

## Waiver of Attorney-Client Privilege Is a One-Way Street

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The attorney-client privilege continues to be a frequently litigated issue in Pennsylvania. In 2011, the Pennsylvania Supreme Court decided *Gillard v. AIG Insurance*, 15 A.3d 44 (Pa. 2011), which affirmed that the attorney-client privilege is a "two-way street" and confirmed that all communications between an attorney and the client are privileged. In a prior article, we predicted that the *Gillard* decision (and other decisions limiting the now-reversed decision in *Nationwide Mutual Insurance v. Fleming*, 924 A.2d 1259 (Pa. Super. Ct. 2007)) would require Pennsylvania courts to consider numerous issues regarding the scope of the attorney-client privilege given the ripples caused by *Fleming*. The Pennsylvania Superior Court recently considered one of those issues and held that only the client, and not the attorney, has the right to waive the attorney-client privilege.

### The Cohen Decision

In *Cohen v. Moore Becker*, No. 913 WDA 2012 (Pa. Super. Ct. Feb. 10, 2014) (a nonprecedential opinion), the Superior Court was faced with a case involving three lawyers hired by a single plaintiff to pursue various legal claims, including an application for Social Security disability benefits and a legal malpractice claim. Against this backdrop, questions of privilege were inevitable.

The plaintiff, Myrna Cohen, hired attorney Jeffrey D. Abramowitz and his former law firm to represent her in a Social Security disability claim. Thereafter, Cohen hired another attorney, Shelly Farber, to pursue the Social Security action and handle other legal matters. She hired a third attorney, John Quinn, to file a legal malpractice action against Abramowitz and his firm. During discovery in the malpractice action, attorneys for the defendants served Cohen's new attorney, Farber, with a subpoena seeking, among other things, all documents pertaining to Cohen's claims for Social Security disability income. Cohen's attorney in the malpractice action did not object to the subpoena or assert the attorney-client privilege. Farber, however, filed a motion for protective order objecting to the subpoena as overly broad and "due to his ongoing and past attorney-client relationship with Ms. Cohen in other cases." The trial court compelled Farber's compliance with the subpoena. Farber sought an immediate appeal.

The single question before the Superior Court was whether a plaintiff in a legal malpractice action can "effectively waive [the] attorney-client privilege with attorneys not directly involved in the legal malpractice case who have advised her to maintain ... such a privilege in part due to the pendency of another legal claim." Farber, Cohen's Social Security disability lawyer, argued that, notwithstanding the waiver of the privilege in the malpractice case, he had a "'two-way street' attorney-client privilege" regarding the Social Security disability claim and that "while Ms. Cohen holds the privilege with respect to communications she made to attorney Farber, he holds the privilege with respect to communications he made to her."

The Superior Court held that although the *Gillard* decision affirmed the "two-way" nature of the attorney-client privilege, the client owns the privilege. The client, not the attorney, may waive the privilege. The seminal case on the scope of the attorney-client privilege in Pennsylvania, *Gillard*, "did not disturb the traditional understanding that the client holds the attorney-client privilege; it elaborated solely on the scope of that privilege." Farber's attempt to assert the attorney-client privilege was, in the words of the Superior Court, "without effect," as the privilege belonged solely to Cohen, even with regard to communications with Farber regarding other legal matters.

## **Effects of Cohen**

The *Cohen* decision affirms that the attorney-client privilege belongs to the client and it is the client, rather than the attorney, who has the right to waive the privilege. The Supreme Court's decision in *Gillard* extended the privilege to communications that originate with both the attorney and with the client, capturing all attorney-client communications within the scope of the privilege, but did not alter the maxim that the privilege belongs to the client, and an attorney cannot claim the privilege or waive it. The Superior Court's decision in *Cohen* is consistent with the goal of encouraging open and honest discussion between a client and attorney. Critics of the *Cohen* decision may contend that the decision will result in more frequent waivers of the attorney-client privilege. Arguably, requiring an attorney to agree to waive the privilege could afford greater protections to the integrity of the privilege, since members of the bar may be mindful of not only the implications of a waiver in a specific case, but also the cumulative effect of frequent privilege waivers. This may be true, but such concerns have not caused Pennsylvania courts to extend control of the attorney-client privilege to the attorney.

*Cohen* is the latest example of a post-*Gillard* decision citing to pre-*Gillard* case law. While *Gillard* was a significant decision in the law of attorney-client privilege, cases that predate the *Gillard* opinion may still guide a court's decision regarding the scope and availability of the attorney-client privilege.

The *Cohen* case also recognizes the practical challenges of allowing an attorney to assert the privilege over the client's waiver. In *Gillard*, the Supreme Court noted that it would be impractical to parse out those portions of client-to-attorney communications that fall within the narrower privilege adopted in *Fleming* (the so-called "one-way" privilege). In a situation like the *Cohen* case, it would be impractical to have a client waive the privilege, only to have an attorney reassert it. That could create a predicament where documents disclosed after a client waiver must be returned or held in limbo pending a possible waiver from an attorney. Moreover, such an approach could hamper the best interests of a client (whom the privilege is intended to protect) where an expeditious waiver may further the client's interests. *Gillard* sought to avoid this sort of cumbersome situation.

### **Guidance for the Bar**

While *Cohen* rejects the notion that an attorney can assert the privilege over the client's waiver, counsel must play a role in safeguarding the privilege and protecting a client's interest. This responsibility starts with ensuring that a client understands the effects of a waiver and that any waiver is made only after a careful and complete discussion of its consequences. Those consequences include the effect on pending litigation and future legal matters. For example, a litigant should be counseled against waiving the privilege where there is the prospect of another, similar lawsuit. The concern about privileged information falling into the wrong hands in a future case or disrupting a pending transaction will often outweigh any advantage that can be gained by waiving the privilege.

In those instances where disclosure of privileged information is in the best interests of a client, counsel should explore ways the information can be conveyed without waiver of the privilege. One tactic is to direct discovery in such a way that otherwise privileged information will be discovered. Where waiver is unavoidable, counsel should explore ways to maximize the protections afforded to the privileged information. Privileged information should only be disclosed after the entry of a protective order limiting the

extent of the disclosure as fully as possible and providing clear penalties for a violation of the order.

It is important to understand that the underlying case in *Cohen* was a legal malpractice claim, which requires a waiver of the attorney-client privilege. That fact may have influenced the Superior Court's decision. Therefore, the *Cohen* case should not be read broadly as favoring a finding of waiver.

After *Cohen*, it is clear that only the client can effectively waive the attorney-client privilege. An attorney, while lacking the authority to waive the privilege, nevertheless retains the vital role of protecting the privilege and advancing the best interests of the client when faced with a potential waiver.

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