Are Confidential Communications from Attorney to Client Subject to Attorney-Client Privilege?

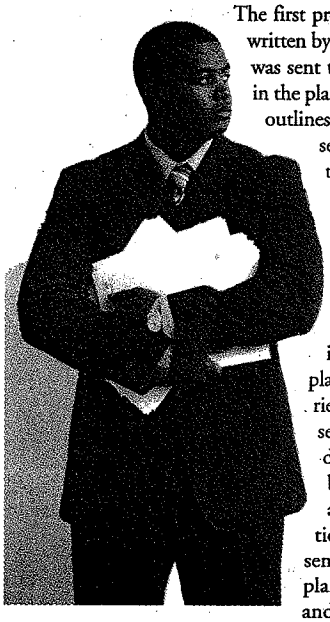
By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the West Chester office of the Pittsburgh-based law firm of Eckert Seamans Cherin & Mellott L.L.C. He is co-vice chair of the PBA Professional Liability Committee and a member of the PBA House of Delegates.

The black-letter law in this commonwealth has been that confidential communications from attorney to client are subject to the attorney-client privilege "only to the extent they contain and would reveal confidential communications from the client." A thorny question, however, is whether this principle of law should be construed broadly or narrowly in its application? For example, does this apply only to communications where actual concrete privileged information provided from the client is revealed? Or should the privilege also apply to any confidential communication from the attorney to the client that was a consequence of privileged communication made by the client to counsel? Another suggested principle under case law is that the privilege is waived if other protected communications concerning the same subject matter have been voluntarily disclosed to a third party. How narrowly or liberally should "same subject matter" be interpreted when applying this principle of law? The Pennsylvania Supreme Court recently weighed in on these issues.

In *Nationwide Mutual Insurance Company v. Fleming*, 2010 WL 336171 (Pa. Jan. 29, 2010), the court provides a less-than-satisfying result because only four justices were available to consider this case and they split evenly in their conclusion. As a result, the Superior Court's decision, reported at 924 A.2d 1259 (PA Super. 2007), was affirmed and two opinions were written, one in support of affirmance and the other in support of reversal. But neither of the opinions constitutes binding precedent.

The case, which involves a discovery dispute, arises out of a contest involving a family of insurance companies (the plaintiffs), certain of its agents who had left its employ to work for competing companies and those competing companies. The dispute concerns two documents that plaintiffs had produced in discovery and one document that plaintiffs had withheld from production, claiming attorney-client privilege. The date of the withheld document, the parties to the communication and the subject matter are identified in plaintiffs' privilege log.



The first produced document, written by corporate counsel, was sent to employees within the plaintiff companies. It outlines why plaintiffs had severed their relationship with certain defendant agents and suggests what information counsel needed from them in discovery in order to develop plaintiffs' legal theories in the case. The second produced document, written by plaintiffs' agency administration director, was sent to certain of plaintiffs' employees and officers. It addresses company policy for dealing with "agent defections." The withheld document, written by plaintiffs' general counsel, was sent to various company employees. It contains counsel's assessment of the defendants' actionable conduct, expresses the view that his clients "cannot reasonably expect the lawsuits to succeed" and states the "primary purpose" of the litigation is to send a message to current employees contemplating defection.

After conducting an *in camera* inspection of the withheld document, the trial court found that plaintiffs had waived privilege because the two produced documents concerned the same subject matter as the withheld document. In the trial court's view, plaintiffs were impermissibly using the attorney-client privilege as both "a shield and a sword" at the same time. That is, plaintiffs had produced those documents that suited their purpose but had withheld the document that did not. Plaintiffs immediately appealed the trial court's ruling.

After the appeal took one trip all the way up to the Pennsylvania Supreme Court, the Superior Court considered the merits of the appeal and affirmed the trial court's ruling but on different grounds than had been relied upon by the trial court. It found that the withheld document, which included an assessment by corporate counsel of the merits of the case, contains only legal advice and, as a consequence, did not involve "revealing confidential client-to-attorney communications." Therefore, in its view, this document was not subject to the attorney-client privilege. As a result of this finding, it never reached the question of waiver. Thereafter, the Supreme Court granted the petition for allowance of appeal.

Justice J. Michael Eakin wrote the opinion in support of affirmance, joined by Justice Max Baer. They agree with the trial court's reasoning that the two produced documents waived the attorney-client privilege for the withheld document because they involved the same subject matter — plaintiffs' "response to agent defections." Justice Thomas G. Saylor wrote the opinion in support of reversal, joined by Chief Justice Ronald D. Castille, and found just the opposite — looking at the same three documents, they conclude that the documents do not involve the same subject matter. They reach this conclusion, however, by noting and applying the principle that "courts should be cautious about finding implied waivers." Therefore, in their view, no waiver has occurred. But all four justices disagreed with the Superior Court's view that the withheld document did not contain privileged communication previously communicated from the client to the lawyer.

Curiously, the Supreme Court, long ago in *National Bank of West Grove v. Earle*, 46 A.268, 269 (Pa. 1900), had addressed the issue of whether confidential attorney-to-client communications can be privileged. There it holds that the privilege applies to all confidential attorney-to-client communications. But until *Fleming*, the Supreme

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Court has never cited that case nor was it cited below by the Superior Court. But *Earle* interprets a codified version of the attorney-client privilege, which statute has been re-enacted since *Earle* without substantive change. Plaintiffs argued that, under a provision of the Statutory Construction Act, this would evidence intent by the Legislature that the codification be construed as in *Earle*. The opinion in support of affirmance does not even cite *Earle* and so is silent in explaining why it does not apply.

The question of whether any confidential communication from a lawyer to his or her client is privileged depending on whether it contains any specific revelation of client communications remains open and disturbing. The four justices involved in this decision would contend that it does not, contrary to the Superior Court's finding. But whether production of a certain document would cause a subject matter waiver is an issue that will now create greater headaches in discovery. In an excess of caution, counsel may have to file a motion, partially under seal, to seek a declaration from the court on whether production of a certain document would constitute such a waiver. Or alternatively, counsel may have to withhold more documents than previously, include them in the privilege log and wait to see if opposing counsel chooses to file a motion to test the appropriateness of asserting the privilege.