



VOLUME 16 | NUMBER 3 | 2015

TRANSPORTATION LAW UPDATE



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Amendments to Expert Discovery



David R. Chludzinski

Within the past year, a new amendment to the Pennsylvania Rules of Civil Procedure has gone into effect regarding the discovery and disclosure of communications between an attorney and an expert. Following the landmark judicial decision in *Barrick v. Holy Spirit Hospital of Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014), the Pennsylvania Supreme Court has adopted and approved a rules change to Pa.R.C.P. 4003.5.

Barrick involved an appeal from a trial court order granting enforcement of a subpoena in which the defendants sought production of records from a medical doctor, serving dual roles as a treating physician and an expert witness on behalf of the plaintiff. The lawsuit alleged damage for physical injuries sustained when a cafeteria chair at the Holy Spirit Hospital collapsed. Plaintiff's treating physician had produced certain records for defense counsel pursuant to a subpoena; however, plaintiff's counsel limited production on a second document request, as the same physician had also been designated as a testifying expert.

Upon defendants' motion to enforce the subpoena, the trial court adopted a rule favoring full discovery and ordered that full disclosure was required. Although the decision was made following an *in camera* review by the trial court, the Pennsylvania Supreme Court later took umbrage with the lack of any analysis or application by the trial court regarding those rules of civil procedure relating to the work product doctrine or discovery of expert witnesses. Additionally, no factual findings were ever made by the trial court to indicate that the defendants had shown cause to seek expert discovery not generally permitted by the Pennsylvania Rules of Civil Procedure.

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On appeal, a three-judge panel of the Superior Court affirmed the trial court's decision and concluded that defendants were entitled to discovery which would allow them to see if the opinions and conclusions of an expert were shaped or molded by counsel. This decision appeared to brush up against the dictates of the work product doctrine. Accordingly, following this decision, plaintiff filed a petition for further review and the decision by the initial three-judge panel was reversed. In fact, upon reversal, the Superior Court indicated that permitting this discovery would violate the work product doctrine and further, that no cause was shown for this additional discovery not typically permitted by the rules.

Upon further appeal, the Pennsylvania Supreme Court held that communications between an attorney and a testifying expert are protected from discovery by way of the work product doctrine, are not discoverable and thus, created a bright-line rule denying discovery of communications between attorneys and expert witnesses. However, the Supreme Court issued a 3-3 split decision affirming the prior holding of the nine-judge *en banc* panel of the Superior Court, and although the Court acknowledged that it is plausible that communications between attorneys and expert witnesses may not always contain attorney work product, it is preferable to err on the side of protecting the attorney's work product by providing this bright-line rule barring the discovery of attorney-expert communications.

In affirming, the Pennsylvania Supreme Court based its holding on Pa.R.C.P. 4003.3 in conjunction with Pa.R.C.P. 4003.5, which governs discovery of expert testimony for trial preparation material. Overall, the

Supreme Court opined that it is better to protect the attorney-expert communications, because there are other methods opposing counsel can use to obtain discoverable information; for instance, through cross-examination of the witness. The Supreme Court also noted that a party can still obtain further information from the expert by the "cause shown" requirements under Pa.R.C.P. 4003.5(a)(2), but as a general rule, the communications between the attorney and his expert are not discoverable.

With the advent of the amendments to Pa.R.C.P. 4003.5, specifically subsection (a)(4), the bright-line rule discussed in *Barrick* has now been put into writing within the Rule itself. The newly amended text of Pa.R.C.P. 4003.5(a)(4) now reads:

"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) or from whom discovery is permitted under subdivision (a)(3) [dealing with opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial who is *not* expected to be called as a witness at trial] regardless of the form of the communications, except in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law. This provision protects from discovery draft expert reports and any communications between another party's attorney and experts relating to such drafts."

Based upon the text of amended Pa.R.C.P. 4003.5, draft expert reports and any communication between

the attorney and the expert relating to such draft reports are explicitly precluded from disclosure or discovery.

Accordingly, attorneys and experts should feel free and confident to provide such draft reports as necessary and needed, without the concern or worry that these drafts may be discoverable by the other party. Additionally, this Rule provides a further safety net that almost all communication between an attorney and his/her expert will not be discoverable to the other party.

Of course, the one caveat that cannot be forgotten is the exception contained within the rule “except in circumstances that will warrant the disclosure of privileged communications under Pennsylvania law.” However, this will likely be a very high standard to meet in order to obtain discovery; for instance, conversations between counsel and his or her expert which could be considered illegal or unethical.

Additionally, while not easily discernible within the text

of this Rule, the Explanatory Comment also reminds us that section (a)(1)(B) of Rule 4003.5 requires the expert to “state the substance of the facts and opinions to which the expert is expected to testify and summary of the ground for each opinion.” The Explanatory Comment also states that if facts or data, which the expert considered, were provided by counsel, or if the expert relied on the assumptions provided by counsel, they must be included in the expert report.

Accordingly, even with the new amendments to Pa.R.C.P. 4003.5(a)(4), the expert is still required to set forth in his or her expert report any facts, opinions or assumptions provided to him or her by counsel.

Thus, counsel should be cognizant in providing any assumptions or opinions to the expert, as that information will still be required to be disclosed by way of the actual expert report. However, the new amendments to Pa.R.C.P. 4003.5 should be seen as a protection and comfort when corresponding and speaking with experts.

David R. Chludzinski concentrates his practice on the defense of commercial motor vehicles and their insurers. David earned his law degree from the Dickinson School of Law at Penn State University. While attending law school, he was a Comments Editor on the *International Law Review* and he received the C.A.L.I. Award for advanced pre-trial advocacy. He earned his Bachelor of Arts degree, *cum laude*, from Boston College.

David is admitted to practice in Pennsylvania and in the U.S. District Courts for the Eastern, Middle, and Western Districts of Pennsylvania. He was selected as a “Pennsylvania Rising Star” by Super Lawyers and *Law & Politics* Magazine in 2012, 2013, 2014 and 2015. Rising Stars are the top 2.5 percent of attorneys in Pennsylvania who are 40 years old and younger or have been in practice for 10 years or less.

David was elected to a three-year term on the Allegheny County Bar Association’s Civil Litigation Section Council in June 2015.

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NEW HARRISBURG ASSOCIATE



Robert J. Aldrich III

Robert J. Aldrich III has joined the firm as an associate in our Harrisburg office. He concentrates his practice in the area of commercial motor vehicle defense.

Robert earned his J.D., *magna cum laude*, from Western Michigan University Cooley Law School in 2013. He served as Senior Associate Editor of the *Law Review* and the *Journal of Practical and Clinical Law*. While attending law school, Robert served as a judicial intern for the United States Court of Appeals for the Sixth Circuit, the Michigan Court of Appeals, and the Supreme Court of Pennsylvania. He also served as a law clerk for a private law firm in Okemos, Michigan.

Robert earned a B.S. degree in Spanish from the Pennsylvania State University in 2009.

After law school, he served as a judicial law clerk to the Honorable J. Michael Eakin, Supreme Court of Pennsylvania, from January 2014 through March 2015. He also served as a judicial law clerk to the Honorable Margherita Patti Worthington, Monroe County Court of Common Pleas, Stroudsburg, Pennsylvania, from September through December 2013.

Robert is admitted to practice in Pennsylvania, as well as the United States District Court for the Middle District of Pennsylvania.

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