should not be protected).

131. For a discussion of the impact of precedent on the interpretation of General Assembly statutes, see *infra* notes 142-45 and accompanying text.

According to Justice Eakin's dissent in *Gillard*, the language of the attorney-client privilege statutes in Pennsylvania is clear, and the majority should have therefore applied the language of the statute.[132] In Pennsylvania, courts must construe statutes to give meaning to the intention of the General Assembly.[133] When courts consider the words of the statute to be clear, the "letter of [the statute] is not to be disregarded."[134] However, when the statute is not clear, a court may consider other factors when attempting to determine the statute's meaning.[135] In addition, a presumption exists 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."[136]

Despite the dissenters' contentions, a review of attorney-client privilege decisions by Pennsylvania courts reveals confusion over the scope of the privilege.[137] Thus, under Pennsylvania law it was appropriate for the court to consider other sources to determine the intention of the General Assembly because the majority concluded that the attorney-client privilege statute was not clear.[138] Pennsylvania statutes allow a court interpreting

132. *See* Gillard v. AIG Ins. Co., 15 A.3d 44, 60 (Pa. 2011) (Eakin, J., dissenting) (noting language of attorney-client privilege statutes is unambiguous and "clear and free from all ambiguity"). For a further discussion of the dissenting opinions in *Gillard*, see *supra* notes 109-24 and accompanying text.

133. *See* 1 PA. CONS. STAT. § 1921(a) ("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.").

134. *Id.* § 1921(b).

135. *See id.* § 1921(c) (providing factors to discern statute's meaning). Section 1921(c) states:

> When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
>
> (1) The occasion and necessity for the statute.
> (2) The circumstances under which it was enacted.
> (3) The mischief to be remedied.
> (4) The object to be attained.
> (5) The former law, if any, including other statutes upon the same or similar subjects.
> (6) The consequences of a particular interpretation.
> (7) The contemporaneous legislative history.
> (8) Legislative and administrative interpretations of such statute.

*Id.*

136. *Id.* § 1922(4). The purpose of § 1922 is to assist courts in determining the intention of the General Assembly. *See id.* § 1922.

137. *See* Harrisburg Auth. v. CIT Capital USA, Inc., 716 F. Supp. 2d 380, 386-87 (M.D. Pa. 2010) (acknowledging different interpretations regarding scope of attorney-client privilege); *see also* Amici Curiae Brief of the Ass'n of Corporate Counsel et al., *supra* note 71, at 21-22 (arguing superior court's approach would create uncertainty because it would cause undertaking of "difficult and fact-intensive inquiry").

138. *See* 42 PA. CONS. STAT. § 1921(c) (providing sources courts can consider to determine General Assembly's intention when statutory language is not clear).

unclear statutory language to consider, among other factors, any former law and any potential consequences of the interpretation.[139] Thus, assuming the majority was correct in determining that the statutory language was unclear, it was appropriate for the court to consider the "'inordinate practical difficulties' which would flow from a strict approach to derivative protection."[140]

Additionally, when the General Assembly re-enacted the statute in 1976, it was substantially the same as the 1887 statute.[141] Thus, the General Assembly was presumably aware of the Supreme Court of Pennsylvania's broad protection of the attorney-client privilege in *Earle*.[142] Therefore, it was also appropriate for the court to consider *Earle* when determining the scope of the privilege.[143] Moreover, when a court of last resort has interpreted a statute, the General Assembly is deemed to have intended that the same construction apply to the new statute unless otherwise stated.[144] Because the supreme court concluded that the statutory language was unclear, it was necessary for the court to consider its prior decisions construing the attorney-client privilege and any potential consequences of a narrow interpretation.[145]

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For a further discussion of standards of statutory construction in Pennsylvania, see *supra* notes 133-36 and accompanying text.

139. *See* 42 PA. CONS. STAT. § 1921(c)(5) (indicating "former law" as proper consideration when statute is ambiguous).

140. Gillard v. AIG Ins. Co., 15 A.3d 44, 58 (Pa. 2011) (quoting Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991)). Additionally, the majority refuted Justice McCaffery's claim that the court was legislating, reasoning that the recognition of the derivative protection shows that it is not possible to both interpret the statute literally and effectuate meaning to its intended purpose. *See id.* at 57-58. The majority considered Justice McCaffery's differing view as to whether the statute should cover attorney-to-client communications "as one of degree rather than direction." *See id.* at 58.

141. *See* 42 PA. CONS. STAT. ANN. § 5928 official cmt. (West 2011) (noting privilege is "substantially a reenactment" of 1887 act).

142. *See* Amici Curiae Brief of the Ass'n of Corporate Counsel et al., *supra* note 71, at 14 (asserting that consistent language in 1976 statute to that of 1887 statutein place at time of *Earle*created "a strong presumption" that General Assembly agreed with court's opinion in *Earle*). For a discussion of the Supreme Court of Pennsylvania's decision in *Earle*, see *supra* note 70 and accompanying text.

143. *See Gillard*, 15 A.3d at 57 (noting *Earle* "dovetails" with court's interpretation of attorney-client privilege). The court stated that the language of § 1922(4) "may be regarded as somewhat of a fiction." *Id.* However, it noted that "statutory construction frequently entails resort to necessary, legitimate, and expressly authorized assumptions about legislative purpose." *Id.*

144. *See* 42 PA. CONS. STAT. § 1922(4) (providing that General Assembly is deemed to be aware of previous court decisions interpreting statutory language). For a further discussion of standards of statutory construction in Pennsylvania, see *supra* notes 133-36 and accompanying text.

145. *See generally* 42 PA. CONS. STAT. § 1921 (setting standards for interpreting intent of Pennsylvania General Assembly). For a discussion of the authority of the Supreme Court of Pennsylvania to broaden the statutory interpretation of the attorney-client privilege, see *supra* notes 128-44 and accompanying text.

### B. *The Supreme Court of Pennsylvania Has Authority Under the Pennsylvania Constitution to Define the Scope of the Privilege*

The Pennsylvania constitution grants the Supreme Court of Pennsylvania the authority to create rules "governing practice, procedure and the conduct of all courts."[146] This is an exclusive grant of authority to the court and the legislature can neither take it away nor interfere with it.[147] Accordingly, the supreme court must find that a statute is procedural, rather than substantive, in nature to determine whether the statute interferes with the court's power.[148]

In *Gillard*, the supreme court stated that it has authority, under the Pennsylvania constitution, to determine "the appropriate scope of testimonial privileges."[149] In addition, section 42 of the Pennsylvania Consolidated Statutes ("Judiciary and Judicial Procedure") codifies the attorney-client privilege.[150] While the Supreme Court of Pennsylvania has acknowledged the difficulty in determining whether a law is substantive or procedural, the court's conclusion that it has the authority to determine the scope of the attorney-client privilege and the inclusion of the privilege in section 42 both indicate that the privilege is procedural.[151]

At least one judge asserted that the Pennsylvania supreme court does not have the power to determine the scope of the attorney-client privilege because it has "repeatedly and specifically affirmed the legislature's authority to codify [the] privileges."[152] However, amici supporting an expansive view of the privilege pointed to the Pennsylvania supreme court's

146. PA. CONST. art. V, § 10(c). The provision goes on to state that "[a]ll laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

147. *See In re* 42 Pa. C. S. § 1703, 394 A.2d 444, 446 (Pa. 1978) (explaining that Pennsylvania constitution explicitly assigns judiciary power "'to prescribe general rules governing practice, procedure and the conduct of all courts'" (quoting PA. CONST. art. V, § 10(c))); Bergdoll v. Kane, 694 A.2d 1155, 1158 (Pa. Commw. Ct. 1997) (acknowledging article V, § 10(c) of Pennsylvania constitution grants "exclusive authority" to Supreme Court of Pennsylvania to establish rules over practice and procedure).

148. *See* Commonwealth v. Morris, 771 A.2d 721, 737-38 (Pa. 2001) (noting under article V, section 10, court has rulemaking authority over procedural law, but not substantive law); Commonwealth v. Fowler, 304 A.2d 124, 127 (Pa. 1973) (providing that court's rulemaking power is limited to defining rules of procedure rather than creating new substantive rights).

149. Gillard v. AIG Ins. Co., 15 A.3d 44, 58 (Pa. 2011).

150. *See* 42 PA. CONS. STAT. § 5916 (codifying attorney-client privilege in Pennsylvania for criminal matters); *id.* § 5928 (codifying privilege for civil matters).

151. *See Morris*, 771 A.2d at 738 (asserting that it is difficult to differentiate between substantive and procedural laws, but recognizing that doing so is "necessary to answer a separation of powers question").

152. Kolar v. Preferred Unlimited, Inc., 14 Pa. D. & C.5th 166, 170 (Pa. Ct. Com. Pl. 2010). Judge Bernstein continues: "By abdicating the codification of privileges, the Supreme Court has deferred the value laden decisions as to what is privileged to the legislative process." *Id.*

citation of article V of the Pennsylvania constitution as the authority under which the court acted to adopt the Pennsylvania Rules of Evidence.[153] Further, the General Assembly does not have the authority to override the court's power to determine the scope of the attorney-client privilege because of the court's constitutional powers to create procedural rules.[154] Because the attorney-client privilege is a procedural rule, the Supreme Court of Pennsylvania has the authority under article V of the Pennsylvania constitution to determine the appropriate scope of the privilege.[155]

## VI. THE TWO-WAY STREET ALLOWS THE ATTORNEY-CLIENT PRIVILEGE TO ACHIEVE ITS INTENDED PURPOSE

The Pennsylvania supreme court's creation of the two-way street supports the privilege's purpose of encouraging communication between clients and attorneys.[156] The legal community has generally responded positively to the court's decision in *Gillard* and indicated that the decision clears up decades of confusion.[157] Several scholars have claimed that the expansion will lead to abuse of the privilege, but as the court noted, the current limitations on the privilege will be adequate to prevent such abuse.[158]

### A. *Creating a Smooth Road Surface: Extension of the Attorney-Client Privilege Is Consistent with Its Intended Purpose*

The purpose of the attorney-client privilege is to enhance the relationship between attorney and client and improve the quality of legal ser-

153. *See* Amici Curiae Brief of the Ass'n of Corporate Counsel et al., *supra* note 71, at 16 (noting Supreme Court of Pennsylvania cited article V of Pennsylvania constitution as authority to enact rules of evidence and chose to leave statutory scheme in place for evidentiary privilege). Further, amici argued that the court presumably left the statutory scheme in place because it was aware of its attorney-client privilege precedent, similar to their assertion that the General Assembly was aware of the *Earle* decision when it re-codified the attorney-client privilege statute. *See id.*

154. *See id.* (stating Pennsylvania supreme court's authority to interpret scope of evidentiary privileges "transcends" General Assembly's ability to legislate these privileges). For a further discussion of the Supreme Court of Pennsylvania's power to dictate procedural rules, see *supra* notes 146-47 and accompanying text.

155. *See* PA. CONST. art. V, § 10(c) (granting authority to supreme court to define certain procedural rules). For a further discussion of the Supreme Court of Pennsylvania's authority to define the scope of the attorney-client privilege in Pennsylvania, see *supra* notes 146-54 and accompanying text.

156. For a discussion of how the decision in *Gillard* advances the underlying purpose of the attorney-client privilege, see *infra* notes 159-72 and accompanying text.

157. For a discussion of the legal community's reaction to the decision in *Gillard*, see *infra* notes 173-77 and accompanying text.

158. For a discussion of how the current limitations on the attorney-client privilege are adequate to prevent future abuse, see *infra* notes 178-87 and accompanying text.

vices provided to clients.[159] Prior to the Supreme Court of Pennsylvania's decision in *Gillard*, the attorney-client privilege in Pennsylvania protected client-to-attorney communications and provided limited derivative protection for communications from attorneys to clients.[160] However, this interpretation created uncertainty in Pennsylvania regarding how courts would apply the privilege.[161] As the U.S. Supreme Court stated, when the privilege lacks certainty, it "is little better than no privilege at all."[162]

Previous attempts by Pennsylvania courts to limit the privilege to—at most—a derivative protection of attorney-to-client communications risked creating practical difficulties for those applying the privilege.[163] Furthermore, uncertainty in the scope of the privilege can create a "significant degree of injustice."[164] In its decision in *Gillard*, the supreme court acknowledged the difficulties with the current scope of the privilege and "the need for greater certainty to encourage the desired frankness."[165]

159. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68 cmt. c (2000) ("The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services."). For a further discussion of the purpose of the attorney-client privilege, see *supra* notes 26-33 and accompanying text.

160. *See, e.g.*, Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1264 (Pa. Super. Ct. 2007) (asserting attorney-client privilege statute only protects communications from clients, but acknowledging that derivative protection applies if communications would reveal communications originating with clients), *aff'd on other grounds*, 992 A.2d 65 (Pa. 2010) (per curiam). For a further discussion of the attorney-client privilege in Pennsylvania prior to the decision in *Gillard*, see *supra* notes 52-80 and accompanying text.

161. *See, e.g.*, *Fleming*, 992 A.2d at 73 (Saylor, J., in support of reversal) (describing uncertainty created by narrow construction of privilege). For a further discussion of the confusion caused by the narrow construction of the attorney-client privilege in Pennsylvania, see *supra* notes 68-80 and accompanying text.

162. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). For a further discussion of the United States Supreme Court's decision in *Upjohn*, see *supra* notes 44-45 and accompanying text.

163. *See* Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991) (providing that narrow construction of attorney-client privilege causes difficulties and renders attorneys unable to participate in fact gathering). The New York court noted that prior to its decision the privilege was not limited to "repetition of confidences that were supplied to the lawyer by the client." *Id.* The "cramped view" that the court rejected is similar to the interpretation of the attorney-client privilege in Pennsylvania prior to *Gillard*. *See id.*; *cf.* Slusaw v. Hoffman, 861 A.2d 269, 273 (Pa. Super. Ct. 2004) (explaining that attorney-client privilege protects attorney-to-client communications to extent they would reveal communication initially disclosed by client).

164. Giesel, *supra* note 46, at 1217. Giesel addressed the uncertainty of the attorney-client privilege in the corporate context. *See id.* at 1170. Giesel noted that in order for the attorney-client privilege to have a degree of certainty, it must have a set rule and not be determined on a case-by-case basis. *See id.* at 1187. She asserted that a balancing approach causes uncertainty for attorneys and clients over whether a court will find that the "benefits of the privilege outweigh the burdens." *Id.* Giesel concluded that to achieve client candor, courts must create certainty in the attorney-client privilege, without which the privilege will become a "mass of confusion providing fertile ground for expensive corollary litigation." *Id.* at 1218.

165. Gillard v. AIG Ins. Co., 15 A.3d 44, 57 (Pa. 2011).

Thus, the supreme court recognized the need to bring the privilege in line with its intended purpose.[166]

Generally, commentators have agreed that attorney-to-client communications will often reveal previous communications made by the client to the attorney.[167] Nevertheless, not all commentators have agreed that expanding the privilege to cover attorney-to-client communications is necessary to fulfill the purpose of the privilege.[168] Further, it is unclear if clients would reveal less to their attorneys if such communications were discoverable.[169]

However, the supreme court in *Gillard* stated that it was not possible to facilitate open communication and provide a literal interpretation of the Pennsylvania attorney-client privilege statutes.[170] Additionally, commentators have argued that a "client cannot develop a trusting relationship with the lawyer if the client lives in fear that any minor digression during a meeting with the lawyer may no longer be secret."[171] One court

166. *See id.* at 58 (noting court must consider underlying purpose of attorney-client privilege in order to determine appropriate scope).

167. *See* Rice, *supra* note 31, at 976 (stating it is "roughly accurate" that communications by attorney will reveal or rely on content from communications originating from client); *cf.* Sisk & Abbate, *supra* note 43, at 240 (asserting that attorneys and clients need to be able to freely communicate under privilege that "grant[s] a unified protection to the deliberations").

168. *See* Imwinkelried & Amoroso, *supra* note 24, at 311-12 (concluding that absent attorney-client privilege, there would still be communication and courts should only expand privilege for "compelling reasons"); *see also* Rice, *supra* note 31, at 1005 (determining that attorney-client privilege's rapid expansion is based on "abandonment" rather than "reevaluation" of its basic principles).

169. *See* Rice, *supra* note 31, at 974 (claiming there is no reason to believe that clients would be less forthcoming in communications with attorneys if privilege were not in place). Rice argued that extending the privilege to communications "between" attorney and client is premised on a belief that candid communication would not occur if such communication was not protected. *See id.* at 973-74. Rice claimed such protection goes beyond the bounds of what is needed to encourage open and candid communications. *See id.* at 974. Further, he claimed that expansion appeals to judges because most attorney communications rely on previous client communications and it removes the need to successfully assert the privilege twice to protect the communications. *See id.* at 976. Rice cautioned that such steps occurred haphazardly and without courts' consideration of potential implications. *See id.* at 1005.

170. *See Gillard*, 15 A.3d at 58 (recognizing that "material ambiguity" exists in Pennsylvania attorney-client privilege statute because of inability to both interpret statute literally and effectuate its intended purpose).

171. Sisk & Abbate, *supra* note 43, at 223. Sisk and Abbate argued that as the practice of law expands, so should the attorney-client privilege. *See id.* at 204. They noted that currently, courts apply an approach that attempts to determine whether the client sought "legal advice." *See id.* at 220. They argued that it should not be the norm that courts examine each statement in the communication, but rather the communication as a whole to determine whether something is privileged. *See id.* at 223. This approach, the authors claimed, would allow lawyers to "fully explore the matter[s]" and prevent parties from being forced to convey why particular comments or words, which are but part of larger communication, "are sufficiently connected to the objectives of the representation." *Id.* at 223-24. The

also noted that while the attorney-client privilege does restrict access to evidence, courts cannot interpret it so narrowly as to counteract the purpose of the privilege.[172]

Although the legal community disagrees as to whether an expansive view of the privilege is necessary, the reception to the court's decision has been overwhelmingly positive.[173] The positive response confirms that there was confusion concerning the scope of the attorney-client privilege.[174] Commentators have stated that the approach taken by the court will make the application of the privilege easier to understand and administer.[175] As the court noted, communications between attorney and client

lack of such protections, they argued, would "reduce lawyers to amoral legal technicians and leave clients unable to call upon lawyers to assist in moral aspiration." *Id.* at 240.

172. *See* Lefta Assocs. v. Hurley, No. 1:09-CV-2487, 2011 WL 2456616, at *7 (M.D. Pa. June 16, 2011) (asserting that while privilege must be construed narrowly because it prevents access to truth, courts must be careful not to impede its intended purpose).

173. *See, e.g.*, Coleen M. Meehan et al., *Pennsylvania Supreme Court Rules Attorney-Client Privilege Is a Two-Way Street*, LITIG. LAWFLASH (Morgan, Lewis & Bockius LLP, Phila., Pa.), Mar. 3, 2011, at 3, *available at* http://www.morganlewis.com/index.cfm/publicationID/6edc3565-0eca-49a0-a313-1b91b3fe0b8e/fuseaction/publication.detail ("*Gillard* alleviates the uncertainty previously created by the Pennsylvania Superior Court's *Nationwide* decision."); Melissa J. Oretsky, *Attorney-Client Privilege is a Two-Way Street in Pennsylvania*, CLIENT ALERTS (Reed Smith LLP, Phila., Pa.), Mar. 11, 2011, http://www.reedsmith.com/Attorney-Client-Privilege-is-a-Two-Way-Street-in-Pennsylvania-03-11-2011/ (noting *Gillard* ruling is significant because it "broadly protects all communications between attorneys and their clients" and "allows both in-house and outside counsel to initiate important communications with their clients"); *Pennsylvania Supreme Court Ruling Restores Guarantee of Privilege Protection for In-house Counsel Communications*, ASS'N OF CORPORATE COUNSEL (Mar. 2, 2011), http://www.acc.com/aboutacc/newsroom/pressreleases/PA-Supreme-Court-Ruling.cfm (stating ruling is "a [v]ictory," also noting that senior vice president for Association of Corporate Counsel explained "'[i]t is an appropriate ruling, as it will allow corporate attorneys to do their jobs—giving legal advice when needed without the specter of disclosure to adversaries in litigation'"). *But see Attorney-Client Privilege Now a Two-Way Street in Pennsylvania*, ABRAHAMSEN, CONABOY & ABRAHAMSEN, P.C., http://www.law-aca.com/white-papers/198-attorney-client-privilege-now-a-two-way-street-in-pennsylvania (last visited Mar. 1, 2012) ("This decision strikes a blow to plaintiffs in bad faith cases, as often information in the files of the underlying insurance defense counsel['s] file on the original claim is necessary to support a claim that the insurer acted in bad faith in evaluating a claim.").

174. *See, e.g.*, Thomas G. Wilkinson, Jr. & Matthew N. Klebanoff, *Pennsylvania's Attorney-Client Privilege Is Revived and Well: The Pennsylvania Supreme Court's Decision in* Gillard v. AIG Ins. Co., COMMERCIAL LITIG. ALERT (Cozen O'Connor, Phila., Pa.), Mar. 1, 2011, at 1, *available at* http://www.cozen.com/admin/files/publications/Commercial_Lit_030111.pdf (noting Pennsylvania supreme court's decision in *Gillard* cleared up "lingering uncertainty that has existed in Pennsylvania regarding scope of the attorney-client privilege").

175. *See* Amici Curiae Brief of the Ass'n of Corporate Counsel et al., *supra* note 71, at 22 (citing 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 9 (5th ed. 2007)) (acknowledging that it is difficult to apply superior court's approach from *Fleming*, while also stating that "two-way street" approach is easier to apply).

are often "intermixed" and thus, to fulfill the purpose of the privilege, a two-way street approach to the privilege is necessary.[176] This elimination of uncertainty will facilitate open communications between clients and attorneys and ultimately allow the attorney-client privilege to achieve its intended purpose.[177]

### B. *Preventing Future Construction: Other Limitations on the Attorney-Client Privilege Will Prevent Subsequent Abuse of the Privilege*

The attorney-client privilege contains several limitations and exceptions that prevent the privilege from unduly burdening a fact finder's ability to access evidence.[178] Pennsylvania adopted several such limitations that remain unaffected by the Supreme Court of Pennsylvania's decision in *Gillard*.[179] In fact, *Gillard* provides that "the existing practices, procedures, and limitations, including *in camera* judicial review and the boundaries ascribed to the privilege are sufficient to provide the essential checks" on the attorney-client privilege.[180]

Nevertheless, some have stated that courts should narrowly construe the language of the statute as part of a "sound policy judgment[ ]" by the General Assembly.[181] Arguably, the privilege's expansion will "open the flood gates to many in camera reviews of documents at the trial court level to determine whether the communication amounts to . . . 'advice, analysis

176. *See* Gillard v. AIG Ins. Co., 15 A.3d 44, 58 (Pa. 2011) (stating that consideration of purpose of attorney-client privilege is essential to determining its scope and also noting that such consideration is consistent with Pennsylvania standards of statutory construction).

177. *See* Giesel, *supra* note 46, at 1186 (asserting there must be degree of certainty about protection of communications to effectuate purpose of attorney-client privilege); Sisk & Abbate, *supra* note 43, at 216 (explaining lawyer must have full access to client information because such flow of information requires client's trust, which can only be obtained with guarantee of confidentiality).

178. *See* Giesel, *supra* note 46, at 1180 (indicating limitation of attorney-client privilege: that it only protects communication, not underlying facts); Leslie, *supra* note 26, at 35-36 (noting attorney-client privilege has several exceptions that seek to limit its scope in order to "exclude as little evidence as possible").

179. *See, e.g.*, Commonwealth v. Chimel, 738 A.2d 406, 414 (Pa. 1999) (holding that in Pennsylvania, client cannot claim incompetent representation and later claim attorney-client privilege to prevent former attorney's response to charges); *In re* Investigating Grand Jury of Phila. Cnty. No. 88-00-3503, 593 A.2d 402, 406 (Pa. 1991) (holding that attorney-client privilege cannot be used to aid in commission of crime or fraud); *In re* Search Warrant B-21778, 521 A.2d 422, 429-30 (Pa. 1987) (holding that, in Pennsylvania, lawyers cannot suppress evidence which they have legal obligation to produce under claim of privilege); *In re* Condemnation by City of Phila., 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) (holding presence of third party during communication will usually negate privilege).

180. *Gillard*, 15 A.3d at 58 (citation omitted).

181. *See* Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C., 186 F. Supp. 2d 567, 569 (E.D. Pa. 2002) (asserting one-way street language of Pennsylvania statute, which does not provide protection to communications from attorneys to clients, is "not a matter of whim or oversight").

or opinion.'"[182] Further, opponents of the two-way street have argued that expanding the attorney-client privilege may lead to its abuse.[183]

Despite these concerns, at least one commentator has claimed that "the traditional prerequisites for and exceptions to the attorney-client privilege are well-suited to exclude abusive applications."[184] Importantly, the *Gillard* court noted that its decision did not eliminate the other restrictions currently in place on the attorney-client privilege in Pennsylvania.[185] The privilege still only protects communication, not underlying facts; and it only protects communications "for the purpose of securing or providing professional legal services."[186] Because the current protections are adequate to prevent abuses of the attorney-client privilege, it is unlikely that the court opened the floodgates for potential abuses of the attorney client privilege moving forward.[187]

## VII. CONCLUSION: PENNSYLVANIA COMPLETES A CONSTRUCTION PROJECT BY ESTABLISHING THE ATTORNEY-CLIENT PRIVILEGE AS A TWO-WAY STREET

The attorney-client privilege is a long recognized privilege dating back to at least the Elizabethan Era in England.[188] Recognized by Penn-

182. Brief for the Appellee at 16, Gillard v. AIG Ins. Co., 924 A.2d 1259 (Pa. 2007) (No. 1065 EDA 2007), 2007 WL 4936021.

183. *See Gillard*, 15 A.3d at 60 (Eakin, J., dissenting) (implying extension of privilege will allow insurance companies to claim good faith, while preventing opposing litigants from obtaining evidence to contrary); *Attorney-Client Privilege Now a Two-Way Street in Pennsylvania*, *supra* note 172 (claiming expansion of attorney-client privilege will prevent access to much-needed evidence by plaintiffs in insurance bad faith litigation).

184. Sisk and Abbate, *supra* note 43, at 232. Sisk and Abbate noted that the privilege does not protect underlying facts and only protects communications made to the attorney. *See id.* at 233. Additionally, the "pre-existing document" rule of the attorney-client privilege only protects documents made specifically for the purpose of communicating with one's attorney. *See id.* The authors also acknowledged other limitations on the privilege, including the crime-fraud exception and the restriction against sharing the communication with third parties. *See id.* at 234. Thus, the authors concluded that these limitations make it unnecessary for courts to restrict the scope of the attorney-client privilege. *See id.*

185. *See Gillard*, 15 A.3d at 58 ("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 are sufficient to provide the essential checks." (citation omitted)). For a further discussion of the limits of the attorney-client privilege in Pennsylvania, see *supra* notes 178-80 and accompanying text.

186. *Gillard*, 15 A.3d at 52 n.8.

187. *See* Amici Curiae Brief of the Ass'n of Corporate Counsel et al., *supra* note 71, at 10 n.5 (stating request for two-way interpretation of attorney-client privilege is not "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"). *But see* Brief for the Appellee, *supra* note 182, at 16 (discussing potential for abuse if courts broadly construe attorney-client privilege).

188. *See* Imwinkelried & Amoroso, *supra* note 24 (noting recognition of attorney-client privilege in English law as early as 1577). For a further discussion of the

sylvania courts since the colony's founding, the legislature statutorily codified the privilege in 1887.[189] Since its original codification, and even more so after its re-codification in 1976, Pennsylvania courts disagreed as to whether the attorney-client privilege is a one-way or two-way street.[190] As the Pennsylvania supreme court noted in *Gillard*, the disagreement among commentators and courts focuses on the tension between encouraging open communication between attorneys and clients and the ability of a fact finder to access material evidence.[191]

The conflicting decisions in Pennsylvania created confusion about how the privilege should apply and made apparent the need for a decision that provided certainty for its future application.[192] The supreme court's decision in *Gillard* eliminated the proverbial construction of the privilege, and created a two-way street that is easier to administer.[193] Further, under the Pennsylvania constitution and the principles of statutory construction, the supreme court did not abuse its discretion by expanding the scope of the attorney-client privilege.[194] Additionally, the current limitations on the privilege are adequate to prevent its abuse moving forward.[195]

The court's decision has already had an impact on the interpretation of the privilege, as evidenced by two cases decided by the Middle District of Pennsylvania where the attorney-client privilege was held to be a two-way street.[196] Additionally, the Pennsylvania legal community expressed

general history of the attorney-client privilege, see *supra* notes 24-36 and accompanying text.

189. *See* Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa. Super. Ct. 1995) (discussing history of attorney-client privilege in Pennsylvania). For a further discussion of the history of the privilege in Pennsylvania, see *supra* notes 52-80 and accompanying text.

190. *See generally Gillard*, 15 A.3d at 57 (noting inconsistency and "ongoing tension" regarding interpretation of attorney-client privilege in Pennsylvania). For a further discussion of the disagreement among Pennsylvania courts regarding the scope of the attorney-client privilege, see *supra* notes 68-80 and accompanying text.

191. *See Gillard*, 15 A.3d at 56-57 (describing reasons for inconsistent interpretations of attorney-client privilege).

192. *See id.* at 57 (agreeing with need for certainty in privilege's application in order to "encourage the desired frankness" in communications between attorney and client).

193. *See id.* at 59 (holding attorney-client privilege protects both client-to-attorney and attorney-to-client communications in Pennsylvania).

194. *See* PA. CONST. art. V, § 10(c) (granting Supreme Court of Pennsylvania authority to prescribe rules of procedure for courts); *see also* 1 PA. CONS. STAT. § 1921 (2011) (detailing requirements for determining intent of General Assembly when interpreting Pennsylvania statutes). For a further discussion of the Supreme Court of Pennsylvania's article V authority and the requirements for interpreting statutes in Pennsylvania, see *supra* notes 146-55 and accompanying text.

195. *See Gillard*, 15 A.3d at 58 (noting current limitations of privilege are sufficient to prevent abuse). For a further discussion of the limitations on the attorney-client privilege in Pennsylvania, see *supra* notes 178-80 and accompanying text.

196. *See* Lefta Assocs. v. Hurley, No. 1:09-CV-2487, 2011 WL 2456616, at *6 (M.D. Pa. June 16, 2011) (describing Pennsylvania supreme court's rejection of narrow interpretation of attorney-client privilege); *see also* Verdetto v. State Farm

both support and relief after the court's decision, confirming that the decision was long overdue.[197] Further, the attorney-client privilege in Pennsylvania is now able to operate toward its intended purpose—to fully promote open communication between attorneys and clients.[198] Where the Pennsylvania Department of Transportation continues to struggle, the Supreme Court of Pennsylvania has succeeded: it completed a "road construction project" by confirming the attorney-client privilege is a two-way street.[199]

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Fire & Cas. Co., No. 3:10-cv-1917, 2011 WL 1485674, at *1 (M.D. Pa. Apr. 19, 2011) (noting supreme court's decision in *Gillard* protects both attorney-to-client and client-to-attorney communications).

197. *See, e.g.*, Gina Passarella, *Attorney-Client Privilege a Two-Way Street, State Supreme Court Rules*, LEGAL INTELLIGENCER, Feb. 25, 2011, at 1 (asserting that *Gillard* decision brings Pennsylvania in line with other jurisdictions and also quoting Duane Morris partner who claimed change would be "'very beneficial'"). For a further discussion of the legal community's reaction to the supreme court's decision in *Gillard*, see *supra* notes 173-74 and accompanying text.

198. *See* Slusaw v. Hoffman, 861 A.2d 269, 273 (Pa. Super. Ct. 2004) (stating purpose of attorney-client privilege is to encourage "a trusting and open dialogue"). For a further discussion of the purpose of the attorney-client privilege, see *supra* notes 26-33 and accompanying text.

199. For further analysis and discussion of the benefits of the supreme court's decision in *Gillard*, see *supra* notes 81-188 and accompanying text.