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To submit ideas for articles, please contact editor Bridget Gillespie at (412) 288-4017 or send her an e-mail at bgillespie@psmn.com.

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Drawing a Bright-line Rule on Discovery of Attorney-Expert Communications: Should All Work Product be Off Limits?

By Thomas G. Wilkinson Jr. and Thomas M. O'Rourke

I. Introduction

Consider the following scenario: You have been retained in a personal injury case and your opponent has hired a medical expert to testify at trial. In response to a discovery request seeking materials from the expert's file, your opponent turns over certain documents but withholds "letters and emails" exchanged with the expert. The basis for this nondisclosure is that the correspondence is protected "attorney work product."

In reviewing the expert's report, you notice that she listed numerous "facts" in support of her opinion, without *indicating* that she reviewed the complaint, depositions or any other discovery. You suspect that your opponent's "letters and emails" supplied the factual basis for the expert's opinion and also significantly shaped her conclusions. Indeed, when you raise the issue with the court, your opponent acknowledges as much, conceding that portions of the "letters and emails address my strategy as to how to frame the expert's testimony." Are you entitled to these materials or are they protected work product?

Thomas G. Wilkinson Jr.

Thomas M. O'Rourke

The Pennsylvania Supreme Court has pending before it an appeal and a proposed amendment to the Rules of Civil Procedure that have significant bearing on this question. On Aug. 31, 2012, the Supreme Court granted allocatur in *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity* to determine whether the Superior Court's decision "improperly provide[d] absolute work product protection to all communications between a party's counsel and their trial expert[.]" 52 A.3d 221 (Pa. 2012). As *Barrick* was pending before the Superior Court, the Civil Procedural Rules Committee proposed an amendment to Rule 4003.5, which would, if approved, prohibit dis-

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Thomas G. Wilkinson Jr. (twilkinson@cozen.com) is a member and Thomas M. O'Rourke (tmorourke@cozen.com) is an associate in the Commercial Litigation Department of Cozen O'Connor in Philadelphia. Wilkinson is also the president of the Pennsylvania Bar Association and a past chair of the Civil Litigation Section.

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covery of "communications between another party's attorney and any expert who [the party expects to call as a witness at trial]."[1]

Both the Superior Court's *Barrick* decision and the proposed amendment to Rule 4003.5 proffer a bright-line rule that prohibits discovery of attorney-expert communications. This article takes the position that it would be preferable to adopt a more balanced approach, drawn from the recent amendments to the Federal Rules of Civil Procedure governing expert discovery. This article proceeds in four parts. First, we summarize the proceedings leading to the Superior Court's *Barrick* decision, highlighting the "tension" between the applicable Pennsylvania rules and the countervailing policy concerns. Second, we review the Rules Committee's Proposed Amendment to Rule 4003.5. Third, we provide an overview of the current approach to attorney-expert communications under the federal rules. Fourth, we critique the *Barrick* decision and the proposed amendment to Rule 4003.5, with the suggestion that *Barrick* should be vacated at least in part, and the proposed amendment should be modified to expressly allow the limited discovery permitted in the federal rules as recently amended.

II. *Barrick*: One Case, Two Opposing Bright-line Rules

On June 17, 2007, Plaintiffs Carl J. and Brenda L. Barrick brought suit against Holy Spirit Hospital of the Sisters of Christian Charity and Sodexho Management Inc., Sodexho Operations LLC and Linda Lawrence (collectively, Sodexho). According to plaintiffs, Mr. Barrick was visiting a hospital cafeteria operated by Sodexho when the chair he was sitting in collapsed and caused him to sustain a severe spinal injury. Mr. Barrick was treated for his injury by his orthopedic treating physician, Dr. Thomas Green, who was later designated as an expert witness in the case. *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity,* 32 A.3d 800, 803 (Pa. Super. 2011).

Sodexho served a subpoena upon Green's office, Appalachian Orthopedic Center (Appalachian), requesting a "[c]omplete copy of the entire medical chart/file regarding" Mr. Barrick. *Id.* The request was initially fulfilled, but when Sodexho asked for an updated medical file a year later, Appalachian withheld certain records that "pertain to Mr. Barrick but were not created for treatment purposes[.]" *Id.* Sodexho filed a motion to enforce its subpoena, to which both Appalachian and plaintiffs responded. The crux of each response was that the withheld documents are: 1) "work product" under Rule 4003.3; and 2) beyond the scope of Rule 4003.5, which as a general matter, limits expert discovery to interrogatories requesting the expert's identity and a statement of "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." *Id.* at 804.

Common Pleas Court Decision: All Communications are Discoverable

The Court of Common Pleas of Cumberland County held a hearing on Sodexho's motion to enforce and performed an *in camera* inspection of the documents at issue. *See Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity,* No. 07-3604, 2009 WL 5841789 (Pa. Com. Pl., Cumberland County, Dec. 15, 2009). The court described the documents as "correspondence" between plaintiffs' counsel and Green, which involved "discussion of the factual background of the case and the circumstances under which the plaintiff suffered injury." *Id.* In addition, the court quoted plaintiffs' counsel, who characterized the documents as "communications between Dr. Green and counsel for Plaintiffs respecting the role of Dr. Green as an expert witness for Plaintiffs." *Id.*

The common pleas court determined that the communications were discoverable and granted Sodexho's motion to enforce. In reaching this conclusion, the court recognized the "tension" between Rules 4003.3 and 4003.5, particularly when attorneys discuss their legal strategy with expert witnesses. *Id.* (quoting *Pavlak v. Dyer,* 59 Pa. D. & C.4th 353, 355 (Pa. Com. Pl. 2003). While Rule 4003.3 protects "the mental impressions of a party's attorney," Rule 4003.5 "allows discovery of 'facts known and opinions held' by testifying experts including the grounds for each opinion[.]" *Id*. In an attempt to alleviate this "tension," the court looked to *Pavlak v. Dyer,* a decision rendered by the Pike County Court of Common Pleas.

In *Pavlak*, defendant sought medical records and documents from plaintiff's expert, but was met with a work product objection as to "correspondence sent to his expert witness[.]" *Id.* The *Pavlak* court performed "an exhaustive review of Pennsylvania law on the subject," and concluded that "that there was no controlling authority directly on point." *Id.* Looking to other jurisdictions, the court found some cases applying a "bright-line disclosure" rule for all attorney-expert communications and other cases allowing discovery but only as to the portions of the communications that did not contain work product. *Id.* at 357-58 (internal quotations omitted). The *Pavlak* court recognized that a bright-line rule would promote "litigation certainty," but was convinced that such an approach would undermine Rule 4003.3 and Pennsylvania cases protecting an attorney's "opinion work product." *Id.* at 357-58, 362-63

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(citing *Dominick v. Hanson,* 753 A.2d 824, 826 (Pa. Super. 2000)). *Pavlak,* therefore, adopted "a balancing approach," whereby "factual allegations reviewed by an expert are discoverable but opinion work product is still protected." *Id.* at 367.

The *Barrick* trial court rejected *Pavlak's* "balancing approach," primarily because it would be difficult to apply. The court was "concerned" about adopting a rule that would require *in camera* review to "insure attorney compliance," and "note[d] that it is seldom possible to discern where the legal theory of counsel ends and the medical opinion being sought from the expert begins."[2] *Barrick*, No. 07-3604, 2009 WL 5841789. In addition, the court observed that:

> [I]n many of these cases, the documents in the expert's file will include correspondence not only to the expert but copies of correspondence from the expert as well. The responses of the expert will, of necessity, allude to the legal theories in correspondence from counsel. Any attempt to redact this information becomes impracticable.

Id. To avoid any practical or administrative difficulties, the court adopted a "bright-line rule," which rendered all of the correspondence discoverable. Although the court did "not quarrel with the proposition that an attorney's work product is not discoverable[,]" it held that "where an expert is being called to advance a plaintiff's case in chief and the nature of the expert's testimony may have been materially impacted by correspondence with counsel, such correspondence is discoverable." *Id.*

The Superior Court's Decision: All Communications are Protected

On Sept. 10, 2010, a three member panel of the Superior Court affirmed the decision of the court of common pleas. *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity,* 5 A.3d 404 (Pa. Super. 2010) (depublished). The panel reconciled the "conflict" between rules 4003.3 and 4003.5 by holding 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 doctrine must yield to discovery of those communications." *Id.*

Plaintiffs filed an application for re-argument en banc, which was granted. On Nov. 23, 2011, in an 8-1 decision, the Superior Court parted with the panel's decision and reversed the Cumberland County court, holding that the attorney-expert communications were not discoverable under the Pennsylvania Rules of Civil Procedure. *Barrick*, 32 A.3d 800, 813 (Pa. Super. 2011). The Superior Court offered two separate justifications for its holding.

First, the Superior Court held that Sodexho's request for attorney-expert communication was beyond the scope of Rule 4003.5, which "exclusively" controls expert discovery. *Id.* at 809-10. The court initially noted that Rule 4003.5(a)(1) allows a party to submit interrogatories to "any other party" that request that the party identify each of their expert witnesses and have each expert "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." *Id.* (quoting Pa. R. Civ. P. 4003.5). Beyond this, any discovery request regarding a testifying expert "must be channeled through the 'cause shown' criterion" of 4003.5(a)(2). *Id.* at 810-11 (quoting *Cooper v. Schoffstall,* 905 A.2d 482, 521 (Pa. 2006)). The court determined that Rule 4003.5(a)(2) required a party to "show cause and acquire a court order *before*" making any such request.[3] *Id.*

Applying this interpretation, the court determined that Sodexho's discovery request was improper. Initially, rather than seeking interrogatory responses from plaintiffs, Sodexho issued a subpoena requesting documents directly from plaintiffs' expert. *Id.* at 810. The Superior Court also found that Sodexho's request for "correspondence between an opposing party's attorney and the expert witness retained by that party falls outside of the express language" of the rule. Specifically, the court found that these communications did not concern "the facts and opinions to which the expert is expected to testify" or the grounds for the expert's opinions. *Id.* Sodexho, therefore, was not entitled to the discovery, because it failed to show "cause" under 4003.5(a)(2) before making its request. *Id.* at 811.

Second, the Superior Court held that the expert correspondence is protected "work product" under Rule 4003.3. Rule 4003.3 provides, in pertinent part, that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." *Id.* (quoting Pa. R. Civ. P. 4003.3). The court explained that the "underlying purpose of the work-product doctrine is to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." *Id.* at 812 (quoting *T.M. v. Elwyn, Inc.,* 950 A.2d 1050, 1062 (Pa. Super. 2008)).

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The court explained that the work-product doctrine "*only* surrenders to the need for discovery when the attorney's work product itself becomes relevant to the action[,]" and concluded that:

> [A]ny mental impressions or legal analyses posited by [Plaintiffs'] counsel and contained within the correspondence constitute attorney work product. Pa.R.C.P. 4003.3. We acknowledge that an in camera review may be necessary in order to determine precisely what aspects of the correspondence fall within the parameters of the attorney work-product doctrine. Nevertheless, to the extent that correspondence between [Plaintiffs'] counsel and [the expert] constitutes attorney work product under [Rule] 4003.3, we conclude that it is not discoverable under the Pennsylvania Rules of Civil Procedure."

Id. at 812-13.

The court also noted that Sodexho would not have been able to show "cause" to justify discovery of the correspondence under 4003.5(a)(2). Specifically the court concluded that the correspondence, while addressing relevant "subject matter," is not "itself ... relevant to this action." *Id.* at 813-14. Therefore, the work-product protection would not yield to discovery.

Judge Mary Jane Bowes filed a concurring and dissenting opinion. Judge Bowes concurred that Rule 4003.5 was violated, but dissented as to the majority's expansive application of the work-product doctrine. *Barrick*, 32 A.3d at 814-15. Judge Bowes reviewed the correspondence and, like the common pleas court, found attorney "work product" as well as "facts" and "correspondence from the expert to the attorney[.]" *Id.* at 817. For Judge Bowes, factual matter and the expert's work product were not protected from disclosure. For this reason, she was unable to "reconcile" the majority's acknowledgement that "*in camera* review may be necessary" with its ultimate holding that all the materials are protected. Specifically, Judge Bowes noted that:

> In holding that Rule 4003.3 work product provides blanket protection of all correspondence between the attorney and his expert on the facts herein, including all properly discoverable material included therein, the majority fails to serve both the letter and the spirit of that rule. Such an interpretation would seem to undermine our High Court's intent to carefully circumscribe the protection afforded an attorney's trial preparation in favor of broader discovery. Moreover, by [implicitly] treating an expert witness as a party representative for purposes of Rule 4003.3 work-product, the majority abandons any pretense of expert objectivity and independence.

Id. at 818. While Judge Bowes recognized that the work-product doctrine "provide[s] an attorney with intellectual room to ruminate about his strategy and thoughts on his client's case," she concluded that the court must also "be mindful of the equally important goal of advancing the truth-seeking process during the course of litigation." *Id.* at 818.

On Aug. 31, 2012, the Pennsylvania Supreme Court granted allocatur on the primary question raised by Judge Bowes: "Whether the Superior Court's interpretation of [Rule] 4003.3 improperly provides absolute work product protection to all communications between a party's counsel and their trial expert?" *Barrick*, 52 A.3d 221 (Pa. 2012).

III. The Proposed Amendment of Rule 4003.5

While *Barrick* was pending before the Superior Court, the Civil Procedural Rules Committee proposed an amendment to Rule 4003.5. In pertinent part, the proposed amendment adds a new "subdivision (a)(4)," which provides that: "A party may not discover the communication between another party's attorney and any expert" who the attorney expects to call as a witness at trial.[4] Under the committee's proposal, this new subdivision limits all other discovery under the Rule. *Id.* (reflecting that (a)(4) limits discovery of the "substance of the facts and opinions to which the expert is expected to testify," the "summary of the grounds for each [expert] opinion," and "any further discovery" that might be available for "cause shown").

The Rules Committee offered an explanatory comment in support of the proposed amendment, which referenced the recent amendments to the Federal Rules of Civil Procedure. Specifically, the comment explains that this amendment to the federal rules:

> [P]rohibit[s] the discovery of communications between an attorney and his or her expert witness unless those communications (1) relate to compensation for the expert's study or testimony, (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

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Proposed Amendment, explanatory cmt. (citing Fed. R. Civ. P. 26(b)(4)(C)).

The committee explained that its proposal "follows the federal rule in explicitly prohibiting the discovery" of attorney-expert communications, and noted that "[c]urrent practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert." The committee, however, declined to adopt the federal rule's express "exceptions" due to "the differences between the federal law and the Pennsylvania rules governing the scope of discovery of expert testimony."

Specifically, the committee asserted that: 1) the exceptions "simply describe some of the matters that may be covered in a[n] [expert] deposition," which are not permitted under the Pennsylvania rules, absent good cause; 2) unlike in federal court, issues "regarding the compensation of experts have traditionally been addressed at trial; there is no indication that this procedure is not working well[;]" and 3) Rule 4003.5(a)(1)(b) already requires the expert to "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the ground[s] for each opinion," thereby making the federal exceptions pertaining to "facts and data" and relevant "assumptions," redundant. *Id.*

The committee solicited comments on the proposed amendment to Rule 4003.5 and then formally submitted the proposal to the Pennsylvania Supreme Court for consideration. Unfortunately the contents of the formal recommendation are deemed confidential, unlike the practice in many other states. We assume for purposes of this article that the recommended rule change pending before the Supreme Court is comparable to the one submitted to the bar for comment in that it generally precludes access to attorney-expert communications.

IV. The Current Approach under the Federal Rules of Civil Procedure

The *Barrick* decision and the Proposed Amendment to Rule 4003.5 both make reference to the 2010 amendments to the Federal Rule 26. Specifically, the Superior Court noted that these amendments "no longer allow[] the discovery of private communications and draft reports from expert witnesses." *Barrick*, 32 A.3d at 808 n.9. The Rules Committee, alternatively, explained that the amendments "prohibited the discovery of communications between an attorney and his or her expert witness," but for three delineated exceptions. The *Barrick* court and the committee did not note that the federal rules, as amended, grant federal courts authority to order discovery of communications between attorneys and expert witnesses beyond the specific "exceptions," where a requesting party can demonstrate a special need for those communications.

2010 Amendments: Limiting Discovery of Attorney-Expert Communications

Effective Dec. 1, 2010, Federal Rule of Civil Procedure 26(b)(4) was amended to rectify perceived problems with expert discovery that arose following the 1993 amendments. Fed. R. Civ. P. 26 Advisory Committee's Note, 2010 Amendments. The 1993 amendments authorized expert depositions and expert disclosures, including, in many instances, detailed expert reports. *Id.* Courts interpreted these new avenues of discovery "as opening the door to ... all communications between counsel and expert relating to the subject matter of the litigation[.]" Gregory P. Joseph, 2010 *Expert Witness Rule Amendments,* Prac. Litigator, 51, 51-52 (Nov. 2010). The trend toward complete disclosure had "undesirable effects." Fed. R. Civ. P. 26 Advisory Committee's Note, 2010 Amendments. Specifically, according to the Advisory Committee:

> Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.[5]

To combat these concerns, Rules 26(b)(4)(B) and (C) were added. Rule 26(b)(4)(B) provides work product protection to the draft of any expert report or disclosure required under Rule 26(a)(2).[6] Rule 26(b)(4)(C) extends work product protection to attorney-expert communications, whether "oral, written, electronic, or otherwise," except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. [7]

Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii) & Advisory Committee's Note, 2010 Amendments.

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A party seeking a draft expert report or attorney-expert communications that fall outside of the exceptions listed in Rule 26(b)(4)(C) may obtain discovery under Rule 26(b)(3)(A). That rule requires a party to "show it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means." If a party makes such a showing, the court may order discovery from the opposing side, provided the court "protect[s] against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation." FED. R. CIV. P. 26(b)(3)(B). This protection "does not extend to the expert's own development of the opinions to be presented[.]"[8]

Furthermore, although an attorney's mental impressions and legal strategies must be "protected" under Rule 26(b)(3)(B),[9] most federal courts recognize that this protection is not absolute and may give way to a party's need for discovery in extraordinary cases.[10] The heightened protection for "mental impressions" has led federal courts to distinguish between "fact" work product and "opinion" or "core" work product.[11] Therefore, while heightened protections apply to "opinion work product," federal courts still maintain some flexibility and discretion to order disclosure of these materials.

Application of the 2010 Amendments

There is still little case law applying the 2010 expert discovery amendments, but the cases that have addressed draft expert reports and attorney-expert communication reflect that the rule has had its intended effect.[12] Federal district courts have generally held that draft reports are not discoverable,[13] but have dealt with attorney-expert communications more flexibly. In dealing with communications, the courts have looked to the nature of the documents at issue in each case and allowed discovery to the extent that they fall within one of the delineated exceptions and do not include opinion work product. Further, where a request for communications falls outside of an exception, courts have looked to the substantial need/undue hardship analysis of Rule 26(b)(3). *See, e.g., Sara Lee Corp. v. Kraft Foods Inc.,* 273 F.R.D. 416, 419-20 (N.D. Ill. 2011) (determining whether communication fits into any of the exceptions and then addressing whether requesting party had a substantial need and could not obtain substantial equivalent without undue hardship).

V. Conflicting Objectives

The Superior Court's *Barrick* decision and the proposed amendment to 4003.5 erect a bright-line rule against discovery of attorney-expert communications. On the surface, there are benefits to this approach, including vast work-product protection, "litigation certainty," lower litigation costs and less court involvement. *See Pavlak v. Dyer,* Pa. D & C.4th 353, 362-64 (Pa. Com. Pl. 2003). However, by promoting attorney "work-product" protection over expert discovery in every case, significant interests will be subverted. As described in Judge Bowes' concurring and dissenting opinion in *Barrick*, courts must also be "mindful of the equally important goal of advancing the truth seeking process during the course of litigation" and "prevent[ing] surprise and unfairness" to the parties. *Barrick*, 32 A.3d at 818.

With these countervailing interests in mind, the Pennsylvania Supreme Court should be reticent to approve the bright-line rule adopted by the Superior Court in *Barrick*, and modify the proposed amendment to Rule 4003.5 in favor of a more balanced approach that recognizes there are circumstances where limited expert discovery may be warranted.

Barrick: An Expanding Work Product Doctrine?

The *Barrick* court held that the attorney-expert "correspondence at issue ... [was] not discoverable[.]" 32 A.3d 800, 813 (Pa. Super. 2011). The court offered Rule 4003.3, which protects the "mental impressions of a parties attorney[,]" as "a separate and independent basis" for its holding, although the communications at issue also included facts and documents produced by the expert. While the Superior Court did note that *in camera* review "may be necessary to determine precisely what aspects of the correspondence" are protected, the opinion also acknowledged that "forcing the disclosure of *any* [of the] communications" would violate Rule 4003.3. *Id.* at 812 (emphasis added).

Rather than providing clarity on this point, the Superior Court ruling injects a new shade of gray. If Rule 4003.3 served as an independent basis for the court's ruling, either: a) attorney-expert correspondence that includes work product is not discoverable, in whole or in part; or b) it was not possible to separate work product from non-work product in this case, so all the correspondence was protected. Either way, significant uncertainty remains as to the scope of the work-product protection granted by the court. In the least, *Barrick* appears to erect a broad-based work-product protection that will often swallow otherwise discoverable evidence. Indeed, both the opinions of the common pleas court and Judge Bowes reflect that the undisclosed correspondence includes "facts" and information generated by the expert. It is unclear how Rule 4003.3 would protect these materials, considering that it is intended to protect attorney work product, "nothing more."[14]

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The *Barrick* decision also leaves little room for trial courts to engage in case-specific review of whether attorney-expert communications should in fairness be disclosed. The *Barrick* court determined that work-product protection "*only* surrenders to the need for discovery when the attorney's work product itself becomes relevant to the action." The court further determined that the "correspondence itself" is not "relevant" to the action because plaintiffs "rely upon the opinions and analyses of the expert witness, not those of their attorneys." *Barrick*, 32 A.3d at 813. This statement will be true in almost every case involving an expert and suggests that work product will never surrender to a party request for access to expert communications.

The *Barrick* court's analysis does not acknowledge that communications exchanged between an attorney and expert may be of substantial relevance to the factfinder.[15] For instance, assume defense counsel sent their trial expert an email, saying "Nice report — just change 'some correlation' to 'reasonable degree of medical certainty' in your conclusion section, to conform to my theory that plaintiff's failure to take his meds was the true root cause of his fall in the nursing home." Further assume the expert reluctantly complied, stating: "Well, I guess that's your call as the attorney, but we will never know for sure." The Pennsylvania rules should not preclude discovery of this email exchange based upon the work-product doctrine. "An adverse party must have the opportunity to show that the opinions an expert was presenting ... as his own had in fact been spoon fed to him." *South Yuba River Citizens League,* 257 F.R.D. 607, 613 (E.D. Cal. 2009) (internal quotation marks omitted).

The *Barrick* court's conclusion on this issue is troubling considering the relationship between work-product protection and the "cause" provision of 4003.5(a)(2). As explained by the *Barrick* court, if a party is unable to overcome work-product protection, he or she is also unable to demonstrate "cause" to seek broader expert discovery. *Id.* at 813-14. The court's holding, if upheld, would unduly constrict the discretion of the lower courts to order expert discovery that touches upon attorney work product.

There is no doubt that the protection afforded to attorney work product under Rule 4003.3 serves an important function. However, the rule should not serve as an impenetrable shield without regard to the other discoverable material that may be imbedded in a document containing work product. In evaluating *Barrick*, the Supreme Court should recognize that some flexibility in approach is necessary, and that courts are capable of striking a balance where appropriate, employing *in camera* review.

Proposed Amendment to 4003.5: The Federal "Rule," without Exception

The Supreme Court should not adopt wholesale the Proposed Amendment to Rule 4003.5 for similar reasons. Although there are differences between the Pennsylvania and federal rules, particularly with respect to the availability of expert depositions and work product protection,[16] both serve to protect an attorney's mental impressions and allow for discovery of the facts known and opinions held by testifying experts. *Compare* Pa. R. Civ. P. 4003.5 *with* Fed. R. Civ. P. 26(a)(2)(B),(4)(C). The proposed amendment to Rule 4003.5 recognizes this common thread by looking to Federal Rule 26(b)(4)(C) for guidance. However, rather than adopting the federal rule amendments circumscribing such discovery, the proposed rule imposes a blanket prohibition on the discovery of attorney-expert communications, without any exceptions. *See Proposed Amendment,* 4003.5(a)(4).

The committee's stated justifications for this blanket approach are less than compelling. Initially the explanatory comment for the proposed rule notes that "[c]urrent practice in Pennsylvania has not been to seek discovery of communications with experts." This conclusory statement is unsupported. It is unclear from whose experience or survey that observation is drawn. It is quite common in commercial litigation practice for counsel to request communications with the expert or access to the expert's file, especially when there is parallel state and federal litigation. Indeed some expert discovery is frequently necessary to explore whether an expert's methodology is generally accepted in the relevant field as the means for arriving at the conclusion the expert will testify to at trial.[17] As compared to federal cases, disclosure of pertinent written attorney-expert communications may be of greater importance in state practice, considering that, "[u]nlike Pennsylvania's rules, ... the federal rules permit depositions of testifying experts as a matter of course." Allen, *supra*, note 16, at 119-20.

In addition, the proposed amendment appears to unjustifiably restrict the scope of Rule 4003.5(a)(2). Currently, Rule 4003.5(a)(2) allows for discovery of information beyond the narrow disclosures specified under 4003.5(a)(1), upon "cause shown." See Pa. R. Civ. P. 4003.5(a)(1)-(2). The proposal would amend (a)(2), providing that "[u]pon cause shown, the court may order further discovery by other means, *subject to* ... the provisions of subdivision (a)(4)." *See Proposed Amendment,* 4003.5(a)(4) (emphasis added). Perhaps this caveat is simply a drafting anomaly. However, if subdivision (a)(4)'s blanket ban on the discovery of attor-

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ney-expert communication restricts access to relief for cause shown under (a)(2), then discovery of attorney-expert communication would be off the table, no matter the situation. The "for cause" relief afforded by subdivision (a)(2) should be fully preserved as a safety valve to secure necessary discovery in the appropriate case, similar to the federal rule's substantial need/undue hardship provision.

For instance, assume an attorney sends an email to his testifying expert offering to pay substantially more than the expert's usual fee if the opinion expressed is stated more favorably to the attorney's client. If there is sound basis to suspect such improper conduct, should the opposing party be left to inquire blindly of the expert concerning his compensation arrangements at trial? It should be within the trial court's discretion to require disclosure of such a fee arrangement or *in camera* review of pertinent communications confirming it under Rule 4003.5.[18] While trial courts may have inherent authority to address this kind of situation if and when it comes to their attention,[19] the Pennsylvania rules should expressly authorize further expert discovery on cause shown and not condition such discretion on adherence to the new blanket prohibition on discovery of expert communications.

The federal rules directly deal with the disclosure of expert fee arrangements. Indeed, Rule 26 carves out an exception allowing discovery of attorney-expert communications that "relate to compensation for the expert's study or testimony." Fed. R. Civ. P. 26(b)(4)(C)(i). However, the explanatory comment to the proposed amendment reflects that this exception was rejected because expert compensation has "traditionally been addressed at trial[,]" and "there is no indication that this is not working well." This is no reason to reject a proposal that will ferret out unethical or questionable fee arrangements. Providing for earlier disclosure of this information upon request will also minimize the (often unnecessary) time at trial devoted to inquiry about the expert's fee arrangements and reduce surprise for the attorneys.

In addition, the proposed amendment fails to include the remaining exceptions set out in the federal rule, which concern "facts or data" considered by the expert and "assumptions" relied on by the expert. Fed. R. Civ. P. Rule 26(b)(4)(C)(ii)-(iii). The reason provided for this omission was that Rule 4003.5(a)(1)(b) already "covers" these exceptions. This is not entirely accurate. For example, assume plaintiff's counsel prepared "draft correspondence" on behalf of his testifying expert on the expert's letterhead, which set forth the factual background, plaintiff's medical history and certain anticipated conclusions or medical opinions. This correspondence would likely be discoverable under the federal exceptions for discovery of "facts or data" supplied and "assumptions." *See In re Asbestos Products Liability Litig.* (No. VI), 830 F. Supp. 2d 1377, 1379 (E.D. Pa. Dec. 13, 2011).

On the other hand, the proposed amendment would not provide for discovery of plaintiff's counsel's "draft correspondence." Rather, counsel's preparation of the entire favorable medical expert report would not likely be discovered except perhaps by way of a thorough cross-exam at trial. In addition, the information contained in the "draft correspondence" is not necessarily covered by the proposed amendment, which simply provides for discovery of "the substance of the facts and opinions to which [the expert] is expected to testify and summary of the grounds for each opinion." If the expert considered, but does not plan to identify in his report what facts or assumptions were supplied and relied upon, do such facts and assumptions have to be disclosed as such? If the proposed amendment is meant to avoid such questions and achieve the same result as the federal exceptions, then it should incorporate the federal rule language. Aside from preventing unnecessary confusion in practice, adopting language consistent with the federal standard will enable litigants and the courts to refer to federal decisions for guidance where appropriate.

Moreover Rule 4003.5 should take a definitive stance on the question whether a draft expert report is a "communication[] between another party's attorney and any expert" who is expected to testify. *Proposed Amendment,* 4003.5(a)(4). Some view every draft of an expert report as a "communication," but what about the draft that is not transmitted by mail, fax or email but rather is simply reviewed in person by the lawyer with the expert? If the intention is to generally immunize draft reports from discovery then the rule as amended should so state.

For these reasons the committee's proposal should be amended in favor of a broader adoption of the recent federal rule amendments governing expert discovery. Specifically, Rule 4003.5 should be amended to incorporate both the general prohibition on discovery of expert communications and the three exceptions contained in Federal Rule 26(b)(4)(C). The amended rule should also not limit the "cause shown" provision of 4003.5(a)(2). This provision should serve as a safety valve, like the substantial need/undue hardship provision of Federal Rule 26(b)(3)(A), so as to permit limited additional discovery of expert communications where warranted. The amended 4003.5 should also expressly state that draft expert reports are not discoverable so as to more clearly convey the Civil Procedural Rules

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Committee's apparent intention that draft reports be off limits.

VI. Conclusion

We started with a hypothetical concerning whether a lawyer's "letters and emails" to his testifying expert were discoverable or protected work product. While perhaps not as satisfying to some practitioners as either a "clearly yes" or "never" answer, the better answer is that certain correspondence should be subject to disclosure in order to prevent unfair surprise at trial and to ensure the integrity of the process. In limited circumstances, discovery of attorney-expert communications will be necessary to enable an opposing party to properly challenge the basis and substance of an expert's testimony or to expose the occasional case of bias or improper collusion. Although this tailored discovery must not infringe on the near absolute protection accorded opinion work product, discovery of attorney-expert communications should not be completely foreclosed by any new procedural rule or court ruling.

After all, discovery is indeed a truth-seeking process; the integrity of that process is paramount and should not give way to expediency or a bright-line rule adopted for ease of administration. Unfortunately, the Superior Court's second effort to articulate a standard in *Barrick* and the Proposed Amendment to Rule 4003.5 both opt in favor of a bright-line rule that essentially immunizes all expert communications as work product, except for the expert's final report.

The Pennsylvania Supreme Court should reject this bright-line approach, and instead opt to borrow from the recent amendments to Federal Rule 26. Those amendments serve to protect legitimate attorney work product, including drafts of expert reports, while also ensuring that pertinent attorney-expert communications are discoverable in three key areas: 1) expert compensation, 2) facts or data considered and 3) assumptions relied upon by the expert. Amending Rule 4003.5 along these lines, while preserving the right of parties to seek further expert discovery where warranted on "cause shown," would reduce unnecessary disparities in federal and state practice and related confusion for practitioners.

[1] *Proposed Recommendation No. 248: Proposed Amendment of Rule 4003.5 Governing Discovery of Expert Testimony, Supreme Court of Pennsylvania Civil* Procedural Rules Committee, 40 Pa. Bulletin, No. 52 (Dec. 25, 2010).

[2] To put its approach into practice, the *Pavlak* court required plaintiff to submit redacted copies of the correspondence at issue to the defendant and both a redacted and clean copy to the court, for *in camera* inspection. 59 Pa. D. & C.4th at 355. "If this *in camera* inspection of the documents reveal[ed] that plaintiff's counsel had inappropriately redacted factual allegations or anything else that [did] not constitute attorney work product," then the court would "forward copies of the unedited letters to defendant's attorney as an immediate sanction." *Id.*

[3] The Superior Court also noted that plaintiffs "point[ed] to adverse policy considerations that would result if discovery under [Rule 4003.5 was] held to include draft reports and private communications of expert witnesses," including "an increase cost of litigation and, consequently, a competitive advantage for wealthier litigants." *Id.* at 808. In support of this argument, plaintiffs cited the recently amended Federal Rules of Civil Procedure, which according to the Superior Court, "no longer allow[] the discovery of private communications and draft reports from expert witnesses," due to these "adverse consequences[.]" *Id*. at 808 & n.9.

[4] *Proposed Recommendation No. 248: Proposed Amendment of Rule 4003.5 Governing Discovery of Expert Testimony,* Supreme Court of Pennsylvania Civil Procedural Rules Committee, 40 Pa. Bulletin, No. 52 (proposed Dec. 25, 2010) [hereinafter "*Proposed Amendment*"].

[5] *Id.; see also Republic of Ecuador v. Bjorkman,* No. 11-cv-01470-WYD-MEH, 2012 U.S. Dist. LEXIS 709, 2012 WL 12755 at *3 (D. Colo. Jan. 4, 2012) ("The Advisory Committee makes clear that the amendments are meant to alleviate the perceived uncertainty and rising costs associated with attorneys' limited interactions with their retained experts as a result of court opinions allowing discovery of an expert's draft reports and of all communications with counsel.").

[6] Specifically, Rule 26(b)(4)(B) provides:

> (B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B)[,which protect against discovery of materials prepared in anticipation of litigation and an attorney or representative's mental impressions, conclusions, opinions, or legal theories,] protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

FED. R. CIV. P. 26(b)(4)(B).

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[7] Rule 26(b)(4)(C) only applies to "communications" involving experts required to produce an expert report. An expert report must be produced by any witness that is "retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2). For example, therefore, a witness who will "both testify as a fact witness and provide expert testimony" is not covered by the attorney-expert communication rules. Fed. R. Civ. P. 26 Advisory Committee's Note, 2010 Amendments; *United States v. Sierra Pacific Indus.,* No. S-09-2445 KJM EFB, 2011 U.S. Dist. LEXIS 60372, 2011 WL 2119078 at *7 (E.D. Cal. May 26, 2011) ("It is clear that the amended rule neither created a protection for communications between counsel and non-reporting expert witnesses, nor abrogated any existing protections for such communications."). Rule 26(b)(4)(B)'s "draft report or disclosures" provision, however, applies to "all witnesses identified under Rule 26(a)(2)(A)," regardless of whether they are required to produce a report.

[8] Fed. R. Civ. P. 26 Advisory Committee's Note, 2010 Amendments.

[9] This rule largely codified *Hickman v. Taylor,* 329 U.S. 495, 505, 512-13 (1947), which first recognized the "work product" doctrine by granting protection to materials prepared or collected by an attorney "in the course of preparation for possible litigation."

[10] *See, e.g., Leviton Mfg. Co. v. Universal Sec. Instruments,* 606 F.3d 1353 (Fed. Cir. 2010) (recognizing that requests for opinion work product are only granted in very rare and extraordinary circumstances) (quotation omitted); *In re Cendant Corp. Sec. Litig.,* 343 F.3d 658, 661-62 (3d Cir. 2003) (directing that opinion work product protection "is not absolute, but requires a heightened showing of extraordinary circumstances"); *In re Grand Jury Investigation,* 599 F.2d 1224, 1230-32 (3d Cir. 1979) (holding that attorney questionnaires and interview memoranda, which touched upon "opinion work product," were entitled to qualified, rather than absolute protection, and finding that "rare" circumstances existed to justify discovery of some of these materials); *In re Murphy,* 560 F.2d 326, 336 (8th Cir. 1977) ("Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the non-discovery of an attorney's mental impressions."); *Hartman v. Banks*, 164 F.R.D. 167, 170 (E.D. Pa. 1995) (holding that "opinions and mental impressions" of a party representative were discoverable because they were directly at issue in an intentional infliction of emotional distress action); *Charlotte Motor Speedway, Inc. v. Intern, Ins. Co.,* 125 F.R.D. 127, 129 (M.D.N.C. 1989) (noting that many court shave recognized narrow exceptions to the rule that opinion work product is immune from production, and holding that discovery was appropriate where counsel's activities and advice were an issue in the case). See generally, Charles Allan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2026 (2010) (collecting cases).

[11] *See, e.g., In re Cendant Corp. Sec. Litig.,* 343 F.3d at 661-62; *Sporck v. Peil, 759 F.2d 312, 316 (3d Cir.1985).*

[12] *See In re Application of Republic of Ecuador,* 280 F.R.D. 506, 512-15 (N.D. Cal. 2012) (performing comprehensive review of Rule 26's application to draft expert reports and communications to expert witnesses, and granting motion to compel in part, noting that Rule 26 strikes a balance between protecting work product and the "search for truth"); *Republic of Ecuador v. Bjorkman,* No. 11-cv-01470-WYD-MEH, 2012 U.S. Dist. LEXIS 709, 2012 WL 12755 at **4-6 (D. Colo. Jan. 4, 2012) (holding that expert's draft reports were undiscoverable, but that "information constituting facts or data considered by the expert" was discoverable under Rule 26(b)(4)(C), even though it was given to the expert in anticipation of litigation); *Dongguk University v. Yale University,* No. 3:08-CV-00441, 2011 U.S. Dist. LEXIS 53751, 2011 WL 1935865 at **1-2 (D. Conn. May 19, 2011) (holding that certain redacted statements in memorandum from attorney to the expert, entitled "Potential Topics for Expert Report," were discoverable because they did not reflect "mental impressions" of attorney and fell within the "facts or data" or "assumptions" exception of Rule 26(b)(4)(C)); *Fialkowski v. Perry,* No. 11-5139, 2012 U.S. Dist. LEXIS 91165, 2012 WL 2527020 at **1, 3-4 (E.D. Pa. June 29, 2012) (document prepared by the plaintiff, which included her own "explanation and assessment" of how discovery documents related to her case, was discoverable because it constituted "facts or data" considered

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by the expert and did not include counsel's work product); *In re Asbestos Products Liability Litig.* (No. VI), 830 F. Supp. 2d at 1379 (E.D. Pa. Dec. 13, 2011) (correspondence prepared by plaintiffs' counsel and sent to experts, including "diagnostic information" about plaintiffs, was discoverable, because it fell within the "facts or data" or "assumptions" exception and did not include opinion work product); *Graco, Inc. v. PMC Global, Inc.,* No. 08-130130, 2011 U.S. Dist. LEXIS 14717, 2011 WL 666056 at **7-10, 14 (D. N.J. Feb. 14, 2011) (reviewing 2010 amendments to federal rules and holding that defendant was not entitled to draft expert reports, but was entitled to all "relevant discovery regarding facts/data considered, reviewed or relied upon for the development, foundation, or basis of [the experts'] affidavits/declarations"); *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.,* No. C06-1750, 2011 U.S. Dist. LEXIS 60894, 2012 WL 1533887 at *8 (W.D. Wash. May 1, 2012) (granting defendant's motion to compel communications between attorney and expert, but only those documents discoverable under [Rule 26(b)(4)(c)(i)-(ii)]).

13 A few recent cases addressing Federal Rule 26(b)(4)(B) draw a distinction between "draft reports" and other draft documents, such as "notes and memoranda," in assessing what materials are discoverable. *See, e.g., Republic of Ecuador,* 280 F.R.D. at 512-15 (N.D. Cal. 2012). Without more, categorizing a document as a "draft" or "notes" is probably not a useful way to make decisions about the scope of expert discovery. See Kimo S. Peluso & Nirav S. Shah, *Work Product Protection for Experts: Notable Decisions Under the 2010 Amendments to Rule 26*, Vol. 12, No. 21 BNA Insights 579-80 (Nov. 2010) ("A jurisprudence that assigns 'notes' to a different privilege category than 'drafts,' strikes us as a step backward. Considering the broad array of documentation an expert might generate to present counsel with different strategies and approaches, we see no reason why such materials should be discoverable when they are 'notes,' but not when they are 'drafts.' "). "If more courts apply that distinction, perhaps experts will simply style everything they write as though it were part of a 'draft report'—the sort of needless ceremony that the 2010 rule change was designated to avoid." *Id.*

14 PA. R. CIV. P. 4003.5, explanatory cmt.; *see Mueller v. Nationwide Mut. Ins. Co.,* 31 Pa. D.&C. 4th 23, 26 (Ct. Com. Pl. May 22, 1996) (Wettick, J.) ("The work product protection is not a privilege; it is a creature of the rules of discovery. Consequently, the limits of the work product protection are determined by reviewing the language of the applicable rule of discovery, the purposes for the rule, and the explanatory note to the rule.").

15 *See Folger v. Dugan,* 876 A.2d 1049, 1058-59 (Pa. Super. 2005) ("[I]f a jury accepts the veracity of the facts which the expert relies upon, it is more likely that the jury will accept the expert's opinion. At the heart of any analysis is the veracity of the facts upon which the conclusion is based.") (quoting *Commonwealth v. Rounds,* 542 A.2d 997 (Pa. 1988)). *See also South Yuba River Citizens League v. National Marine Fisheries,* 257 F.R.D. 607, 613 (E.D. Cal. 2009) (emphasizing the importance of being able to reveal to the jury that an attorney participated in the preparation of an expert report, because "[j]uries ... often defer to an expert's testimony without developing their own understanding of it").

16 See *Morganti v. Ace Tire & Parts Inc.,* 70 Pa. D.&C. 4th 1, 7 (Pa. Com. Pl. Dec. 28, 2004) (Wettick, J.) ("The Pennsylvania Rules of Civil Procedure, with respect to attorney work product, differ from the federal rules. Except in limited circumstances ... , Pennsylvania does not protect trial preparation material. To the contrary, [Rule] 4003.3 specifically provides that a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation for trial[.]"); Kevin P. Allen, The Attorney-Client Privilege and Work Product Doctrine in Pennsylvania 108-13 (PBI Press, 3d ed. 2012) (identifying differences between the Pennsylvania and federal work product doctrine, including that there is no "anticipation of litigation" element in Pennsylvania and Pennsylvania provides less protection to "fact" work product).

17 *See, e.g., Betz v. Pneumo Abex, LLC,* 44 A.3d 27, 52-58 (Pa. 2012); *Grady v. Frito-Lay, Inc.,* 839 A.2d 1038, 1044-46 (Pa. 2003).

18 See Pa. R. Prof. Conduct 3.4(b) (providing that "[a] lawyer shall not ... falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case[]").

19 *See Vertical Resources, Inc. v. Bramlett,* 837 A.2d 1193, 1201-02 (Pa. Super. 2003) (reviewing court's inherent authority to sanction counsel for violation of Rule

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of Professional Conduct 4.2 and noting that trial court could have precluded counsel from using information gained in a discussion with a person represented by counsel); *see also In re Estate of Pedrick,* 482 A.2d 215, 221 (1984).

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