

ALERTS AND UPDATES

Superior Court of Pennsylvania Holds Communications Between Attorneys and Experts Are Not Discoverable

December 5, 2011

In a significant reversal of its prior opinion, the Superior Court of Pennsylvania, sitting *en banc*, has ruled in [*Barrick v. Holy Spirit Hospital*](#)¹ that communications between an attorney and his or her expert witness are not discoverable under the Pennsylvania Rules of Civil Procedure.

In *Barrick*, plaintiffs Carl M. Barrick and his wife Brenda Barrick sued a number of defendants in the Court of Common Pleas of Cumberland County, Pa., contending that Carl Barrick suffered severe spinal injuries when a chair collapsed underneath him in the cafeteria of Holy Spirit Hospital. Defendants Sodexho Management, Inc., Sodexho Operations, LLC and Linda Lawrence (collectively, "Sodexho") served a subpoena on third party Appalachian Orthopedic Center ("Appalachian") for a complete copy of its medical chart regarding Mr. Barrick. While at Appalachian, Mr. Barrick was treated by Dr. Thomas Green, who was later designated as an expert witness for the plaintiffs. In response to the subpoena, Appalachian produced an updated set of medical records for Mr. Barrick, but informed Sodexho that "[c]ertain records . . . that pertain to Mr. Barrick but were not created for treatment purposes are not being produced." Sodexho filed a motion to enforce the subpoena, which the plaintiffs opposed, arguing that the materials not disclosed by Appalachian included communications between plaintiffs' counsel and Dr. Green and other documents related to such communications. The trial court granted Sodexho's motion and ordered disclosure of all materials in Appalachian's custody. Mr. Barrick appealed the decision to the Superior Court in October 2009.

In 2010, a three-member panel of the Superior Court affirmed the trial court's decision. However, in an 8-1 decision, the *en banc* panel of the court held that written materials generated by and related to any communications between plaintiffs' counsel and Dr. Green were not discoverable and thus were not subject to disclosure under the subpoena. The court first held that Pennsylvania Rule of Civil Procedure 4003.5, governing the discovery of "Expert Testimony and Trial Preparation Material," requires only that experts "state the facts and opinions to which they are expected to testify and to summarize the grounds

for each such opinion."² Under prior Supreme Court of Pennsylvania precedent, discovery beyond these narrowly drawn categories requires a party to show cause for the discovery and to obtain a court order compelling the discovery.³

While no such order had been obtained by Sodexho, the Superior Court further held that even if Sodexho had sought such an order, it would not have been entitled to discover the correspondence between plaintiffs' counsel and Dr. Green. The court stated that any mental impressions or legal analyses of an attorney contained in correspondence between the attorney and an expert constitute work product, generally barred from discovery absent a specific showing under the Pennsylvania Rules of Civil Procedure.⁴ Under the court's analysis, communications between an attorney and an expert witness containing work product are not discoverable, unless the party seeking discovery of those communications can show that the work product is directly relevant to an action.⁵ In this particular case, as in most others involving expert opinion, it was the opinions of the expert witness that were relevant to the case, rather than the mental impressions of the attorney.⁶ Because the communications sought by Sodexho contained the mental impressions of the plaintiffs' attorney, and because the attorney's own impressions were not relevant to the claims at issue in the case, the court held that Sodexho could not discover those communications. Additionally, the Superior Court held that such communications are not discoverable through a direct subpoena to the expert witness. The court stated that this type of discovery is not permissible under Rule 4003.5, as such communications fall "beyond the boundaries" of the rule's restriction of discovery to "the facts and opinions to which [the expert is] expected to testify and . . . the grounds for [his/her] opinion."⁷

What *Barrick* Means for Pennsylvania Litigants

The *Barrick* decision represents a reversal of the Superior Court's view on communications between an attorney and his or her expert witnesses, and it is likely to have a substantial effect on parties who communicate with experts during the course of litigation. Under the Superior Court's previous opinion, such correspondence was discoverable, and attorneys needed to be mindful of the material placed in communications to expert witnesses. However, under the *en banc* decision, parties unquestionably gain the benefit of both Rule 4003.5 protection and attorney work-product protection over communications to an expert containing the attorney's mental impressions or legal analyses. Only in the rare circumstance

where an attorney's own opinions are directly relevant to the lawsuit can such communications be disclosed. For attorneys, the *Barrick* decision represents a new ability to communicate with their retained experts without fear of their written correspondence being discoverable by adverse parties.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact [Beatrice O'Donnell](#), [Michael J. Lyon](#), any [member](#) of the [Trial Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. 2011 PA Super. 251 (Pa. Super. Ct. 2011).
2. *Barrick*, 2011 PA Super. at *23.
3. *Cooper v. Schoffstall*, 905 A.2d 482, 492 (Pa. 2006); see also Pa. R. Civ. P. 4003.5 (requiring only disclosure of facts and opinions held by an expert and for the expert to summarize grounds for his or her opinion).
4. See Pa. R. Civ. P. 4003.3.
5. *Barrick*, 2011 PA Super. 251 at *33-*34.
6. *Id.* at *34.
7. *Id.* at *25; see also Pa. R. Civ. P. 4003.5.

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