

Contact: Marcy Mallory and Jeff Gingerich, Pennsylvania Bar Association Communications, 800-932-0311, communications@pabar.org

Pennsylvania Bar Association Files Amicus Brief on Attorney-Client Privilege in Pennsylvania Turnpike Commission Case

HARRISBURG (Sept. 20, 2012) — The Pennsylvania Bar Association has filed an amicus curiae brief in a case arising out of an ongoing grand jury investigation of the Pennsylvania Turnpike Commission by the Pennsylvania Office of Attorney General (OAG). The PBA brief addresses whether the Commission and its employees are entitled to the protection of the attorney-client privilege. The PBA urged the Supreme Court to proceed with caution in addressing the OAG's claim that privilege has been waived by the state's Commonwealth Attorneys Act (CAA) for all communications between state employees and both staff counsel and outside counsel to commonwealth agencies.

In *In re Thirty-Third Statewide Investigating Grand Jury*, the state bar association yesterday called upon the Pennsylvania Supreme Court to overrule an April 2012 ruling denying the turnpike commission's motion for an order upholding their attorney-client privilege. The ruling accepts the OAG's argument that the CAA allows the office "the right to access at all times the books and papers of any commonwealth agency necessary to carry out its duties," hence *waives* the attorney-client privilege for all state agencies and their employees from whom the OAG requests documents.

The PBA urged the Supreme Court to reject the theory advanced by the Office of Attorney General that the Commonwealth Attorneys' Act abolishes the privilege entirely whenever the Office of Attorney General seeks access to communications between government officials seeking the advice of either inside or outside counsel.

"The Pennsylvania Bar Association has hundreds of members who are employed by state and local government agencies," explained PBA President Thomas G. Wilkinson Jr. "The PBA is vitally interested in this important appeal involving the scope of attorney-client privilege. The PBA Board of Governors unanimously authorized the participation of the PBA as amicus curiae in this appeal that directly affects the ability of lawyers to practice law in this commonwealth."

The brief was prepared under the direction of the PBA Amicus Curiae Brief Committee chaired by James C. Sargent Jr. of -Lamb McErlane PC. The Philadelphia Bar Association also participated in the brief.

The brief took no position on whether the particular communications at issue in this case ultimately are protected by privilege. However, it urged the Supreme Court to remand the case to the lower court with instructions to conduct an *in camera* review of any privilege log submitted for any purposes of assessing whether the attorney-client privilege was, in fact, satisfied as to the documents at issue.

The amicus brief addressed the question: "Is it better to have government officials/employees be fearful of obtaining legal advice because their communications with counsel are no longer privileged, or to have those officials/employees feel free to seek legal advice based on candid discussion, knowing that they are entitled to invoke the long standing attorney-client privilege?"

According to the brief, one of the key premises of the privilege, accepted in the Supreme Court's recent decision in *Gillard v. AIG Insurance Company*, 609 Pa. 65, 15 A.3d 44 (2011) and in many other decisions, is that the privilege serves to encourage clients to seek the confidential legal advice from both inside or outside counsel as to compliance with the client's legal obligations, including any governing rules and regulations, and no new rule should serve to discourage or chill that desirable policy.

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“Lawyers help clients get to the ‘right’ answer and do the ‘right’ thing and of course are obliged to counsel clients to comply with governing law and not engage in criminal conduct,” explained Wilkinson. The brief also quotes Professor Paul R. Rice, a leading expert and author of treatises on the attorney-client privilege, as stating: "If confidentiality cannot reasonably be anticipated, the decision to limit the government's privilege will have destroyed the privilege by destroying its foundation."

A copy of the amicus brief is attached.

Founded in 1895, the Pennsylvania Bar Association strives to promote justice, professional excellence and respect for the law; improve public understanding of the legal system; facilitate access to legal services; and serve the 28,000 lawyers who are members of the association.

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Source: Pennsylvania Bar Association, 100 South Street, Harrisburg, PA 17108