IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Docket No. 32 WAP 2007

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY and COLONIAL INSURANCE COMPANY OF WISCONSIN f.k.a. COLONIAL INSURANCE COMPANY OF CALIFORNIA,

Plaintiffs-Appellants,

vs.

JOHN FLEMING, JOSHUA MEEDER, MEEDER FLEMING & ASSOCIATES, INC., MORAINE GROUP, INC., MARY LOU FLEMING, ANDREA MEEDER, ROBERT DEAN, JOHN WILLIAMS, BARBARA REDDICK, RAY KOOSER, SANDY KOOSER, DAVID COLLEY, CONNIE TAYLOR, MICHELLE DAUGHERTY, LON McALLISTER, and LON McALLISTER AGENCY,

Defendants-Appellees.

BRIEF FOR PLAINTIFFS-APPELLANTS

Appeal From the Order of the Superior Court on May 21, 2007 in No. 207 WDA 2005, Which Affirmed Order Entered on January 25, 2005 in Court of Common Pleas of Butler County, Civil Division, No. EQ 99-50018

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STATEMENT OF JURISDICTION

Jurisdiction over this appeal is based on Pa.R.App.P. 313 and 1112.

ORDERS IN QUESTION

May 21, 2007 Order by Superior Court[1]

¶ 30 In summary, after careful and comprehensive review, we conclude that Document 529 does not satisfy the requirements for protection under attorney-client privilege and is thus discoverable. Therefore, we affirm the order of the trial court, although on different grounds.

¶ 31 Order affirmed.

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

Date: May 21, 2007

January 25, 2005 Order by Trial Court[2]

AND NOW, this 25th day of January, 2005, after hearing oral argument of counsel and upon review of relevant case law relative to the required production of a certain document marked "Privileged and Confidential" under date of July 29, 1999, it is hereby Ordered that the Plaintiffs/Counterclaim Defendants, Nationwide Mutual Insurance Company, et al., is [sic] hereby Ordered to produce said document in a nonredacted form to Defendants/Counterclaim Plaintiffs, John Fleming, et al.

BY THE COURT:

/s/_____
S. Michael Yeager, Judge

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1 A copy of the Superior Court's Opinion is attached as Exhibit "A." (Nationwide Mut. Ins. Co. v. Fleming, 2007 PA. Super. 145, 924 A.2d 1259 (2007)).

2 A copy of the trial court's Order and subsequent Opinion is attached as Exhibit "B." (Nationwide Mut. Ins. Co. v. Fleming, 2005 WL 5006540 (C.P. Butler Co. 2005).

SCOPE AND STANDARD OF REVIEW

The Superior Court's holding that the attorney-client privilege did not apply to a confidential memorandum sent by Nationwide's in-house senior counsel to its senior officers, executives and attorneys was based on that Court's interpretation of Pennsylvania's attorney-client privilege statute, 42 Pa. C.S.A. § 5928. That statutory interpretation raises "a pure question of law. This Court's standard of review is de novo and scope of review is plenary." Mechanical Contractors Ass'n of Eastern Pa. v. Commonwealth of Pennsylvania, 2007 Pa. LEXIS 2432 at *18 (Pa. Nov. 21, 2007); Upper Southampton Twp. v. Upper Southampton Twp. Zoning Hearing Board, 2007 Pa. LEXIS 2448 at *11 (Pa. Nov. 20, 2007) (review of lower court's statutory construction is "plenary and non-deferential."). Moreover, whether a particular communication falls within the ambit of the attorney-client privilege is a question of law subject to de novo review. Commonwealth v. Kennedy, 583 Pa. 208, 214, n. 3, 876 A.2d 939, 943 n. 3 (2005).

QUESTION INVOLVED

Whether the Superior Court erred as a matter of law in holding that the attorney-client privilege did not apply to a confidential memorandum written by Nationwide's in-house senior counsel to its senior executives and attorneys which related to pending and future litigation and reflects confidential information previously shared by the client with the attorney, as well as the attorney's legal advice.

STATEMENT OF THE CASE

Nationwide is a mutual insurance company with its principal offices in Columbus, Ohio and engages, inter alia, in the sale and service of insurance products throughout the United States. Nationwide brought this action in the Court of Common Pleas of Butler County against: (1) its former exclusive agents and their respective insurance agencies, John Fleming, Joshua Meeder, Lon McAllister, Meeder Fleming & Associates, Inc., and Lon McAllister Agency (collectively, the "Agent Defendants") and (2) Moraine Group, Inc. and certain of its principals, Mary Lou Fleming, Andrea Meeder, Robert Dean, John Williams, Barbara Reddick, Ray Kooser, Sandy Kooser, David Colley, Connie Taylor and Michelle Daugherty (collectively, the "Moraine Defendants"). The gravamen of Nationwide's claims is that, during their tenure as Nationwide's exclusive agents, the Agent Defendants accessed confidential Nationwide policyholder information from Nationwide's internal agent computer system and provided the same to Nationwide's competitors for their competitive use (including through the auspices of Moraine), both during and after their tenure as Nationwide's exclusive agents. Nationwide alleges that the Agent Defendants breached their obligations to Nationwide under their Agent's Agreements (including their duties of exclusive representation and loyalty to Nationwide as its agents) and that the Moraine Defendants participated in such breach, thereby tortiously interfering with Nationwide's existing and prospective policyholder relationships.

The defendants, while admitting that the Agent Defendants appropriated Nationwide policyholder information for their own competitive advantage from Nationwide's internal agent computer system while serving as Nationwide's exclusive agents, deny that such conduct was improper, and, further, assert a variety of counterclaims against Nationwide.

The defendants allege that Nationwide's claims against them have been brought in bad faith. Nationwide denies that its claims against the defendants are in bad faith. Indeed,

the defendants' motion for summary judgment on Nationwide's claims was denied in a companion federal case because the evidence presented a genuine issue of material fact, and that ruling was adopted by the trial court below on the defendants' motion for summary judgment in this case. Nationwide Mut. Ins. Co. v. Fleming, et al., No. 99-1417 (W.D. Pa. Oct. 12, 2001). See also R. at 72a-73a.

On January 10, 2005, the bench trial in this case commenced before the Hon. Thomas J. Doerr. During the course of the trial, Nationwide's witnesses were examined about a program, sometimes referred to as the "Reflex Action Plan," developed and initiated by Nationwide as a uniform response to the circumstance of departing Nationwide exclusive agents, and, particularly, departing agents who engaged in post-termination (if not also pre-termination) competition with Nationwide. See R. at 89a; R. at 31a. The defendants contend that Nationwide's uniform response to the departure of its exclusive agents shows that this lawsuit was brought in bad faith.

During the course of the defendants' cross-examination of a Nationwide witness, the defendants moved orally for an order compelling production of an unredacted version of a July 29, 1999 memorandum designated as the defendants' proposed Trial Exhibit 529 (hereinafter "Document 529"). Nationwide previously asserted the attorney-client privilege with respect to Document 529 and produced a redacted version of it in response to the defendants' discovery requests. R. at 28a. Nationwide opposed the defendants' oral motion to compel.

The redacted version of Document 529 is marked "PRIVILEGED AND CONFIDENTIAL" at the top and references as its subject, "Agent Defections." R. at 28a. The author of Document 529 is Attorney Thomas Dietrich, then a senior attorney in Nationwide's Office of General Counsel. Attorney Dietrich addressed Document 529 to Tom Crumrine, then-President of Nationwide Exclusive Agencies (the department at Nationwide dealing with

agencies and agents nationally), and three of Mr. Crumrine's senior deputies who were handling agent departure issues, Jim Merhar, Rick Waggoner and Chuck Wollenzien, all located at Nationwide's Columbus, Ohio headquarters. Attorney Dietrich copied Document 529 to: (1) Nationwide's then-President, Galen Barnes; (2) Nationwide's Sales Officers for Pennsylvania (Roy Bowerman); New York (Rich Kline); and Ohio (John Albert); (3) Nationwide's State Officers for Pennsylvania (Cyndi Tolsma), Ohio (Jack Wood), and New York (Mark Pizzi); (4) Mr. Pizzi's superior in Nationwide's Office of Agency (Tom Starr); and (5) other attorneys within Nationwide's Office of General Counsel - Attorney Lindsey McCutchan (dealing with agent departure issues in New York), Attorney George Macklin (dealing with agent departure issues in Pennsylvania), and Attorney Randy Orr, who was in Nationwide's Office of General Counsel and was the supervisor of Attorneys McCutchan and Macklin.

Since this case was being tried to the Court, rather than a jury, Judge Doerr directed that a hearing be held by another judge of the Common Pleas Court (Hon. S. Michael Yeager) to address the defendants' oral motion to compel. R. at 63a. An unredacted version of Document 529 was presented to Judge Yeager under seal for in camera review. R. at 66a. **Significantly, it was undisputed by the defendants in the trial court that Document 529 constituted an attorney-client communication within the ambit of the attorney-client privilege.** (R. 70a-72a). Instead, the defendants argued that Nationwide waived the attorney-client privilege with respect to Document 529 by virtue of the production, in response to the defendants' discovery requests, of two other documents - an email sent by Attorney Orr (the defendants' Exhibit 314, hereinafter "Exhibit 314"), and a three-page email sent by Robert M. Leo (the defendants' Exhibit 395, hereinafter "Exhibit 395"). (R. 31a-32a; 67a-72a). Defendants, not Nationwide, introduced Exhibits 314 and 395 into evidence at trial.

Nationwide opposed the defendants' waiver argument on the ground that Exhibits 314 and 395 are business communications which are not privileged from disclosure under the attorney-client privilege, and therefore the production of those documents in response to the defendants' discovery requests was not intended to, and did not, waive the attorney-client privilege, which defendants conceded was applicable to Document 529. R. at 82a-83a.

Like the defendants, Judge Yeager recognized that Document 529 was indeed encompassed within the ambit of the attorney-client privilege: **"This Court does not dispute the fact that there is an attorney/client privilege that unless waived should be respected."** (Exhibit "B" at p. 3) (emphasis added). However, he held that Nationwide waived the privilege with respect to Document 529 and ordered production of an unredacted version of it to the defendants. (Exhibit "B"). He stated: "It is this Court's belief that in the case at bar, Appellants waived their attorney/client privilege by voluntarily disclosing communications between attorney and client with regard to the subject of "Reflex Action, Agent Defection." (Exhibit "B" at p. 3). He held that Nationwide "previously disclosed attorney-client communications concerning the topic of 'Reflex Action, Agent Defection,' to further their efforts in the pending litigation and are now attempting to shield this particular document under date of July 29, 1999, concerning the very same subject" and "this cannot be done." (Id. at p. 4).

Pursuant to the collateral order doctrine set forth in Pa. R.App.P. 313, Nationwide immediately appealed from the order requiring production of Document 529. The trial judge recognized that the order was a collateral order that was properly appealable as a matter of right under Rule 313, and accordingly stayed that order pending the outcome of the appeal. (Exhibit "C"). Document 529 has remained under seal, and the trial proceedings have been stayed during the pendency of this appeal.

The defendants filed a "Motion to Quash" Nationwide's appeal in the Superior Court on February 18, 2005, arguing that there was no appellate jurisdiction. Nationwide filed its opposition to that Motion on February 25, 2005. On March 18, 2005, the Superior Court entered an Order which denied the Motion to Quash without prejudice. Thereafter, the parties fully briefed the merits of the appeal. On August 29, 2005, the Superior Court advised the parties by letter that the appeal was listed for argument on October 6, 2005. Curiously, however, three weeks later, on September 19, 2005, the Superior Court did an about-face and granted defendants' Motion to Quash in a one-sentence per curiam Order. (Exhibit "D").

Nationwide filed a timely Application for Reargument on September 26, 2005. However, even before the defendants had responded and a full week before the expiration of the 14-day reply period set forth in Pa.R.App.P. 2545, the Superior Court denied Nationwide's Application for Reargument on October 3, 2005 in a per curiam order. (Exhibit "E").

Nationwide filed a Petition for Allowance of Appeal with this Court on November 2, 2005. On April 27, 2006, this Court granted that Petition and summarily vacated the Superior Court's order quashing the appeal. 586 Pa. 622, 896 A.2d 565 (Exhibit "F"). This Court remanded the case to the Superior Court for consideration of the merits of the appeal.

On May 21, 2007, the Superior Court rendered its decision. 2007 PA. Super. 145, 924 A.2d 1259 (Exhibit "A"). It held that the trial court erred in finding a subject matter waiver of the attorney-client privilege by Nationwide. Nevertheless, it affirmed the trial court's order compelling Nationwide to provide Document 529 to the defendants on other grounds, ruling that this Document was not protected by the attorney-client privilege. The Superior Court acknowledged that its conclusion differed from that of the trial court,[3] but failed to acknowledge

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[3] Exhibit "A" at p. 17 ("the trial court clearly had concluded that attorney-client privilege applied to Document 529").

that even the defendants had repeatedly conceded that Document 529 was covered by the attorney-client privilege.[4]

The Superior Court stated as follows:

> ¶ 12 In sum, under our statutory and decisional law, attorney-client privilege protects from disclosure *only* those communications *made by a client* to his or her attorney which are confidential and made in connection with the providing of legal services or advice. Slusaw, [861 A.2d] at 273; Estate of Wood, [818 A.2d] at 571.
>
> ¶ 13 The privilege extends to communications *from an attorney* to his or her client *if and only if* the communications fall within the general statutory definition. Under Section 5928, counsel cannot testify as to confidential communications made to him or her by the client, unless the client has waived the privilege. Consistent with this statute, the privilege protects confidential communications from an attorney to his or her client only to the extent that such communications contain and would thus reveal confidential communications from the client.
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> * * * *
>
> ¶ 27 In claiming attorney-client privilege for Document 529, Nationwide neglects to consider that, under this privilege, protection is available *only* for confidential communications made *by the client* to counsel. The very title of the relevant statutory provision specifies what is protected: "Confidential communications *to* attorney." 42 Pa.C.S.A. § 5928 (emphasis added). Communications *from* counsel to a client may be protected under Section 5928, but *only* to the extent that they reveal confidential communications previously made by the client to counsel for the purpose of obtaining legal advice. See Slusaw, 861 A.2d at 273; Birth Center, 727 A.2d at 1164; Coregis Insurance Co., 186 F.Supp.2d at 569-72.
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> ¶ 28 Document 529, which was written by counsel, does not disclose any confidential communications made by Nationwide, the client, to its counsel.

(Ex. "A" at pp. 7, 18-19) (italics in original).

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[4] See January 25, 2005 hearing before Judge Yeager (R.70a-72a); defendants-appellees' May 18, 2005 and June 27, 2006 briefs in the Superior Court; and defendants-appellees' Nov. 21, 2005 brief in this Court.

Nationwide timely filed its Petition for Allowance of Appeal on June 20, 2007. This Court granted that Petition on October 31, 2007. 2007 Pa. LEXIS 2361 (Exhibit "G"). On that same date, the Court also granted Nationwide's motion for leave to file Document 529 under seal so the Court could review it in camera. (Exhibit "H").

SUMMARY OF ARGUMENT

The Superior Court committed legal error when it ruled that "attorney-client privilege protects from disclosure *only* those communications *made by a client* to his or her attorney which are confidential and made in connection with the providing of legal services or advice." (Exhibit "A" at p. 7) (italics in original). This unduly restrictive interpretation of the privilege conflicts with this Court's decision in National Bank of West Grove v. Earle, 196 Pa. 217, 221, 46 A. 268, 269 (1900), where this Court denied a request "to compel counsel to disclose the advice given to his clients." This Court had correctly recognized that, if an attorney's legal advice to his client were discoverable, "the client will exercise common prudence by avoiding counsel." Id. The decision in National Bank of West Grove was rendered by this Court 13 years after enactment of the attorney-client privilege statute, and the Legislature's re-enactment of that statute in 1976 without any substantive change gives rise to a presumption that "the language thus repeated is to be interpreted in the same manner such language had been previously interpreted when the court passed on the earlier statute." Commonwealth v. Sitkin's Junk Co., 412 Pa. 132, 137, 194 A.2d 199, 202 (1963); 1 Pa. C.S.A. § 1922(4). The Superior Court did not even acknowledge this Court's controlling decision in National Bank of West Grove, much less attempt to distinguish it.

Moreover, the Superior Court's decision is fundamentally at odds with the salutary purpose underlying the attorney-client privilege, which is to "encourage confidence and dialogue between attorney and client." In re Investigating Grand Jury, 527 Pa. 432, 439-40, 593

A.2d 402, 406 (1991). Allowing discovery of the confidential communications and legal advice from opposing counsel to his or her client would surely deter attorneys from providing full and candid legal advice to their clients. Indeed, the privilege would essentially be eviscerated, contrary to the intent of the Legislature when it codified the privilege. See 1 Pa. C.S.A. § 1921(c)(6) ("[t]he consequences of a particular interpretation" of a statute should be considered in determining legislative intent); 1 Pa. C.S.A. § 1922(1) (it is presumed that the General Assembly does not intend a result that is "absurd" or "unreasonable.").

In this case, both the trial court and the defendants had acknowledged that Document 529 is a privileged communication. As this Court can see from its own in camera review, Attorney Dietrich's confidential memorandum to his clients described in detail the pending litigation against former Nationwide agents as well as potential future litigation against agents in various states. He rendered legal advice by discussing the potential remedies available to Nationwide, as well as recommended changes to the Agent Agreement. Moreover, he discussed confidential information given to him by his client, including the primary purpose of the ongoing litigation against the former agents. This confidential memorandum is a privileged attorney-client communication, and the Superior Court committed legal error by holding otherwise.

ARGUMENT

The Superior Court twice emphasized that, under the attorney-client privilege, "protection is available *only* for confidential communications made *by the client* to counsel." (Exhibit "A" at p. 18) (italics in original). See also id. at p. 7 ("under our statutory and decisional law, attorney-client privilege protects from disclosure *only* those communications *made by a client* to his or her attorney which are confidential and made in connection with the providing of legal services or advice.") (italics in original). However, the Superior Court was

wrong - its unduly restrictive view of the attorney-client privilege as protecting only those communications made by a client to his or her attorney is not supported by governing precedent, the statute, or the important purposes served by the privilege.

A. The Salutary Purposes Underlying The Attorney-Client Privilege

As this Court explained in Commonwealth v. Maguigan, 511 Pa. 112, 124, 511 A.2d 1327, 1333 (1986), "[t]he attorney-client privilege is deeply rooted in our common law" and "[i]t is the most revered of our common law privileges." The Court has stressed that "its purpose is to create an atmosphere that will encourage confidence and dialogue between attorney and client." In re Investigating Grand Jury, 527 Pa. 432, 439-40, 593 A.2d 402, 406 (1991). Accord Estate of Kofsky, 487 Pa. 473, 482, 409 A.2d 1358, 1362 (1979) (purpose of the privilege is "to foster a confidence between client and advocate that will lead to a trusting and open attorney-client dialogue."). "The intended beneficiary of this policy is not the individual client so much as the systematic administration of justice which depends on frank and open client-attorney communication." Investigating Grand Jury, 527 Pa. at 440, 593 A.2d at 406.

Similarly, the United States Supreme Court has explained the paramount importance of the privilege in our legal system:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

In Upjohn, the Supreme Court stated that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. at 390 (emphasis added). Accord Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (the privilege "is founded upon the

necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); Trammel v. United States, 445 U.S. 40, 51 (1980) (the privilege is "rooted in the imperative need for confidence and trust" between client and attorney).

The "trusting and open attorney-client dialogue" that this Court spoke of in Estate of Kofsky entails confidential communications not only from client to attorney, but also from attorney to client. It is a dialogue, not a monologue. If the attorney-client privilege protected "*only* those communications *made by a client* to his or her attorney," as the Superior Court twice incorrectly declared in this case (Exhibit "A" at pp. 7, 18) (italics in original), a lawyer's legal advice to his or her client would be discoverable by the client's adversary.

As explained by Professor John Henry Wigmore in an oft-cited passage from his treatise on evidence:

> That the *attorney's communications to* the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question. The reason for it is not any design of securing the attorney's freedom of expression, but the necessity of preventing the use of his statements as admissions of the client (§ 1071 *supra*), or as leading to inferences of the tenor of the client's communications - although in this latter aspect, being hearsay statements, they could seldom be available at all.

8 Wigmore, Evidence § 2320 (McNaughton rev. 1961) (italics in original).[5]

Similarly, in United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980), the Third Circuit set forth two reasons why the attorney-client privilege has been

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[5] The foregoing passage from Wigmore was cited in MacQuown v. Dean Witter Reynolds Inc., 47 D. & C.3d 21, 24 (C.P. Allegheny Co. 1987); City of Shamokin v. West End National Bank, 22 D. & C. 3d 232, 234 (C.P. Northumberland Co. 1982); Messner v. Korbonits, 39 D. & C. 3d 182, 185-6 (C.P. Chester Co. 1982).

construed to protect not only communications from client to attorney, but also from attorney to client:

> Two reasons have been advanced in support of the two-way application of the privilege. The first is the necessity of preventing the use of an attorney's advice to support inferences as to the content of confidential communications by the client to the attorney. 8 Wigmore on Evidence § 2320 (McNaughton Rev. 1961). The second is that, independent of the content of any client communication, legal advice given to the client should remain confidential.

See also Restatement of the Law (Third), The Law Governing Lawyers § 69 Comment (i), Reporter's Note (2000) (privilege protects communications from attorney to client "because it provides assurance to lawyers to be forthcoming in giving legal advice.").

B. This Court Has Previously Held That The Attorney-Client Privilege Protects Communications From Attorney to Client

In Pennsylvania, the common law rule was 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 . . . should be clearly shown." Moore v. Bray, 10 Pa. 519, 524-25 (1849) (emphasis added). Accord Alexander v. Queen, 253 Pa. 195, 203, 97 A. 1063, 1065 (1916).

The attorney-client privilege was first codified in Pennsylvania 120 years ago:

> Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client or the client to compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client.

Act of May 23, 1887, P.L. 158, § 5d (formerly 28 P.S. § 321).

In 1976, the privilege statute was re-enacted by the Legislature as part of the omnibus Judicial Code, and no substantive changes were made to the 1887 predecessor:

> 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.

Act of July 9, 1976, Act No. 142, § 2, 1976 Pa. Laws 586 (codified as 42 Pa. C.S.A. § 5928).

This statute "embodies the common-law privilege universally accepted as indispensable to an attorney's professional relationship with his client." In re Gartley, 341 Pa. Super. 350, 362, 491 A.2d 851, 858 (1985), aff'd 513 Pa. 429, 521 A.2d 422 (1987). Accord Cohen v. Jenkintown Cab Company, 238 Pa. Super. 456, 462 n. 2, 357 A.2d 689, 692 n. 2 (1976); McCrink v. Peoples Benefit Life Ins. Co., 2004 U.S. Dist. LEXIS 23990 at *4 (E.D. Pa. Nov. 30, 2004) ("This statute codifies the common-law attorney-client privilege..."); Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391, 395 (E.D. Pa. 1996) (same).

In interpreting the statute in this case, this Court is not writing on a clean slate. In 1900, which was just 13 years after the statute was first enacted, this Court held that the legal advice given by counsel to a client is privileged. National Bank of West Grove v. Earle, 196 Pa. 217, 221, 46 A. 268, 269 (1900). In its decision, this Court stated as follows:

> As to the other defendant, Mr. Johnson, from whom a discovery is sought, because he was of counsel for the trustees in this and other proceedings, he has demurred, because "a bill of discovery is not the proper method, if there be any proper method, to compel counsel to disclose the advice given to his clients." It is not necessary for us to elaborate on this averment; it is a complete answer to plaintiff's prayer. If it were not, 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. If the secrets of the professional relation can be extorted from counsel in open court, by the antagonist of his client, the client will exercise common prudence by avoiding counsel.

196 Pa. at 221, 46 A. at 269 (emphasis added). Although this Court's decision in National Bank of West Grove did not cite the statute, defendants have conceded that "it does provide a clear interpretation" of the statute. (Brief in Opp. to Petition for Allowance of Appeal at p. 14).

This Court has not cited its National Bank of West Grove decision since it was rendered in 1900, nor has the Superior Court. However, state and federal trial courts have relied upon it and recognized that "[w]hile the statute refers only to communications from the client to the attorney, the protection of the privilege also encompasses all confidential communications from the attorney to the client." Emejota Engineering Corp. v. Kent Polymers Inc., 1985 U.S. Dist. LEXIS 13415 at *5-6 (E.D. Pa. Nov. 27, 1985) (emphasis added); Willis v. Pa. Millers Mut. Ins., 14 D. & C.3d 705, 707 (C.P. Monroe Co. 1980) (relying on National Bank of West Grove to hold that advice given by attorney to client was privileged); Northampton Borough Municipal Auth. v. Remsco Assoc., 22 D. & C.3d 541, 550 (C.P. Lehigh Co. 1981) (citing National Bank of West Grove for proposition that "there is authority which applies the privilege of communication from counsel to client"). See also Sedat, Inc. v. DER, 163 Pa. Cmwlth. 29, 35, 641 A.2d 1243, 1245 (1994) ("[i]t is well settled that legal advice given by an attorney in his professional capacity in response to a client inquiry is immune from discovery on the basis of the attorney-client privilege pursuant to Rule 4003.1"); Pennsylvania Law Encyclopedia Witnesses § 100 (1961) (citing National Bank of West Grove, and stating that "Generally, an attorney may not testify as to his client's confidential communications, nor may an attorney's communications to his client be disclosed, unless the client fails to object or waives the privilege.") (emphasis added).

Interpreting Pennsylvania law, the late Judge Edward Becker authored an opinion for the Third Circuit in which that Court recognized that the privilege runs in both directions, and encompasses not only communications from client to attorney, but also from attorney to client:

> It should be noted that the law makes no distinction between communications made by a client and those made by an attorney, provided the communications are for the purpose of securing legal advice. . . In other words, the entire discussion between a client and an attorney undertaken to secure legal advice is privileged, no matter whether the client or the attorney is speaking.

In re Ford Motor Co., 110 F.3d 954, 965 n. 9 (3d Cir. 1997) (emphasis added).

In this case, the Superior Court did not even cite the National Bank of West Grove decision, much less attempt to distinguish it. The Superior Court was not free to simply disregard that controlling decision, notwithstanding its vintage, as this Court's precedents remain binding on the lower courts unless and until they are overruled by this Court. See, e.g., Commonwealth v. Millner, 585 Pa. 237, 260, 888 A.2d 680, 693 (2005) ("We remind the Superior Court that its jurisprudential task 'is to effectuate the decisional law of this Court, not to restrict it through curtailed readings of controlling authority."). The Superior Court's decision squarely conflicts with this Court's decision in National Bank of West Grove, and thus should be reversed.

C. The Superior Court's Decision Conflicts With Well-Settled Principles of Statutory Construction

Dispositive here is the critically important fact that, 76 years after this Court's decision in National Bank of West Grove, the Legislature re-enacted the attorney-client privilege statute without making any substantive changes to it. Act of July 9, 1976, Act No. 142, § 2, 1976 Pa. Laws 586 (42 Pa. C.S.A. § 5928). Under the Statutory Construction Act, it is presumed 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." 1 Pa. C.S.A. § 1922(4). See, e.g., Commonwealth v. Sitkin's Junk Co., 412 Pa. 132, 137, 194 A.2d 199, 202 (1963) ("Where the legislature, in a later statute, uses the same language as used in a prior statute which has been construed by the courts, there is a presumption that the language thus repeated is to be interpreted in the same manner such language had been previously interpreted when the court passed on the earlier statute."); Commonwealth v. Wetzel, 435 Pa. 468, 473-74, 257 A.2d 538, 540-41 (1969) (same); Lorillard v. Pons, 434 U.S. 575, 580 (1978) (pursuant to the legislative re-enactment doctrine, Congress is

"presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Accordingly, it must be presumed that the when the Legislature re-enacted the attorney-client privilege statute in 1976, it intended "the same construction to be placed upon such language" that this Court had adopted in its earlier decision in National Bank of West Grove. 1 Pa. C.S.A. § 1922(4).

Another canon of statutory construction that is germane here is that a court must consider "[t]he consequences of a particular interpretation" of a statute. 1 Pa.C.S.A. § 1921(c)(6). See, e.g., Sculley v. City of Phila., 381 Pa. 1, 8-9, 112 A.2d 321, 325 (1955); Girard Trust Co. v. City of Phila., 369 Pa. 499, 504-5, 87 A.2d 277, 279-80 (1952). Moreover, it is presumed "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa. C.S.A. § 1922(1). See, e.g., Upper Southampton Twp. v. Upper Southampton Twp. Zoning Hearing Board, 2007 Pa. LEXIS 2448 at *13 (Pa. Nov. 20, 2007).

Affirmance of the Superior Court's unduly restrictive interpretation of the privilege statute as protecting only communications from client to attorney would have profound adverse consequences. As noted above, this Court has stressed that the underlying purpose of the attorney-client privilege is to "encourage confidence and dialogue between attorney and client." In re Investigating Grand Jury, 527 Pa. at 439-40, 593 A.2d at 406. However, far from promoting "frank and open attorney-client communication" (527 Pa. at 440, 593 A.2d at 406), affirmance of the Superior Court's decision in this case would have a chilling effect on such communications. As eloquently stated by this Court in National Bank of West Grove, "[i]f the secrets of the professional relation can be extorted from counsel in open court by the antagonist of his client, the client will exercise common prudence by avoiding counsel." 196 Pa. at 221, 46

A. at 269. If such discovery is permitted, the client "should run away from a lawyer rather than consult him." Id.

Moreover, if the privilege was construed not to protect the legal advice rendered by Pennsylvania attorneys to their clients, then businesses would be far more inclined to seek legal advice from lawyers in other states.

Accordingly, Nationwide submits that the statutory interpretation adopted by the Superior Court would eviscerate the attorney-client privilege, and thus does not comport with the intent of the Legislature.[6]

D. Document 529 Is Privileged

After first definitively stating that "protection is available *only* for confidential communications made *by the client* to counsel," the Superior Court then acknowledged an exception for certain communications from attorney to client: "Communications *from* counsel to a client may be protected under Section 5928, but *only* to the extent that they **reveal** confidential communications previously made by the client to counsel for the purpose of obtaining legal advice." (Exhibit "A" at pp. 18-19) (italics in original, bold emphasis added).

However, the earlier Superior Court decision that the Court cited had adopted a different test: "[i]n addition to confidential communications which flow from a client to his or her attorney, we have held that the attorney-client privilege applies to confidential

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[6] As ostensible support for its conclusion that the attorney-client privilege does not protect communications from attorney to client, the Superior Court stated that "The very title of the relevant statutory provision specifies what is protected: 'Confidential communications *to* attorney.' 42 Pa. C.S.A. § 5928." (Exhibit "A" at p. 18, italics in original). However, as stated in the Statutory Construction Act, while the heading of a statute may be considered in interpreting the statute, it "shall not be considered to control." 1 Pa. C.S.A. § 1924. See, e.g., Commonwealth v. Shafer, 414 Pa. 613, 620, 202 A.2d 308, 311-12 (1964); Wiley v. Umbel, 355 Pa. 206, 209, 49 A.2d 371, 373 (1946). That is particularly true where, as here, this Court has previously construed the statute more expansively than the heading.

communications which flow from an attorney to his or her client to the extent the communications are based upon confidential facts that the client disclosed initially to the attorney." Slusaw v. Hoffman, 2004 PA. Super. 354, 861 A.2d 269, 273 (2004) (emphasis added). Under this somewhat more expansive approach, the attorney-client privilege would attach to a memorandum setting forth the attorney's advice based on confidential facts disclosed by the client, regardless of whether or not the memorandum itself contains and thus reveals those confidential facts.

Similarly, the state and federal trial courts in Pennsylvania have adopted divergent tests for determining whether a communication by the attorney to the client is privileged. For example, in Reusswig v. Erie Insurance, 49 Pa. D. & C. 4th 338, 350-51 (C.P. Monroe Co. 2000), the court stated that "[t]his privilege also protects statements or writings from counsel to his or her client if the contents of those statements or writings would reveal a confidential communication by the client." (emphasis added). Accord Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, 186 F.Supp.2d 567, 570 (E.D. Pa. 2002) (same).

By contrast, in City of Shamokin v. West End National Bank, 22 D. & C. 3d 232, 234 (C.P. Northumberland Co. 1982), the court held that "the protection of the privilege must encompass all confidential professional communications from the attorney to the client, to the extent that such communication is based on confidential facts disclosed to the attorney by the client." (emphasis added). Accord Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391, 395 (E.D. Pa. 1996) (same); In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 76 F.R.D. 47, 56 (W.D. Pa. 1977) (same); In re Tire Workers Asbestos Litigation, 125 F.R.D. 617, 621 (E.D. Pa. 1989) (same).

Pennsylvania law treatises likewise reflect the differing and confusing standards adopted by the lower courts on this issue. For instance, in Binder on Pennsylvania Evidence,

§ 5.03 (4th ed. 2005), it is stated that the attorney-client privilege "does not apply to a communication from attorney to client, unless the attorney's communication would disclose protected information that was supplied to the attorney by the client." (emphasis added). By contrast, in Pennsylvania Law Encyclopedia, Witnesses § 100 (2d ed. 2006), it is stated that "[t]he privilege has been held to apply to confidential communications which flow from an attorney to his or her client to the extent the communications are based upon confidential facts that the client disclosed initially to the attorney." (emphasis added). Accord Packel and Poulin, Pennsylvania Evidence § 521-1 (2d ed. 1999) (privilege covers "communications from counsel to the client to the extent that such communications are based on confidential facts disclosed by the client to counsel.") (emphasis added).

This Court's decision in National Bank of West Grove protects all communications from attorney to client embodying legal advice.[7] This approach creates a bright-line test that eliminates uncertainty and confusion. It thus encourages attorneys to be candid in rendering legal advice, as they can rest assured that their advice will not be subject to discovery by an opposing litigant. Another important advantage of this bright-line test is that it minimizes the amount of ancillary litigation regarding whether or not the privilege applies to particular communications from attorneys to their clients.

Alternatively, if the Court decides that one of the two competing lines of authority in the lower courts discussed above is preferable, Nationwide respectfully submits that the Court should adopt the more expansive of these approaches. The Court should hold that the privilege

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[7] See Emejota Engineering Corp. v. Kent Polymers, Inc., 1985 U.S. Dist. LEXIS 13415 at *5-6 (E.D. Pa. Nov. 27, 1985) (citing National Bank of West Grove for proposition that "the protection of the privilege also encompasses all confidential communications from the attorney to the client") (emphasis added); Gibbons, Pennsylvania Discovery Practice § 2.3 (1996) ("the protection of the privilege must encompass all confidential professional communications from the attorney to the client.") (emphasis added).

protects a lawyer's communication of legal advice to a client if it is based upon confidential facts previously disclosed to the attorney by the client, regardless of whether or not the attorney's communication actually discloses those facts.[8] As noted above, the more protection that is afforded to communications by attorneys to their clients, the more forthcoming and frank that attorneys will be in rendering their advice. See Restatement of the Law (Third), The Law Governing Lawyers § 69 comment (i) (2000) ("Some decisions have protected a lawyer communication only if it contains or expressly refers to a client communication. That limitation

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[8] Attorneys frequently render legal advice to their clients in letters, memoranda and e-mails without making explicit reference to the confidential facts which were previously imparted by their clients. For example:

> "We recommend bringing suit against defendants A, B and C (but not potential defendant D), and asserting the following claims. . ."
>
> * * *
>
> "We think it would be advisable to make the following settlement proposal. . . "
>
> * * *
>
> "We believe we should file a motion along the following lines, and for the following tactical reasons. . ."
>
> * * *
>
> "We believe that your agreements and forms should be modified in the following manner. . ."
>
> * * *
>
> "We believe that, under applicable laws and regulations, you may proceed with your proposed course of action, but with the following modifications. . ."
>
> * * *
>
> "We believe that the applicable federal and state laws require you to make the following disclosures to your shareholders (customers, employees, etc.). . ."

is rejected here in favor of a broader rule more likely to assure full and frank communications. . . Moreover, the broader rule avoids difficult questions in determining whether a lawyer's communication itself discloses a client communication."). (emphasis added).

Document 529 is unquestionably privileged under each of the approaches discussed above - - it reflects Attorney Dietrich's legal advice; is based upon confidential facts disclosed by the client to Attorney Dietrich; and it also reveals those confidential facts. As stated above, the trial court had reviewed Document 529 in camera, and it concluded that Document 529 was privileged. (Exhibit "B" at p. 3). Moreover, up until the Superior Court's decision, the defendants had consistently conceded that Document 529 is privileged. See p. 9 n. 4, supra. The Superior Court's conclusion to the contrary is incorrect as a matter of law, and should be reversed.

Nationwide is constrained from discussing Document 529 in detail, lest it disclose the privileged information it is still seeking to keep confidential.[9] The memorandum was sent by Tom Dietrich, a senior attorney in Nationwide's Office of General Counsel, to a number of high-ranking executives and officers, including Tom Crumrine, who was then-President of Nationwide Exclusive Agencies (which dealt with agencies and agents nationally), and Galen Barnes, who was then-President of Nationwide, along with several other attorneys in the Office of General Counsel. Attorney Dietrich had designated his memorandum as "PRIVILEGED AND CONFIDENTIAL." The subject was "Agent Defections," and Attorney Dietrich described in detail the pending litigation against agents as well as potential future litigation against agents in various states. Significantly, he discussed the primary purpose of the ongoing litigation

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[9] As noted above, on October 31, 2007, this Court granted Nationwide's motion for leave to submit Document 529 to the Court under seal for its own in camera review. (Exhibit "H").

efforts, which was confidential information given to him by the client. He also discussed the potential remedies available to Nationwide, as well as recommendations for changes to the current Agent Agreement.

The Superior Court stated that "Document 529 also outlines, again in general terms, counsel's opinion as to the likely outcome of current and pending litigation," and concluded that "Document 529 reveals no confidential facts *communicated by Nationwide to* counsel." (Exhibit "A" at 19-20) (italics in original).

However, the Superior Court simply ignores the critically-important fact that Attorney Dietrich discusses not only the "likely outcome" of the litigation (id.), but also the primary purpose of the litigation. That objective was confidential information previously imparted to him by the client, and disclosure of Document 529 would necessarily reveal that confidential client communication. Thus, the Superior Court committed legal error when it held that "Document 529 reveals no confidential communication concerning these [litigation] efforts from Nationwide to its counsel for the purpose of obtaining legal advice or a legal opinion." (Exhibit "A" at 19).

Accordingly, Nationwide respectfully submits that this Court should hold that Document 529 is privileged.

CONCLUSION

For the foregoing reasons, Nationwide respectfully submits that the Superior Court's decision should be reversed, and this Court should hold that Document 529 is protected from discovery by the attorney-client privilege.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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