

Communications Between Attorney and Testifying Expert Are Discoverable in Pennsylvania

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Publication Date: October 06, 2010

Addressing an issue of first impression in Pennsylvania, the Pennsylvania Superior Court recently concluded that an attorney's communications with a testifying expert are discoverable. This important decision puts Pennsylvania law squarely at odds with the newly amended Federal Rule 26(b)(4), set to take effect December 1, 2010, which prohibits discovery of drafts of an expert's reports as well as communication between counsel and the expert. Now, as much as ever, it is critical to understand the venue-specific rules on communications with experts.

In *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, No. 1856 MDA 2009, 2010 PA Super 170 (Pa. Super. Sept. 16, 2010), Carl Barrick claimed to be injured when the chair he was sitting on in a hospital cafeteria collapsed. Barrick was treated by Dr. Thomas Green, whom plaintiff's counsel also identified as an expert. In discovery, plaintiff's counsel produced the medical treatment records but, citing the privilege afforded attorney-work product, refused to produce communications between plaintiff's counsel and Dr. Green. Following an in camera review, the trial court concluded that the communications between counsel and the expert were discoverable.

On appeal, the Pennsylvania Superior Court affirmed, finding that "if an expert witness is being called to advance a party's case-in-chief, the expert's opinion and testimony may be impacted by correspondence and communications with the party's counsel; therefore, the attorney's work-product must yield to discovery of those communications."

The Superior Court recognized tension between two basic state rules of discovery: Rule 4003.3, which limits the scope of production of an attorney's trial preparation materials; and Rule 4003.5, which permits "discovery of the facts known and opinions held by an expert" that are "acquired or developed in anticipation of litigation or for trial." Pursuant to Rule 4003.3, discovery of the mental impressions of a party's representative, including an attorney, formulated in preparation for trial, is prohibited. Pursuant to Rule 4003.5, however, discovery of the "substance of the facts and opinions underlying a testifying expert's conclusions, which ostensibly would include communications with an attorney," is permitted.

Addressing this tension, the Superior Court reflected on a Pennsylvania Court of Common Pleas decision, *Pavlak v. Dyer*, 59 Pa. D. & C. 4th 353 (Pike County 2003), that attempted to thread the needle. In *Pavlak*, the court ordered that communication between counsel and the expert be produced, but allowed for the redaction of any attorney work-product contained in those communications. *Pavlak* also mandated *in camera* review of the original communications.

The Superior Court in *Barrick*, while acknowledging the rationale of *Pavlak*, did not find redaction or *in camera* review to be a practical solution. Instead, the Superior Court adopted a "bright-line" rule: "attorney work-product must yield to the disclosure of the basis of a testifying expert's opinion."

The Superior Court explained that the attorney work-product privilege is not absolute, and that counsel could not have expected his work-product to remain privileged when Rule 4003.5 clearly permits a party to discover the "substance of the facts and opinions to which the expert is expected to testify" as well as the "grounds for each opinion." In order for defendants to "test the weight and veracity" of Dr. Green's conclusions and then properly defend against them, defendants were entitled to discover whether counsel influenced Dr. Green's opinions, and whether counsel directed Dr. Green to focus on or disregard any particular facts or reach specific conclusions. *In camera* review is unnecessary since communications between counsel and a testifying expert are not protected by the attorney work-product privilege.

The practical effect of this decision is clear: Counsel in Pennsylvania state court should tread lightly in communications with testifying experts. But two caveats remain unaffected by the Superior Court's decision. First, counsel may have privileged communications with a consulting expert, as opposed to a testifying expert, although this practice can be cumbersome. Second, the Superior Court decision in *Barrick* still leaves the door open for parties to enter into a written agreement prohibiting discovery of communications between counsel and a testifying expert.

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