

Work Product Privilege Outweighs Broad Expert Discovery

Madeline M. Sherry, Esquire and Stephen J. Finley, Jr., Esquire
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In *Barrick v. Holy Spirit Hospital*, 2014 Pa. LEXIS 1111 (Apr. 29, 2014), a divided Pennsylvania Supreme Court left in place a decision of the Pennsylvania Superior Court creating “a bright-line rule denying discovery of communications between attorneys and expert witnesses.”

Barrick involved a defense request for records from the plaintiff’s treating physician, who had also been designated as an expert. Plaintiff’s physician responded to a series of subpoenas by producing the requested medical records, but objected to production of “certain records … that pertain to [plaintiff] but were not created for treatment purposes.” The defense moved to enforce the subpoena and, after conducting an *en camera* review, the Court of Common Pleas granted the motion.

An appeal followed to the Pennsylvania Superior Court. A three judge panel affirmed the trial court’s order directing compliance with the subpoena. However, an *en banc* panel of the Superior Court held the records relating to the physician’s service as an expert witness were “beyond the permissive scope” of Rule 4003.5, which governs discovery of the “facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.”

The Pennsylvania Supreme Court was evenly split in *Barrick*, thus leaving in place the Pennsylvania Superior Court’s *en banc* decision precluding discovery of communications between an expert and an attorney. Justice Baer’s Affirming Opinion and Justice Saylor’s opinion to reverse noted that the interplay of Pennsylvania discovery rules favors both liberal discovery and protection of the attorney work privilege. The three Justices writing to affirm found in favor of protecting the attorney work product privilege and precluding discovery of attorney-expert communications.

Justice Saylor, writing in favor of reversing the Superior Court’s *en banc* opinion, held “purely factual or other information - such as evidence and scientific doctrines that an expert may consider when forming an opinion - that does not represent core attorney work product, although contained within communications between counsel and an expert witness, does not fall within Rule 4003.3’s protective scope.” The Reversing Opinion took particular issue with the Superior Court’s holding that “communications from an expert to an attorney are *per se* undiscoverable” and “overlooked the possibility that some of the correspondence might be partly or wholly free of attorney work product...”

As has been the case with recent Pennsylvania appellate court precedent, see, e.g., *Cohen v. Moore Becker. P.C., et. al.*, No. 913 WDA 2012 (Pa. Super. Ct. Feb. 10, 2014), the three Affirming Justices were concerned about the practical effects of their decision. The Affirming Opinion noted the increased time and expense associated with requiring frequent motion practice and regular *en camera* review of potentially privileged

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attorney-expert communications. The Affirming Justices noted that attorney-expert correspondence will rarely contain either purely work product or purely factual information. Rather, “most correspondence between counsel and an expert witness will necessarily entail substantial overlap and intermingling of core attorney work product with facts which triggered the attorney’s work product, including the attorney’s opinions, summaries, legal research, and legal theories.” Requiring trial courts to parse out work product from non-privileged portions of the communications would result in needless disputes, increased cost and added burden on trial courts. “[W]e conclude that attempting to extricate the work product from the related facts will add unnecessary difficulty and delay into the discovery process.”

On the other hand, the three Justices who favored reversal thought these practical considerations were overstated. The Reversing Opinion suggested that where a communication contains work product and non-privileged material, “both sets of policy objectives are served if that portion of the document consisting of core work product is protected, while the remainder is subject to discovery.” The Reversing Opinion dismissed any concern about frequent *en camera* review, noting that the process used for resolving disputes over work product reflected in attorney-expert communications would mirror the process employed when other privileges are implicated. Nevertheless, the fact that the subpoena at issue in the *Barrick* case was served more than five years before the Supreme Court opinion suggests the Affirming Justices concern about added expense and delay is valid.

The Pennsylvania Supreme Court decided the *Barrick* case against the backdrop of a pending amendment to the Pennsylvania Rules of Civil Procedure. Prior to the Pennsylvania Supreme Court hearing argument in *Barrick*, the Pennsylvania Supreme Court Civil Rules Committee proposed an amendment to Pennsylvania Rule of Civil Procedure 4003.5 (Discovery of Expert Testimony. Trial Preparation Material). The proposed amendment is still pending and provides:

- (4) A party may not discover the communications between another party’s attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) regardless of the form of the communications.

The proposed amendment to the Pennsylvania Rules would bring Pennsylvania practice in line with the Federal Rules of Civil Procedure, which were amended in 2010 to prohibit discovery of attorney-expert communications.

The Affirming Opinion noted that the amendment to Rule 4003.5 “would unambiguously embrace the bright line rule denying discovery of all attorney-expert communications.” While the three justices favoring reversal maintained that there was an insufficient record regarding the purpose of the amendment, the Affirming Opinion recognized that the commentators to the rule determined the “current practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert.” With the Federal Rules now precluding discovery of attorney-expert communications,

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and some record to suggest that attorney-expert communications are not routinely discovered in Pennsylvania, the Affirming Justices may have sought to resolve this issue to conform with the current practice and the prevailing view on this question.

There is a legitimate concern that the decision in *Barrick* creates a state of affairs that is over protective of the work product privilege without affording due consideration to the liberal discovery standard embodied in the Pennsylvania Rules of Civil Procedure. However, evidentiary privileges, whether the attorney-client privilege, the work product privilege or the spousal privilege, are based upon policy considerations, not questions of relevance. Statements made by a client to his or her attorney, for example, might be highly relevant, but are shielded from discovery for sound policy reasons. Similarly, sound policy reasons favor broadly protecting attorney work product, even at the expense of Pennsylvania's otherwise liberal discovery standard.

Pennsylvania's work product doctrine now clearly extends to all attorney-expert communications. In order to fully discover the facts known and opinions held by an adverse expert, practitioners should consider, and fully utilize, the tools available to discover the basis for an expert's opinion. Certainly, detailed expert interrogatories as authorized by Rule 4003.5 should be served. In addition, litigants should more frequently request leave to depose an opposing expert. To this end, Pennsylvania Courts should consider relaxing the standard for allowance of expert depositions. Greater use of expert depositions would be a significant step toward addressing the concern that precluding discovery of attorney-expert communications hampers the justice system's truth seeking function. Moreover, the work product doctrine is not absolute. Where facts known to an expert cannot otherwise be discovered despite diligent efforts, such as when an attorney, rather than an expert, undertakes all pertinent investigation and analysis, the work product doctrine may nevertheless permit discovery of otherwise privileged communications under *Barrick*.

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