IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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NO. 32 WAP 2007

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NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL

Plaintiffs/Appellants

v.

JOHN FLEMING, JOSHUA MEEDER, MEEDER FLEMING & ASSOCIATES, ET AL

Defendants/Appellees

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# BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA DEFENSE INSTITUTE

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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 the Court of Common Pleas of Butler County, Civil Division, No. EQ 99-50018

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## INTEREST OF AMICUS CURIAE, THE PENNSYLVANIA DEFENSE INSTITUTE

The Pennsylvania Defense Institute ("PDI") was organized in 1969. PDI is a statewide non-profit association of defense counsel and insurance company executives. PDI is a forum for developing public policy initiatives, for the exchange of ideas, and for the pursuit of its goals, which include the prompt, fair and just disposition of claims and disputes, the preservation of the administration of justice, the enhancement of the legal profession's service to the public, the elimination of court congestion and delays in civil litigation, and the promotion of a wide variety of matters, including legislation and litigation.

In light of the significant involvement of PDI members in the insurance industry here in Pennsylvania, they are particularly interested in the resolution of the issue this Court has agreed to hear in this case. In this appeal, this Court has the opportunity to eliminate years of unnecessary confusion and reaffirm the fundamental principle that the attorney-client privilege encompasses confidential communications of legal advice from the attorney to the client. Deciding whether the attorney-client privilege is a one-way street or runs in both directions is obviously an important area of jurisprudence in innumerable civil and criminal contexts. Determining that the attorney-client privilege does not protect the attorneys' confidential professional advice except to the extent it reiterates confidential facts provided by the client in order to obtain that legal advice will have a chilling effect on persons seeking to obtain that confidential legal guidance and counsel.

A curtailment of the attorney-client privilege will discourage frank and open communications from the client to the attorney and deter, if not prevent, the attorney from providing the client with thorough, objective professional advice on the merits of the case or

issue for fear that such advice would later be divulged to opposing parties as a measuring stick or admission of the client against which future conduct may be judged. The intended sanctity of confidential communications between a client and his attorney would be turned on its head if the law were now to permit adverse parties to discover and use the attorney's confidential advice against the client. Recognizing that there are and will remain certain exceptions to the privilege extant under the law, PDI is keenly interested in preserving the confidentiality of an attorney's legal advice to the client, and it urges this Court to reaffirm the fundamental principal that the attorney-client privilege includes the attorney's appropriately obtained legal advice.

## STATEMENT OF JURISDICTION

Jurisdiction over this appeal exists pursuant to Pennsylvania Rules of Appellate Procedure 313 and 1112.

ORDER IN QUESTION

May 21, 2007 Order of Superior Court

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.

Order affirmed.

Judgment Entered

/s/ Eleanor R. Valecko
Deputy Prothonotary

Date: May 21, 2007

January 25, 2005 Order by Trial Court

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 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

## QUESTION PRESENTED FOR REVIEW

By Per Curiam Order dated October 31, 2007, this Honorable Court granted Petitioner's Allowance of Appeal on the following issue:

> 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 Petitioners' 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?
>
> Answered in the negative by the Superior Court.
>
> Answer suggested: Yes.

## SUMMARY OF ARGUMENT

The attorney-client privilege is recognized under the common law as indispensable to the relationship between a client and his counsel. This Court held long ago that the common law privilege encompasses both the information provided by the client to the attorney for the purpose of obtaining legal advice and the attorney's advice to the client. It is only by protecting the confidentiality of the entire dialogue between client and counsel that the purpose of the privilege, which is to foster full and frank communications providing legal guidance, is served.

There is a well-established body of law regarding a client's waiver of the attorney-client privilege when the client asserts the "advice of counsel" defense. If the attorney-client privilege does not apply to the attorney's legal advice, then that entire body of law is meaningless.

The Pennsylvania statutes relating to the attorney-client privilege explicitly protect the client's confidential information conveyed to the attorney but are silent regarding the attorney's advice. Under well-established principles of statutory construction, statutes do not change existing common law unless they do so explicitly.

The attorney-client privilege should apply to routine insurance coverage opinions sought by insurers and insureds alike even though such legal opinions do not involve any "secret facts". In that situation and countless others, absent a client's decision to waive the privilege, the public good is served by encouraging citizens to seek out legal guidance without fear that the legal advice confidentially obtained will be made public and even used against them.

## ARGUMENT

### I. The Attorney-Client Privilege Encompasses The Confidential Dialogue Between Client and Counsel For The Purpose of Seeking Legal Advice

The attorney-client privilege recognized in the common law has been a part of Pennsylvania law since the founding of the Pennsylvania colony. In re: Estate of Wood, 818 A.2d 568, 571 (Pa. Super. 2003); In re: Gartley, 491 A.2d 851, 858 (Pa. Super 1985). It is the most revered of our common law privileges and is universally accepted as indispensable to an attorney's professional relationship with his client. In re: Investigating Grand Jury, 593 A.2d 402, 406 (Pa. 1991); Commw. v. Maguigan, 511 A.2d 1327, 1333 (Pa. 1986). Indeed, the attorney-client privilege is so deeply rooted in the common law that if can be traced back to the reign of Elizabeth I, where it was already unquestioned. Commw. v. Maguigan, id., 511 A.2d at 1333; referencing 8 J. Wigmore, Evidence §2290 (McNaughton rev. 1961).

As early as 1900, the Pennsylvania Supreme Court recognized that the advice and guidance that an attorney provides to his client must be protected by the privilege. National Bank of West Grove v. Earle, 196 Pa. 217, 46 A.268 (1900). In that case, a group of unsecured creditors sought discovery from one "counselor Johnson" who was an attorney involved in the reorganization of stock for a company known as Record Publishing Company, in order to satisfy outstanding creditors. Id., 46 A. at 268. Johnson objected to the discovery, arguing that "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." Id. at 269. (emphasis added). The Pennsylvania Supreme Court found that his advice was privileged, explaining:

> 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 cli*ent, *the client will exercise common prudence by avoiding counsel.*

Id. (emphasis added). Consequently, this Honorable Court has already concluded that an attorney's advice was protected from discovery based upon the attorney-client privilege. Obviously, this decision validates the position that attorney-client communications are in the nature of a two-way street.

Indeed, the fundamental principle notion that an attorney's advice falls within the privilege has been presumed in this Commonwealth, as suggested by one of the leading treatises on evidence. 8 Wigmore, Evidence §2320. Professor Wigmore explained:

> 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[1] (McNaughton rev. 1961) (italics in original). As a result, few cases have specifically discussed the difference between communications from the attorney and those from the client.

Meanwhile, jurisdictions across the country have recognized that, in order to effectuate the purpose of the attorney-client privilege, it must extend to legal advice from counsel. See, e.g. Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1971); Byrd v. Arkansas, 929 S.W. 2d 151, 154 (Ark. 1996). "The law of attorney-client privilege makes no distinction between communications made by the client and those made by the attorney, provided the communications are for the purposes of

[1] This passage from Wigmore has been cited in 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. 182, 185-186 (C.P. Chester Co. 1982); and MacQuown v. Dean Witter Reynolds, Inc., 47 D. & C. 3d 21, 24 (C.P. Allegheny Co., 1987).

securing legal advice." 81 Am. Jur. 2d, Witnesses §357 (2004). Accordingly, there is a substantial base of authority that the privilege must also protect counsel's advice to his client.

This Court has recognized not only that the attorney-client privilege encompasses the entire confidential dialogue between client and attorney, but also that the privileged is based upon the common good served by the protection being more important than the fact finding in any particular case. As the Court has explained.

> Recognizing that its purpose is to create an atmosphere that will encourage confidence and dialogue between attorney and client, the privilege is founded upon a policy extrinsic to the protection of the fact-finding process. *Estate of Kofsky*, 487 Pa. 473, 409 A.2d 1358 (1979). 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. *In re Search Warrant B-21778, 513 Pa. 429, 521 A.2d 422, 428 (1987); Estate of Kofsky, supra.*

In re: Investigating Grand Jury; supra., 593 A.2d at 406. Indeed, where the focus of the privilege issue was a set of handwritten notes of a confidential attorney-client consultation, some prepared by the lawyer and some prepared by the client, this Court concluded that both were protected by the privilege.

> We have reviewed the handwritten notes that remain under seal. It is without question that the substance of the notations is derived from confidential communications between counsel and the bank president regarding the matter under investigation. The impact of the confidential communications is not diminished by the client's action of reducing the discussions in summary to writing for his own use and for that of his attorney. Nor is the privilege defeated thereby. The same must be said for the notes of the attorney.

id.

Based upon the foregoing, the attorney-client privilege does and should protect the entirety of the confidential communication between the client and his counsel for the purpose of obtaining legal advice. So long as the client is seeking legal advice, and has not waived the

privilege, the purpose of the privilege can only be served by protecting both the information shared by the client and the advice provided by the attorney. If, as suggested by the Superior Court here, the client's information is protected but the attorney's advice is not, then persons who would otherwise have the need or occasion to seek out legal advice will no longer seek out that advice for fear it will later be made public and even used against them.

Indeed, PDI respectfully submits that the key premise in this issue rests in the recognition that, so long as the client is legitimately and appropriately seeking out legal advice, then it is the entirety of that dialogue which is and must remain confidential. The attorney-client privilege is not about protecting "secret facts" held by a client and then shared with his attorney. When you think about it, other than perhaps the location where the proverbial robber hid the loot, there really are not that many "secret facts" known only to a client, and the attorney-client privilege was not created to protect only those "secret facts". Instead, the attorney-client privilege was meant to foster full and frank communications between a client and his counsel with the certain and reliable confidence that, unless the client were to waive that privilege of confidentiality, the entire discussion will remain confidential in the eyes of the law.

The Superior Court decision in this case essentially eliminates the attorney-client privilege, and that decision calls out for correction by this Court for the good of all of us.

II. If the Attorney-Client Privilege Does Not Encompass the Attorney's Advice Confidentially Provided to the Client, Then The Law Regarding "Advice of Counsel" as Waiving the Privilege Is Meaningless

Although it is admittedly a bit indirect, the fundamental principle that a client can waive the confidentiality of the attorney-client privilege when that client puts the attorneys' advice at issue by asserting "advice of counsel" only makes sense when that legal advice is otherwise protected by the privilege. If, as the Superior Court has concluded, the privilege does not apply to the lawyer's legal advice, then the entire body of law discussing the waiver of the privilege where the client relied upon and asserts an "advice of counsel" defense is reduced to meaningless surplusage.

There are numerous cases decided in both the state and federal courts in this Commonwealth which presume that communications from counsel are protected by attorney-client privilege; the question, instead, being whether that privilege was waived. Rhone-Poulenc Rorer v. Home Indem. Co., 32 F.3d 851 (3d. Cir. 1994); McCrink v. Peoples Benefit Life Ins. Co., 2004 U.S. Dist. LEXIS 23990 (E.D. Pa. 2004); Mueller v. Nationwide Mut. Ins. Co., 31 Pa. D&C 4th 23 (Alleghey Cty. 1996). In Rhone-Poulenc, the Third Circuit Court of Appeals found that merely because an attorney's advice may be relevant to an opposing party's claim, that advice is not subject to disclosure unless the client chooses to waive its privilege. Id., at 863. As the court explained, when that advice is relevant to an opposing party's claim, it should still be the client's choice as to whether to waive the privilege:

> As the attorney-client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be of the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unveiled litigation, the client will have no sense of whether the

> communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.

Id., 864.

Indeed, the Third Circuit's detailed explanation of the "advice of counsel" waiver by a client is premised on the principle that the advice is otherwise protected from any disclosure. As the Court explained:

> There is authority for the proposition that a party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation. For example, a client may waive the privilege as to certain communications with a lawyer by filing a malpractice action against the lawyer. See Wigmore, §2327, at 638. A defendant may also waive the privilege by asserting reliance on the advice of counsel as an affirmative defense. *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992)* (party's claim that its tax position was reasonable because it was based on advice of counsel puts advice in issue and waives privilege); see also, *Hunt v. Blackburn*, 128 U.S. at 470, (client waives privilege when she alleges as a defense that she was misled by counsel). *See generally, E. Cleary, McCormick on Evidence §93, at 343 (3d ed. 1984)*. In an action for patent infringement, where a party is accused of acting willfully, and where that party asserts as an essential element of its defense that it relied upon the advice of counsel, that party waives the privilege regarding communications pertaining to that advice. *Mellon v. Beecham Group PLC, 17 U.S.P.Q. 2D (BNA) 1149, 1151 (D.N.J. 1991); see also, e.g., W.L. Gore & Associates, Inc. v. Tetratec Corp., 1989 U.S. Dist. LEXIS 14245, 15 U.S.P.Q.2D (BNA) 1048, 1051 (E.D.Pa. 1989)* (client waived privilege by asserting reliance upon advice of counsel as an essential element of his defense).
>
> In these cases, the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue. Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by

> disclosing or describing an attorney client communication. *North River Insurance Company v. Philadelphia Reinsurance Corporation, 797 F. Supp. 363, 370 (D.N.J. 1992); Pittston Company v. Allianz Insurance Co., 143 F.R.D. 66, 71 (D.N.J. 1992)*.
>
> * * * *
>
> Finding a waiver of the attorney client privilege when the client puts the attorney's advice in issue is consistent with the essential elements of the privilege. That is, in leaving to the client the decision whether or not to waive the privilege by putting the attorney's advice in issue, we provide certainty that the client's confidential communications will not be disclosed unless the client takes an affirmative step to waive the privilege, and we provide predictability for the client concerning the circumstances by which the client will waive that privilege. This certainty and predictability as to the circumstances of a waiver encourage clients to consult with counsel free from the apprehension that the communications will be disclosed without their consent.

Rhone-Poulec, id., 32 F. 3d at 863-864.

In state court, His Honor Judge Stanton Wettick from Allegheny County has also discussed and explained the "advice of counsel" defense asserted by an insurer as a waiver of the privilege otherwise applicable to the attorney's confidential advice. In Mueller v. Nationwide, 31 D.&C. 4th 23 (Allegheny Co., 1996), the judge explained that when an insurer is asserting that it relied upon the advice of counsel, it must disclose attorney communications, but if it has not taken that position, that advice is still protected:

> I recognize that there will be instances in which an insurance company will contend that it was influenced by the advice of counsel. It may, for example, contend that it acted in good faith because it based its decision on advice of counsel. In this instance, the privilege is deemed to have been waived by the client. A party is not permitted to use the attorney-client privilege as a sword and as a shield. See Minatronics Corp. v. Buchanan Ingersoll P.C., 23 D.&C. 4th 1, 15-21, 143 P.L.J. 228, 233-36 (1995), and cases cited therein. Consequently, if an insurance company is going to raise as a defense to the bad faith claim that it relied upon advice of counsel, the privilege has been waived as to any communications between the insurance company and its counsel regarding the

> underlying claims upon which the bad faith claim is based. Thus, in these cases Nationwide and Erie cannot raise the attorney-client privilege unless they state that they will not be contending that advice of counsel was a factor that influenced the manner in which they handled the insured's claim.

Id., at 32-33 (emphasis added).

If the Superior Court were correct, and the attorney-client privilege only applies to the information provided by the client and not the attorney's advice, there would simply be no need to consider or discuss the "advice of counsel" waiver. Where that is rather obviously not the case, and instead where there is a fully developed body of law surrounding the "advice of counsel" waiver, the very existence of that body of law offers substantial support for the position that the attorney's advice is otherwise privilege and not subject to disclosure.

## III. Pennsylvania's Attorney-Client Statutes Do Not Extinguish the Confidentiality of the Lawyer's Advice to his Client

This whole "issue" of whether the attorney-client privilege applies to the attorney's legal advice seems to have emerged as a question issue based upon the fact that the two Pennsylvania statutory provisions related to witnesses appearing at depositions specifically refer only to the client's information and not the attorney's advice. PDI maintains that those statutory provisions do not repeal or restrict the common law privilege, nor should they be interpreted in such a way that they actually eviscerate the confidentiality they are intended to protect.

The two statutory provisions at issue appear in Sections 5916 and 5928 of the Judicial Code and provide as follows:

> §5916. Confidential communications to attorney.
>
> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, not shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. 42 Pa. C.S.A. §5916.

* * * * *

> §5928. Confidential communications to attorney
>
> 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. 42 Pa. C.S.A. §5928.

This Honorable Court has stated that "[t]his codification is merely a restatement of the common law privilege and its attendant case law interpretations." Commw. v. Maguigan, supra. 511 A.2d at 1333. The Superior Court has recognized that, "[i]n most jurisdictions, including Pennsylvania, the incorporation of the common-law rule into statute has not changed the essentials of the privilege". In re: Gartley, 491 A.2d 851, 858 (Pa. Super. 1985).

Again, PDI respectfully disagrees with the Superior Court's narrow view of this issue, as it necessarily subjects every assertion of the privilege to scrutinizing the attorney's advice in an effort to determine what part of the legal advice contains or reveals "confidential" information from the client and what part does not. Where, again, application of the privilege would turn on that rather slippery case-by-case scrutiny, the inherent uncertainty of those outcomes will have a chilling effect on persons deciding whether or not to seek needed legal advice. Instead, PDI maintains that the statutes explicitly and affirmatively protect the client's confidential communications to the attorney, but they simply make no mention of the attorney's confidential advice given to the client. Moreover, there is no basis under the law to interpret that legislative silence as silently overruling this most basic privilege of confidentiality by silent implication.

The courts of this Commonwealth, including this Court, have long recognized that statutes are never presumed to make changes in the rules and principles of the common law or prior existing law beyond what is expressly declared in that statute. Commw. v. Miller, 364 A.2d 866, 887 (Pa., 1976); see also Thompson v. Commw., Dept. of Highways, 257 A.2d 639,

641 (Pa. Super. 1969). In 2003, this Court reaffirmed that fundamental precept of statutory construction in the case of In re: Appointment of Rodriguez, 900 A.2d 341 (Pa. 2003), explaining that the legislature must affirmatively repeal existing law or specifically preempt accepted common law in order for prior law to be disregarded. As this Court explained,

> Whenever we are called to interpret a statute and determine the legislative intent, the analysis must necessarily begin with the Statutory Construction Act. *1 Pa. C.S. §1921 et seq*. Under that Act an implication alone cannot be interpreted as abrogating existing law. The legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded.
>
> *Metropolitan Property and Liab. Ins. Co. v. Insurance Comm'r of Pa., 525 Pa. 306, 580 A.2d 300, 302 (Pa. 1990); see also Rahn v. Hess, 378 Pa. 264, 106 A.2d 461, 464 (Pa. 1954)*("Statutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions[.]") (citing *Szilagyi et al. v. Bethlehem, 312 Pa. 260, 167 A. 782 (Pa. 1933*); *Gratz v. Insurance Co. of North America , 282 Pa. 224, 127 A. 620 (Pa. 1925)*; *Buradus v. General Cement Prods. Co., 159 Pa. Super. 501, 48 A.2d 883, 886 (Pa. Super. 1946)*("In the absence of express declaration, the law presumes that the act did not intend to make any changes in the common law, for if the legislature had that design they would have expressed it."), *aff'd per curiam on basis of opinion of lower court*, 356 Pa. 349, 52 A.2d 205 (Pa. 1947); accord *United States v. Texas, 507 U.S. 529, 534, 123 L. Ed. 2d 245, 113 S. Ct. 1631 (1993)*("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.")(quoting *Mobil Oil Corp. V. Higginbotham, 436 U.S. 618, 625, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978*)); *Wheaton v. Peters, 33 U.S. 591, 691, 8 L. Ed. 1055 (1834)* (Thompson, J., dissenting)("If a thing is at common law, a statute cannot restrain it, unless it be in negative words."); *but cf. 1 Pa. C.S. §1928*.

*In re: Appointment of Rodriguez*, 900 A.2d at 344-45. Applying that established principle of statutory construction to the two Pennsylvania statutory provisions, they only refer to the preservation of the client's confidential communications to the attorney, and they make no mention of the common law privilege already recognized by this Court as protecting the lawyer's

confidential advice back to the client. Since the statutes do not explicitly refer to or preempt that common law privilege, PDI respectfully disagrees with the Superior Court's restrictive view of the impact of the statutory provisions, , and instead urges this Court to apply the contrary presumption already existing under the law.

## IV. Attorney-Client Privilege Should Apply Even Without any "Secret Facts"

As alluded to in the opening Statement of Interest, PDI's membership consists predominantly of defense counsel and insurance company executives. The preservation of confidential legal advice pursuant to the attorney-client privilege is by no means a plaintiff vs. defendant, or insured vs. insurer issue in the context of civil litigation. It is an issue which pervades all areas of civil litigation, including insurance disputes. Since PDI members are frequently involved in such insurance disputes, whether they are in litigation or not, we are most familiar with the many ways in which this issue can and does arise in that context.

Consistent with the earlier suggestion that the confidentiality which the privilege is designed to protect is the entire dialogue between attorney and client for the appropriate purpose of the client obtaining legal advice, and not the protection of "secret facts" held only by the client, there is one very common instance where that distinction is immistakeably obvious. That is the commonplace instance of either an insurer or an insured seeking out a legal opinion on whether an underlying claim or lawsuit against the insured is or not covered under an insurance policy the insured has in place with his insurer.

By way of example, and just within the last several years, this Honorable Court has gone through the exercise of deciding important insurance coverage cases in order to determine whether an underlying civil claim against an insured is or is not covered under a particular policy. See, e.g., Kvaerner Metals Division of Kvaerner U.S. Inc. v. Commercial Union Ins. Co., 908 A.2d 888 (Pa. 2006); Madison Construction Co. v. Harleysville Ins. Co., 735 A.2d 100 (Pa.

1999); and Mutual Benefit Ins. Co. v. Haver, 725 A.2d 743 (Pa. 1999). Each of these important insurance coverage cases presented difficult and interesting questions, with legitimate arguments on both sides of multiple issues. Each also involved this Court ultimately applying the so-called "four corners rule", where the determination of whether or not there is a duty to defend or indemnify is decided, in the first instance, by comparing the facts appearing on the face of the complaint to the provisions of the policy as written.

For purposes of the attorney-client privilege issue, and particularly the question of whether the attorney's legal advice to the client is within the protection of the privilege, the key point is that there are no secret facts involved in that attorney-client consultation. In the face of an underlying lawsuit against an insured, and especially a commercial insured who may already have established access to counsel, it is perfectly appropriate for insureds and insurers alike to seek out a legal opinion from counsel on whether and to what extent coverage may or may not exist. For insurers and insureds alike, that process would entail sending the complaint and the policy to the selected counsel, and that counsel performing the appropriate legal analysis to formulate his coverage opinion. There are no "secret facts", or even confidential facts in the traditional sense of the word, involved in those communications, but the insurer and counsel both intend that the coverage opinion is a privileged and confidential communication. Were the insured to obtain a similar coverage opinion from counsel, they would justifiably share that same expectation of confidentiality, unless and until either party might choose to waive that privilege in subsequent litigation.

Obtaining confidential insurance coverage opinions in order to guide an insurer's response to a claim against an insured is but one single example of the innumerable instances where the collective public good is served by promoting confidentiality of legitimate legal

consultations. As a society organized under layers of often complicated laws, we should encourage our citizens to seek out legal advice to guide their conduct and decisions without fear that those confidential communications will be made public and possibly be used against them by their adversaries. We do not encourage those consultations by protecting only half of the discussion, and this Court is urged to reaffirm its earlier holdings by reversing the Superior Court in this case and ruling that the attorney-client privilege includes the attorney's legal advice confidentially communicated back to the client.

## CONCLUSION

For all of the reasons set forth herein, *amicus curiae* Pennsylvania Defense Institute urges this Court to hold that the common law attorney-client privilege includes the attorney's legal advice confidentially communicated to the client.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, R. Bruce Morrison, hereby certify that two true and correct copies of the foregoing Brief for Plaintiffs-Appellants were served by first class mail, postage prepaid, to the following counsel at the addresses shown:

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