FISHING SEASON IS OVER: AFTER *BARRICK* AND AMENDED PENNSYLVANIA RULE OF CIVIL PROCEDURE 4003.5, PENNSYLVANIA REACHED THE RIGHT DECISION REGARDING WORK PRODUCT PROTECTIONS BETWEEN ATTORNEYS AND EXPERTS

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ABSTRACT

The long-standing tension in Pennsylvania inherent in the competing policies promoting the truth-determining process and protecting attorney work product from discovery has finally reached resolution with regard to expert communications. Pennsylvania has turned back the clock to protecting the disclosure of attorney-expert communications by creating a bright-line rule prohibiting disclosure of those communications under Barrick v. Holy Spirit Hospital *and the subsequent Pennsylvania Rule of Civil Procedure 4003.5. The new Pennsylvania rule is much more protective of attorney-expert communications, and aligns itself with both the recent amendments to*

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the Federal Rules and many states, including Pennsylvania's sister state, New Jersey. Although the expert discovery fishing expedition is now over, the rule does not create a complete bar to questioning experts about some of their interactions with attorneys for impeachment purposes. Proper cross-examination is still available even with the new protections under Barrick *and Pennsylvania Rule of Civil Procedure 4003.5.*

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INTRODUCTION

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and

> the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.[1]

Courts have long protected the thought processes of attorneys when preparing cases.[2] The work product privilege is one of the most valuable tools for ensuring effective trial preparation. Under the work product doctrine, documents and other tangible materials prepared in anticipation of trial are privileged, and thus protected from pre-trial discovery.[3] Unlike the attorney-client privilege, which concerns communications between the attorney and his and her client and is absolute if not waived, the work product protection is only a limitation on discovery.[4] The work product doctrine originated in the seminal case of *Hickman v. Taylor*, in which the United States Supreme Court held that the statements of witnesses, made to an attorney prior to trial, were privileged.[5] The Court reasoned that mandating the disclosure of such statements would discourage an attorney from memorializing his communications, and as a result, "inefficiency, unfairness[,] and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."[6]

Prior to *Hickman*, an attorney had no mechanism through which he could shield his mental impressions, private memoranda, or written statements of witnesses—materials that did not fall within the purview of the attorney-client privilege—from pre-trial discovery. However, no sooner did the Supreme Court create these protections than came the issue of what materials constitute "work product." Generally speaking, the work product rule grants protection to an attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible" materials.[7] However, it does not grant broad protection for all material prepared by an attorney; rather, work product

1. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).
2. *See id.* at 511–12.
3. FED. R. CIV. P. 26(b)(3).
4. *See* Kandel v. Brother Int'l Corp., 683 F. Supp. 2d 1076, 1083 (C.D. Cal. 2010).
5. 329 U.S. at 511–13.
6. *Id.* at 511.
7. *Id.*

protection is limited to "memoranda, statements, and other information made or obtained by an attorney '*in the course of preparation for possible litigation* after a claim has arisen.'"[8]

The ruling in *Hickman* was not predicated upon the recognition of an absolute privilege with regard to the statements of prospective witnesses, but rather on the theory that such statements are protected against disclosure unless the adverse party can show good cause for their production.[9] To that end, unlike the absolute protection granted under the attorney-client privilege, work product protection is regarded in most jurisdictions as qualified, meaning that attorney work product may be discoverable upon the proper showing of good cause by the party seeking discovery. Although the standard varies based on the jurisdiction and the nature of the material, the general rule requires a showing of exceptionally good cause. In federal court, that standard has been codified as an instance where an attorney has a "substantial need for the materials to prepare [his or her] case and cannot, without undue hardship, obtain their substantial equivalent by other means."[10]

Pennsylvania courts afford attorneys the same work product protection as federal courts do for materials prepared in anticipation of litigation, but the scope and application of the work product doctrine in Pennsylvania has continued to evolve since *Hickman*. The latest change in the rule concerns the discoverability of communications between an attorney and an expert witness. The change stemmed from the result of a ruling in *Barrick v. Holy Spirit Hospital of Sisters of Christian Charity*, which instituted a bright-line rule barring all such communications from being produced in pre-trial discovery.[11] Pennsylvania thus joined a growing contingent of jurisdictions nationwide that have deemed attorney-expert communications off-limits in discovery.[12]

This Article endorses the changes to the discovery rules and offers tips to aid practitioners in adapting to the new rules of discovery. Part II of this Article will provide a brief history of the work product doctrine in Pennsylvania, from its adoption of the *Hickman* principles up

8. Hogan v. Zletz, 43 F.R.D. 308, 317 (N.D. Okla. 1967) (emphasis added) (quoting *Hickman*, 329 U.S. at 495), *aff'd in part sub nom.* Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); *see* FED. R. CIV. P. 26(b)(3)(A).

9. *See Hickman*, 329 U.S. at 508–09.

10. FED. R. CIV. P. 26(b)(3)(A)(ii).

11. Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 91 A.3d 680, 680 (Pa. 2014).

12. *See, e.g.*, N.J. CT. R. 4:10-2(d); N.Y. C.P.L.R. 3101(d)(2) (MCKINNEY 2014); DEL. SUPER. CT. CIV. R. 26(b)(3).

through the *Barrick* case, as well as potential exceptions that could serve to introduce attorney-expert communications. Part III examines the application of the work product doctrine with regard to attorney-expert communications in other jurisdictions, including the federal courts. Part IV offers an analysis of the new rule, endorsing the change on the grounds of public policy and judicial economy. Finally, Part V discusses the practical application of the new rule and presents a number of practice tips to allow practitioners to take advantage of, rather than fall victim to, the recent changes to the rule.

I. WORK PRODUCT IN PENNSYLVANIA

*A. History of the Work Product Doctrine Relating to Expert-Attorney Communications Pre-*Barrick

Until 1978, all information obtained by a party in anticipation of litigation or trial was protected from discovery under what was then Rule 4011(d).[13] Originally created to extend the doctrine of *Hickman* to Pennsylvania courts, Rule 4011(d) prohibited discovery of "the existence or location of reports, memoranda, statements, information[,] or other things made or secured in anticipation of litigation or in preparation for trial."[14] The Pennsylvania rule further limited the scope of discovery by allowing disclosure only where the matter would "substantially aid in the preparation of the pleadings or the preparation or trial of the case."[15]

The 1978 amendments to the Pennsylvania Deposition and Discovery Rules broadened the scope of discovery in order to more closely conform to the Federal Rules of Civil Procedure. Prior to 1978, it was believed that the differences between federal and state practice warranted such divergence; for example, "the federal system employs notice pleading while Pennsylvania uses fact pleading."[16] Additionally, the difference in the amounts involved in federal cases and in state cases had an important effect in the shadow of *Hickman*.[17] The 1970

13. *See* GOODRICH & AMRAM 2D PROCEDURAL RULES SERVICE WITH FORMS: STANDARD PENNSYLVANIA PRACTICE 169 (West 2014).

14. PA. R. CIV. P. ch. 4000, explanatory cmt., *available at* http://www.pacode.com/secure/data/231/chapter4000/chap4000toc.html; *see* Grew v. Brunner, 1 Pa. D. & C.2d 754, 756 (Ct. Com. Pl. 1955); *see also* GOODRICH & AMRAM, *supra* note 13, at 169.

15. PA. R. CIV. P. 4007(a); GOODRICH & AMRAM, *supra* note 13, at 138.

16. KEVIN A. HESS ET AL., PENNSYLVANIA CIVIL PRACTICE 194 (5th ed. 2012).

17. *Id.* at 196.

revisions to the Federal Rules created even wider differences, particularly in the discovery of reports, memoranda, statements, or other information secured in anticipation of litigation or in preparation for trial. However, after nearly thirty years of practice under *Hickman* and the general acceptance of the philosophy of discovery, the Pennsylvania system became justified in bringing its rules into as close conformity as possible with the Federal Rules.[18]

As a corollary, Rule 4011(d) was rescinded and new Rules 4003.1 through 4003.5 were drafted in order to define the specific aspects of discovery. Rule 4003.1, which today delineates the general scope of discovery, states that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[19] This language, which remains unchanged since 1978, is taken almost verbatim from the Federal Rules.[20] Additionally, the standard for disclosure no longer requires an attorney to demonstrate that the matter "substantially aid" in preparation of the case, but rather merely requires disclosure to be "reasonably calculated to lead to discovery of admissible evidence."[21]

The amendments also created Rule 4003.3, which today governs the scope of trial preparation discovery. The new rule abolishes most of the trial preparation protections set forth in Rule 4011(d) in favor of broader disclosure, permitting the "discovery of documents, reports[,] and tangible things prepared in anticipation of litigation or for trial."[22] However, the updated rule balances this general rule of expansive discovery with the spirit of protecting attorney work product. The Supreme Court established work product protections in *Hickman*: "The 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."[23] Pennsylvania courts have articulated the purpose of the work product doctrine as a mechanism that shields "the mental processes of an attorney, providing a privileged area within which he can analyze

18. *See* GOODRICH & AMRAM, *supra* note 13, at 138.

19. PA. R. CIV. P. 4003.1(a).

20. GOODRICH & AMRAM, *supra* note 13, at 138; *see also* FED. R. CIV. P. 26(b)(1).

21. GOODRICH & AMRAM, *supra* note 13, at 138; *see also* FED. R. CIV. P. 26(b)(1).

22. GOODRICH & AMRAM, *supra* note 13, at 169.

23. PA. R. CIV. P. 4003.3.

and prepare his client's case."[24] The doctrine "promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients."[25]

Prior to 1978, Rule 4011(f) controlled the discovery of expert witnesses and "protected a deponent, whether or not a party, from giving an opinion as an expert witness over his objection."[26] Rule 4003.5 grants similar protection to an expert not expected to testify at trial, permitting no discovery of "consulting" experts, while distinguishing them from experts that are testifying at trial.[27] The amended rule permits the discovery of the facts known and opinions held by expert witnesses who are expected to testify, where such information is "otherwise discoverable" under Rule 4003.1.[28]

Rule 4003.5 also discusses the procedural mechanisms of expert discovery. The rule permits discovery of an expert's testimony only through a narrowly defined set of interrogatories; to obtain discovery beyond the scope of these interrogatories, a party must show cause and acquire a court order for the additional discovery.[29] The party answering expert interrogatories generally files a report created by the testifying expert in preparation for trial, which usually serves as the sum of expert witness discovery pursuant to Rule 4003.5.[30] However, the rule's inclusion of all the expert's facts and opinions "otherwise discoverable" casts a wide net with regard to the substance of what may be disclosed generally.[31]

Because Rule 4003.3 precludes discovery of an attorney's mental impressions, yet Rule 4003.5 requires disclosure of a testifying expert's opinions and the facts upon which such opinions are based, these rules can be in tension with one another. For example, Rule 4003.5 might require the disclosure of an attorney's communications with an expert pertaining to the facts of a case, but that correspondence may also include that attorney's mental impressions, conclusions, or opinions—material protected as attorney work product. Furthermore, Rule 4003.3 makes no mention of either the prohibition or

24. Lepley v. Lycoming Cnty. Court of Common Pleas, 393 A.2d 306, 310 (Pa. 1978) (citation omitted).

25. Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa. Super. Ct. 1995) (citation omitted).

26. GOODRICH & AMRAM, *supra* note 13, at 189.

27. PA. R. CIV. P. 4003.5(a)(3).

28. PA. R. CIV. P. 4003.5(a).

29. PA. R. CIV. P. 4003.5(a)(2); Cooper v. Schoffstall, 905 A.2d 482, 492–93 (Pa. 2006).

30. HESS ET AL., *supra* note 16, at 200–02.

31. PA. R. CIV. P. 4003.5(a).

allowance relating to the disclosure of an attorney's correspondence with an expert, further clouding the issue.

In practice, then, if a document composed solely of an attorney's opinions or legal theories were sent to an expert, it would be protected by Rule 4003.3's work product provision. On the other hand, work product protection would not apply to any communications outside of that ambit (e.g. discussion related to the facts of the case), pursuant to Rule 4003.1. However, because "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," these rules often found themselves at odds with one another.[32]

As a result, many Pennsylvania courts chose to review such conflicts on a case-by-case basis, operating under the belief that correspondence with an expert, to the extent it contained the mental impressions and conclusions of the attorney, could be deemed protected work product following an *in camera* examination.[33] The trial court often conducted these reviews to determine precisely what aspects of the correspondence between attorney and expert fell within the parameters of the attorney work product doctrine, with the non-privileged communications produced in pre-trial discovery.[34]

B. The Barrick *Case*

Carl Barrick brought suit against defendant Holy Spirit Hospital in 2007 after sustaining serious spinal injuries when the chair in which he was sitting in the defendant's cafeteria collapsed.[35] After Mr. Barrick was treated for his injuries by an orthopedic surgeon, the company overseeing management of the cafeteria and a co-defendant in the case, Sodexho Management, Inc., served the physician's hospital with a subpoena requesting plaintiff's complete medical file.[36] The hospital provided the records without objection and also provided a

32. Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 91 A.3d 680, 687 (Pa. 2014) (Baer, J., supporting affirmance).

33. *See* T.M. v. Elwyn, Inc., 950 A.2d 1050, 1063 (Pa. Super. Ct. 2008); *In re* Estate of Wood, 818 A.2d 568, 573 (Pa. Super. Ct. 2003).

34. *Elwyn*, 950 A.2d at 1063.

35. Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800, 803 (Pa. Super. Ct. 2011), *aff'd*, 91 A.3d 680 (Pa. 2014).

36. *See Barrick*, 91 A.3d at 680–81 (Pa. 2014) (Baer, J., supporting affirmance).

second set of records in response to a subsequent subpoena.[37] However, upon producing the second set of records, the hospital declined to disclose '"[c]ertain records of this office that pertain to Mr. Barrick but were not created for treatment purposes.'"[38]

Sodexho filed a motion to enforce the subpoena; the hospital responded by asserting that the physician was retained as an expert witness in the case, and the subpoena may not encompass trial preparation materials under Pennsylvania Rule of Civil Procedure 4003.3 or communications between plaintiff's counsel and his expert under Pennsylvania Rule of Civil Procedure 4003.5.[39] The trial court "deferred resolution of the motion until after it conducted an *in camera* review of the pertinent correspondence between [the physician] and [Mr. Barrick's] counsel."[40] The court ultimately entered an order granting Sodexho's motion to enforce the subpoena directed at Mr. Barrick's physician.[41]

The trial court ruled that facts reviewed by an expert in formulating his opinion are subject to disclosure even where they may be contained within communications to or from counsel.[42] However, although engaging in the practice themselves, the court disapproved of the *in camera* review process because of the difficulties in ascertaining where counsel's theories end and an expert's opinions begin.[43] The court reasoned that because the *in camera* review process does not involve parties' counsel, those with intimate knowledge of the facts are precluded from providing appropriate context, potentially hindering the court's ability to make an informed judgment concerning a document's discoverability.[44] As a result, the trial court imposed a "bright-line" rule whereby all communications would have to be produced, stating that correspondence is discoverable "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."[45]

37. *Id.* at 681.
38. *Id.*
39. *Id.*
40. *Barrick*, 32 A.3d at 804 (Pa. Super. Ct. 2011).
41. *Id.*
42. *Barrick*, 91 A.3d at 681–82 (Pa. 2014).
43. *See id.* at 681.
44. *See id.*
45. *Id.* at 682.

A panel of the Superior Court initially affirmed the trial court's ruling.[46] Noting the inherent conflict between rules 4003.3 and 4003.5, the panel held that discovery should supersede the work product doctrine under the circumstances, given that the protections of Rule 4003.3 do not create an absolute privilege, whereas Rule 4003.5 specifically requires disclosure of the substance upon which an expert's opinions are based, including information contained within correspondence.[47] The panel also echoed the trial court's reluctance towards imposing *in camera* review, explaining that such an "inspection would be duplicative and a waste of judicial resources," imposing a *per se* rule in favor of disclosure.[48]

The Superior Court agreed to reconsider and, sitting *en banc*, reversed the panel decision.[49] The court held that not only were the records in question "beyond the permissive scope" of the interrogatories under Rule 4003.5(a)(1), but that the defendants also failed to satisfy the provision allowing for additional discovery upon cause shown.[50] However, the court took the analysis a step further, holding that the records were additionally shielded from discovery under Rule 4003.3's protection of attorney work product.[51] As a result, the Pennsylvania Supreme Court granted *allocatur* to consider the issue of whether the Superior Court's interpretation of Rule 4003.3 improperly provided absolute work product protection to all communications between a party's counsel and its trial expert.[52]

The high court, much like the lower courts preceding it, reasoned that using the *in camera* review process to settle discovery disputes was inefficient and expensive, breeding needless litigation and incurring tremendous expense for all parties involved.[53] The high court also cautioned against the potential for the erroneous disclosure of attorney-expert correspondence, which would at a minimum violate work product protection but could also amount to prejudicial error, requiring an entirely new trial.[54] Although the court noted that it is

46. Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 5 A.3d 404, 413 (Pa. Super. Ct. 2010) (opinion withdrawn by court).

47. *Id.*

48. *Id.* at 412.

49. Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800, 804, 814 (Pa. Super. Ct. 2011), *aff'd by an evenly divided court*, 91 A.3d 680 (Pa. 2014).

50. *Id.* at 810–11.

51. *Id.* at 812–13.

52. Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 52 A.3d 221, 222 (Pa. 2012).

53. *Barrick*, 91 A.3d at 687 (Pa. 2014).

54. *Id.* at 688.

possible that correspondence could include no attorney work product, it concluded that it would be highly unusual for an attorney to communicate with an expert in a manner that did not contain any "mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories."[55] Because the majority of attorney-expert communications would likely implicate both core attorney work product as well as the underlying facts that triggered an attorney's theories, attempting to extricate the work product was not only a fool's errand, but wildly inefficient, necessitating the implementation of a bright-line rule.[56]

The Pennsylvania Supreme Court went on to state that protecting an attorney's work product is paramount when discoverable information can be obtained through other avenues, such as interrogatories under Rule 4003.5(a)(1) and, where warranted, additional discovery under the "cause shown" provision elucidated in Rule 4003.5(a)(2).[57] Additionally, in the absence of a viable discovery option, an expert's opinion may also be challenged on cross-examination.[58] As a result, an evenly divided court concluded that "it [was] preferable to err on the side of protecting the attorney's work product," affirming the Superior Court and creating a bright-line rule barring the discovery of all communications between attorneys and expert witnesses.[59]

C. Implementation of the New Rule 4003.5

Concurrent with the *Barrick* litigation, the Pennsylvania Civil Procedural Rules Committee proposed an amendment that would codify a bright-line rule, denying discovery of all attorney-expert communications.[60] The Pennsylvania State Constitution delegates to the Pennsylvania Supreme Court the power to "prescribe general rules governing practice, procedure and the conduct of all courts."[61] Because

55. *Id.* at 688 n.12 (quoting PA. R. CIV. P. 4003.3).

56. *Barrick*, 91 A.3d at 687 (Pa. 2014).

57. *Id.* at 688.

58. *Id.*

59. *Id.*

60. Order Amending Rule 4003.4 of the Pennsylvania Rules of Civil Procedure, 40 Pa. Bull. 7334 (Dec. 25, 2010) (per curiam), *available at* http://www.pabulletin.com/secure/data/vol40/40-52/2451.html.

61. PA. CONST. art. V, § 10.

the work product privilege in Pennsylvania is not statutory, but rather a product of common law adopted by the Supreme Court in discovery rules, the court "has the power to adopt the rule, to broaden or to narrow the scope of the rule, and interpret the work-product privilege on a case-by-case basis."[62] Although the court's ruling in *Barrick* closed the door on the question of whether communications between an attorney and an expert are discoverable, the subsequent amendment of 4003.5 nailed it shut. Mere months after the *Barrick* decision, the Pennsylvania Supreme Court issued an order that served to codify the decision they reached in *Barrick*.[63] As a result, the rule was amended to include the following language:

> 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) 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.[64]

II. OTHER VENUES

A. Jurisdictions Consistent with Pennsylvania – Bright-Line Rule of No Disclosure

1. Federal court

In 1993, Rule 26 of the Federal Rules of Civil Procedure was amended, requiring expert witnesses to provide detailed reports and to disclose, among other things, the "data and other information considered by the expert" in arriving at his opinion.[65] Proponents of these changes believed that revising the scope of privileged material would promote a more efficient exchange of basic information and eliminate

62. Kolar v. Preferred Unlimited Inc., 14 Pa. C. & C. 5th 166, 170 (Ct. Com. Pl. 2010).

63. *In re* Amendment of Rule 4003.5 of the Pennsylvania Rules of Civil Procedure, No. 604 (Pa. 2014) (per curiam), *available at* http://www.palegallinks.com/barrick_4003.pdf.

64. PA. R. CIV. P. 4003.5(a)(4).

65. FED. R. CIV. P. 26 advisory committee's note (1993).

a great deal of the paperwork required to request such information.[66] Many courts read these amendments to also grant opposing counsel the ability to discover preliminary drafts and subsequent revisions of such reports, as well as a substantial amount of communications and materials exchanged between attorneys and experts.[67] As a result, these amendments ultimately served to foster inefficiency in the discovery process, leading to an escalation in litigation expenses and collateral discovery disputes.[68] Attorneys also became more guarded in their interactions with experts, often finding themselves protecting against discovery at the expense of conducting a thorough investigation.[69] The quality of expert opinions was often jeopardized by the lack of communication between attorneys and their experts.

Attorneys on both sides of the aisle found the discovery process onerous and counterproductive to achieving the rule's ambitions of an efficient and streamlined exchange of information.[70] Defense attorneys complained that the interpretation of the rules encouraged "overbroad and excessive discovery demands," while counsel for the plaintiff reported that they often faced "stonewalling" tactics and frivolous motions that required expensive responses.[71] Additionally, the rules encouraged both sides to retain two separate sets of experts, one for consulting purposes and another used to testify in court.[72] Attorneys would engage in strategic discussions with consulting experts rather than with testifying experts because experts who will not be offered as trial witnesses are virtually immune from discovery.[73]

66. *See id.*

67. *See* Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir. 2006) ("[W]e now join the 'overwhelming majority' of courts . . . in holding that Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.").

68. *See* FED. R. CIV. P. 26 advisory committee's note (2010) ("The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects.").

69. *Id.* ("[A]ttorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts.").

70. *See* JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & THE COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 3–4 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf. [hereinafter REPORT TO THE CHIEF JUSTICE].

71. *Id.* at 7.

72. Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800, 808 (Pa. Super. Ct. 2011) *aff'd*, 91 A.3d 680 (Pa. 2014).

73. *Id.*

The practice of retaining duplicate experts unnecessarily increased the costs of litigation, while putting those litigants who could not afford to do so at a disadvantage.[74]

To address the shortcomings of the 1993 amendments to Rule 26, a number of studies were conducted for the purposes of implementing changes to the federal discovery rules.[75] To that end, The Advisory Committee on Civil Rules asked the Federal Judicial Center (FJC) to study federal civil cases that terminated in the last quarter of 2008 and "included detailed surveys of the lawyers about their experience in the cases."[76] The FJC conducted similar surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA).[77]

Using the information gleaned from these surveys, various organizations conducted studies.[78] Among these studies was a joint project of the American College of Trial Lawyers Task Force, an association comprised of both civil plaintiff and defense trial lawyers, and The Institute for the Advancement of the American Legal System.[79] The major consensus of the survey was that the civil justice system, although "not broken," is "in serious need of repair."[80] In sum, the task force found that under the current discovery framework, the civil system took too long and cost too much.[81] The Task Force also opined that "the requirement [in most jurisdictions] of an expert report from an expert should obviate the need for a deposition in most cases."[82] "In fact, some Task Force members believe[d] that [the Task Force]

74. *Id.*

75. REPORT TO THE CHIEF JUSTICE, *supra* note 70, at 1.

76. *Id.* at 2.

77. *Id.*

78. *E.g.*, *Member Survey on Civil Practice: Full Report*, 2009 A.B.A. SEC. OF LITIG. REP., *available at* http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report _aba_report.authcheckdam.pdf; NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS (Fall 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf.

79. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1 (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/ACTLIAALS_Final_Report_rev_8-4-10.pdf.

80. *Id.* at 2.

81. *Id.* ("Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.").

82. *Id.* at 17.

should obviate altogether the need for a deposition of experts," a mechanism already a part of Pennsylvania practice.[83]

As a result, Rule 26(a)(2)(B)(ii) was subsequently amended to require disclosure of only "the facts or data considered by the witness in forming [an opinion]," rather than the wide reaching "data or other information" disclosure required in the 1993 amendments.[84] New Rule 26(b)(4)(B) specifically extends work product protection to the "drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."[85] Finally, Rule 26(b)(4)(C) also extends work product protection to "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications."[86]

There are three exceptions to the protections afforded to attorney-expert communications under the new rule. First, attorney-expert communications regarding the expert's compensation are subject to discovery.[87] The second exception allows the discovery of facts or data provided by a party's attorney and considered by the expert in forming the opinion to be expressed.[88] This exception applies only to communications identifying the facts or data provided by counsel; communications concerning the potential relevance of the facts or data are protected.[89] The third exception allows the discovery of any assumptions provided by an attorney to an expert that the expert actually relied upon in forming the expressed opinions.[90]

The post-*Barrick* Pennsylvania discovery rule has a great deal in common with the federal rule, with a few important distinctions. The most striking departure from Federal Rule of Civil Procedure 26(b) concerns its exceptions, which Pennsylvania has declined to adopt due to key differences from federal practice:

> The federal rules of civil procedure permit an expert to be

83. *Id.*; Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 91 A.3d 680, 685 (Pa. 2014) (Baer, J., supporting affirmance) ("Plaintiffs assert that it would be highly relevant to have a routine right to pre-trial depositions of experts, but that is not allowed in Pennsylvania.").

84. *See* FED. R. CIV. P. 26 advisory committee's note.

85. *Id.*; FED. R. CIV. P. 26(b)(4)(B).

86. FED. R. CIV. P. 26(b)(4)(C).

87. *Id.* at (b)(4)(C)(i).

88. *Id.* at (b)(4)(C)(ii).

89. *See* FED. R. CIV. P. 26 advisory committee's note.

90. FED. R. CIV. P. 26(b)(4)(C)(iii).

> deposed after the expert report has been filed. The exceptions enumerated above simply describe some of the matters that may be covered in a deposition. However, in the absence of cause shown, the Pennsylvania rules of civil procedure do not permit an expert to be deposed. Thus, the exceptions within the federal rule are inconsistent with the restrictions of the Pennsylvania rules of civil procedure governing discovery of expert witnesses.[91]

Besides the fact that experts in Pennsylvania are not deposed, the Rules Committee also noted that questions of expert compensation have traditionally been addressed at trial, and there was no evidence indicating a change was necessary.[92] Moreover, because experts in Pennsylvania may not be deposed, their findings are most often elicited through pre-trial discovery in the form of an expert report.[93] Testifying experts are required to limit the scope of their testimony to the facts and conclusions contained in that report pursuant to Pennsylvania Rule of Civil Procedure 4003.5(c), which states that,

> [t]o the extent that the facts known or opinions held by an expert have been developed in discovery proceedings . . . the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto.[94]

In its 1978 Explanatory Comment to Rule 4003.5, the Civil Procedural Rules Committee further noted:

> To prevent incomplete or "fudging" of reports which would fail to reveal fully the facts and opinions of the expert or his grounds therefor, subdivision (c) provides that an expert's direct testimony at the trial may not be inconsistent with or go beyond the fair scope of his testimony as set forth in his

91. Order Amending Rule 4003.5 of the Rules of Civil Procedure, 44 Pa. Bull. 4996 (Jul. 26, 2014) (per curiam) (explanatory comment), *available at* http://www.pabulletin.com/secure/data/vol44/44-30/1556.html.

92. *Id.*

93. *See* PA. R. CIV. P. 4003.5(a)(1)(B).

94. PA. R. CIV. P. 4003.5(c); *see* Jones v. Constantino, 631 A.2d 1289, 1296 (Pa. Super. Ct. 1993) (holding that the discovery rules do not allow an expert to make a "bald assertion of non-negligence in his expert report and then proffer an in-depth theory explaining the absence of culpability at trial.").

deposition and answer to interrogatories, separate report or supplements thereto.[95]

2. Other jurisdictions

Similar to the new rule in Pennsylvania, the rule in New Jersey affords practitioners perhaps the most stringent protection in the country regarding communications between an attorney and an expert. Disclosure is limited to only the facts and data considered by the expert, and all other communications (including draft reports) are deemed trial preparation materials.[96] Trial preparation materials are considered privileged and undiscoverable absent a showing of "substantial need" and the inability to obtain equivalent materials absent "undue hardship."[97] However, unlike Pennsylvania, which limits pretrial discovery of an expert's testimony to a defined set of interrogatories, New Jersey permits the deposition of experts as to the opinions offered in their report.[98] New Jersey also distinguishes between an expert retained to testify as a witness and an expert not expected to testify, barring *all* discovery of communications implicating the latter absent a showing of "exceptional circumstances."[99] Also similar to Pennsylvania, New Jersey's Rules of Civil Procedure do not expressly enumerate any exceptions to its bright-line rule prohibiting the discovery of attorney-expert communications.[100]

In New York, materials "prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has 'substantial need'" for the materials and cannot obtain them without "undue hardship."[101] Courts have commonly interpreted this language to construe correspondence between attorney and expert as privileged "materials 'prepared for litigation,'" subject

95. GOODRICH & AMRAM, *supra* note 13, at 190–91.

96. N.J. CT. R. 4:10-2(d)(1).

97. *See id*.

98. *See id*. at (d)(2).

99. *See id*. at (d)(3).

100. *See generally* N.J. CT. R. 4:10-2(d).

101. N.Y. C.P.L.R. 3101(d)(2) (MCKINNEY 2014).

to disclosure only in the event opposing counsel can meet the aforementioned "substantial need" burden.[102] Given that New York courts will generally allow for discovery of communications only in cases of "substantial need," a burden similar to the allowances for cause that are present in the Pennsylvania and New Jersey rules, New York's protection is more consistent with a bright-line rule mandating protection than one that tasks the court with a case-by-case analysis.[103] However, The New York State Bar Association has expressed no urgency in amending its discovery rules to reflect the federal change. The prevailing thought amongst practitioners is that, although current state practice does not impose a statutory barrier against disclosure of attorney communications with experts, "there is already sufficient protection for such communications under New York law, thereby eliminating the need for a special rule in this case."[104]

As of September 2014, Delaware's discovery rules also mirror the Federal Rules. All draft reports are protected from disclosure, regardless of the form in which a draft is recorded.[105] Additionally, all communications between an attorney and any witness required to provide an opinion is protected, except in cases where the communications involve the three exceptions articulated in the federal rule.[106] Delaware does not allow for the depositions of expert witnesses and only permits the discovery of a non-testifying expert in cases of exceptional circumstances.[107] In fact, the nationwide trend seems to be moving towards adoption of the new federal rule, as many more jurisdictions, including Kansas, South Dakota, and Utah, have recently adopted the amended federal rule regarding disclosure of attorney-expert communications.[108]

102. *See* Martinez v. KSM Holding Ltd., 741 N.Y.S.2d 519, 519 (App. Div. 2002); Beller v. William Penn Life Ins. Co. of N.Y., 828 N.Y.S.2d 869, 875 (Sup. Ct. 2007).

103. *See Beller*, 828 N.Y.S.2d at 875; *see also Martinez*, 741 N.Y.S.2d at 519.

104. *See Report Opposing the Recommendation of the American Bar Association Section of Litigation That Draft Expert Reports and Communications Between Experts and Attorneys Not Be Discoverable Insofar As It Applies to New York State Practice*, 2006 A.B.A. SEC. OF COM. & FED. LITIG., *available at* http://www.nysba.org/Sections/Commercial_Federal_Litigation/Comed_Display_Tabs/Reports/ReportOpposingABARecommendationreDraftExpertReports_pdf.html (suggesting that adoption of the Federal Rules "would amount to an unwarranted intrusion into an existing discovery scheme that already provides ample protection for attorneys' interactions with testifying experts.").

105. DEL. SUPER. CT. CIV. R. 26(b)(3).

106. *See id.*

107. *Id.* at (b)(4)(A)–(B).

108. *See* KAN. STAT. ANN. § 60-226(b)(5) (West 2012); S.D. CODIFIED LAWS § 15-6-26(b)(4) (2011); UTAH R. CIV. P. 26(a)(4), (b)(7)(A)-(B).

B. Jurisdictions Dissimilar from Pennsylvania

1. No bright-line rule—courts resolve disputes

In Maryland, discovery of the findings and opinions of experts, otherwise discoverable and acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory

> to identify each person . . . whom the other party expects to call as an expert witness at trial[,] to state the subject matter on which the expert is expected to testify, to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion[,] and to produce any written report made by the expert concerning those findings and opinions.[109]

A party may also depose the expert to ascertain the same information.[110]

Although Maryland does not feature a bright-line rule either requiring or prohibiting the disclosure of attorney-expert communications[,] "[t]he discovery scheme initially requires broad and comprehensive disclosures, then 'provid[es] a mechanism for addressing disputes concerning the necessity of complying with a disclosure request and the adequacy of any challenged disclosure.'"[111] Trial judges are tasked with resolving any disputes relating to discovery, and upon doing so are granted wide deference from appellate courts.[112]

Florida similarly does not employ a bright-line rule with regard to the discoverability of attorney-expert communications. The rule simply states that "[d]iscovery of facts known and opinions held by experts, otherwise discoverable . . . , may be obtained" through interrogatories or deposition of the witness.[113] Much like the pre-*Barrick* rule in Pennsylvania, this rule is in tension with the attorney's work product protection, in which the court protects against "disclosure of the mental impressions, conclusions, opinions, or legal theories of an

109. MD. CODE ANN., CTS. & JUD. PROC. § 2-402(g)(1)(A) (West 2008); *see* Dorsey v. Nold, 765 A.2d 79, 86 (Md. 2001).

110. MD. CODE ANN., CTS. & JUD. PROC. § 2-402(g)(1)(A).

111. Logan v. LSP Mktg. Corp., 11 A.3d 355, 363 (Md. Ct. Spec. App. 2010) (quoting Gallagher Evelius & Jones, LLP v. Joppa Drive–Thru, Inc., 7 A.3d 160, 167 (Md. Ct. Spec. App. 2010) (citation omitted)).

112. *See* Warehime v. Dell, 720 A.2d 1196, 1203 (Md. Ct. Spec. App. 1998).

113. FLA. R. CIV. P. 1.280(b)(5)-(5)(A).

attorney or other representative of a party concerning the litigation."[114]

However, Florida courts have been inclined to construe this tension in favor of more liberal discovery, finding that decisions shielding expert information from disclosure under the work product doctrine are "ill-considered."[115] Additionally, the Supreme Court of Florida has consistently held that

> all materials reasonably expected or intended to be used at trial, including documents intended solely for witness impeachment, are subject to proper discovery requests . . . and are not protected by the work product privilege. Florida's dedication to the prevention of 'surprise, trickery, bluff[,] and legal gymnastics' at trial holds no exception for impeachment materials.[116]

California's discovery rules attempt to strike a balance between the conflicting purposes of the work product privilege and modern discovery rules.

> [I]f and when the expert becomes a potential witness on behalf of the client the product of his employment is subject to discovery. However, the mere fact the expert may have the dual status of a prospective witness and of advisor to the attorney, does not remove the product of his services rendered exclusively in an advisory capacity, as distinguished from the product of services which qualify him as an expert witness, from the work product limitation upon discovery.[117]

California courts therefore distinguish between testifying and nontestifying, or consulting, experts. Reports by a testifying expert containing "findings and opinions of the expert that go to the establish-

114. FLA. R. CIV. P. 1.280(b)(4).

115. Mims v. Casademont, 464 So. 2d 643, 644 (Fla. Dist. Ct. App. 1985); *see also* Grimshaw v. Schwegel, 572 So. 2d 12, 13 (Fla. Dist. Ct. App. 1990) ("The legislature did not provide an exception to the discovery privilege for certain documents created during the presuit screening process when such documents are relied upon by experts who are expected to testify at trial.").

116. Northup v. Acken, 865 So. 2d 1267, 1271 (Fla. 2004) (quoting Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 111 (Fla. 1970) (citation omitted)).

117. Scotsman Mfg. Co. v. Superior Court, 51 Cal. Rptr. 511, 514 (Ct. App. 1966).

ment or denial of a principal fact in issue" in the case must be produced in response to opposing counsel's demand.[118] However, reports rendered in a consulting capacity remain protected because they are often "reflective of the mental processes of the attorney under whose direction the expert works."[119] Much like pre-*Barrick* Pennsylvania, California courts often employ a three-step *in camera* inspection of the report of an expert identified as a witness in order to rule on the claim of the attorney's work product privilege.[120]

2. Jurisdictions employing a bright-line rule for disclosure

Texas has a bright-line rule requiring the disclosure of all communications between an attorney and a testifying expert.

> A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert: all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony.[121]

Information that is subject to discovery under Rule 192.3, regarding experts, remains discoverable even if it is prepared for trial.[122]

The Texas Supreme Court clarified the extent to which attorney-expert communications may be discovered in the case of *In re Christus Spohn Hospital Kleberg*.[123] In that case, the defendant hospital mistakenly provided privileged documents to its expert witness,[124] documents that in the ordinary course of trial would become discoverable upon their transmission to an expert.[125] However, the defendant sought to recover these documents under what is known as a "snap-back" provision, which allows a party to maintain privilege in the event of an inadvertent disclosure.[126] In a case of first impression, the Texas Supreme Court sought to settle the tension between the snap-

118. Nat'l Steel Prod. Co. v. Superior Court, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).
119. *Id.*
120. *Id.*
121. TEX. R. CIV. P. 192.3(e)(6).
122. TEX. R. CIV. P. 192.5(c).
123. 222 S.W.3d 434 (Tex. 2007).
124. *Id.* at 435.
125. *See* TEX. R. CIV. P. 192.3(e)(6).
126. *See* TEX. R. CIV. P. 193.3(d); *Christus Spohn*, 222 S.W.3d at 438–39.

back provision, which protects privileged documents, and the broad requirements of expert disclosure.[127] Although the court ultimately held that the snap-back provision would fail to preserve the privilege as long as the recipient expert testified at trial,[128] the court's discussion of attorney-expert discovery in Texas illustrates the competing policy interests supporting a bright-line rule in favor of full disclosure.

Texas courts have rooted their penchant for disclosure in an understanding that expert witnesses occupy a vastly different role in litigation from the traditional lay witness. Most significantly, as a result of possessing special "knowledge, skill, experience, training, or education," the expert witness is generally held out to be an objective authority figure, more knowledgeable and credible than the typical witness.[129] As a corollary, juries may therefore be inclined to rely solely on the expert to decide complex issues without independently analyzing underlying factors.[130] The United States Supreme Court has acknowledged this potential for undue influence as a result of the expert's specialized background, noting that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[131]

In addition to the powerful influence that the expert witness wields on the stand, the Texas Rules of Evidence afford experts a number of privileges in offering testimony that are unavailable to ordinary witnesses.[132] For example, "while lay witnesses may only testify regarding matters of which they have personal knowledge, expert witnesses may testify about facts or data not personally perceived but 'reviewed by, or made known' to them."[133] "If the facts or data are of a type upon which experts in the field reasonably rely in forming opinions on the subject,"[134] the Rules permit experts to rely on information that would ordinarily be inadmissible in evidence, such as hearsay or privileged

127. *Christus Spohn*, 222 S.W.3d at 439.

128. *Id.* at 435.

129. TEX. R. EVID. 702; *see* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995).

130. *See Robinson*, 923 S.W.2d at 553.

131. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

132. *See Christus Spohn*, 222 S.W.3d at 440.

133. TEX. R. EVID. 602; TEX. R. EVID. 703; *Christus Spohn*, 222 S.W.3d at 440.

134. *See Christus Spohn*, 222 S.W.3d at 440.

communications.[135] An expert may also state an opinion on mixed questions of law and fact, such as whether certain conduct was negligent or proximately caused injury, assertions that would be off limits to an ordinary fact witness.[136]

Finally, concerns about attorney-expert impropriety also color the court's preference for full disclosure.[137] "[O]nly the most naive of experienced lawyers or judges could fail to realize that in our present legal culture money plus the proper 'marching orders' will get an 'expert' witness who will undertake to prove [al]most anything."[138] The court reasoned that mandating the discovery of attorney-expert communication would uncover any such "marching orders," allowing for the expert to be cross-examined thereon and ensuring expert opinion testimony remains "fair, reliable and within the bounds of reason."[139] The *Daubert* Court opined that as long as the attorney's orders are reasonable and fair, the attorney would have little to fear in disclosing communications with the expert.[140]

Acknowledging for the foregoing reasons that the expert "paints a powerful image on the litigation canvas," Texas courts have chosen to construe the rules in a manner that ensures the jury may fully "understand the pallet from which the expert paints to accurately assess the testimony's worth."[141] As a result, the Texas Supreme Court held that a "jury should be aware of any documents . . . provided to an expert that [may] have influenced the expert's opinion,"[142] and as such deemed the documents in the case discoverable if that expert were to testify at trial.[143]

Colorado employs a similar bright-line rule in favor of disclosure, citing many of the same policy rationales as the *Christus Spohn* court. In response to the question of whether the liberal discovery provided to parties relating to expert testimony should trump the strong protections afforded an attorney's work product, the Colorado Supreme

135. TEX. R. EVID. 703; *Christus Spohn*, 222 S.W.3d at 440.

136. TEX. R. EVID. 704; *see* Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 365 (Tex. 1987).

137. *See Christus Spohn*, 222 S.W.3d at 440.

138. *See id.* at 442 (quoting TV-3, Inc. v. Royal Ins. Co. of Am., 193 F.R.D. 490, 492 (S.D. Miss. 2000)).

139. *TV-3*, 193 F.R.D. at 492.

140. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 495 (1993).

141. *Christus Spohn*, 222 S.W.3d at 440.

142. *Id.*

143. *Id.* at 445.

Court looked to the 1993 amendments of the Federal Rules.[144] Interpreting the changes in a similar manner as many federal courts of the time, the court believed that a construction of broad disclosure was appropriate for public policy reasons.[145] Relying on many of the same policy rationales as Texas, and taking a cue from the Federal Rules that at the time that promoted broad disclosure, the court reasoned that

> [a] bright-line rule promotes efficiency, fairness, and the truth seeking process. Requiring trial courts to review every expert communication in camera to determine the appropriate degree of disclosure, on the other hand, simply foments needless discovery battles, undercuts the truth seeking principles of the rules of civil procedure, and wastes scarce judicial resources.[146]

The Colorado court reasoned that a bright-line rule preserves judicial economy by eliminating the need for a judge to consider whether counsel's communications to retained experts contain work product.[147] "It also frees trial courts from the task of sifting through volumes of documents to separate 'factual work product' from 'opinion work product,'" a form of compromise employed by some jurisdictions, Pennsylvania formerly being one of those jurisdictions.[148]

A bright-line approach also gives parties notice of precisely which materials will be discoverable in every case, thereby reducing the number of discovery disputes.[149] Thus, the adoption of a bright-line rule "actually preserves opinion work product in that there is no lingering uncertainty as to what documents will be disclosed. Counsel

144. Gall *ex rel.* Gall v. Jamison, 44 P.3d 233, 238–39 (Colo. 2002).

145. *Id.* at 239.

146. *Id.*

147. *Id.*

148. *Id.*; *see, e.g.*, Rail Intermodal Specialists v. Gen. Elec. Capital Corp., 154 F.R.D. 218, 221–22 (N.D. Iowa 1994) (reviewing documents *in camera* before denying discovery, in part, because the factual information was available through other sources); *see also* T.M. v. Elwyn, Inc., 950 A.2d 1050 (Pa. Super. Ct. 2008).

149. Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 774–75 (1994) ("Without a clear and uniform rule to indicate the consequences of disclosure, the litigator must repeatedly face the frustrating decision whether to disclose protected documents to the expert, and ultimately he must choose either to gamble that the court will not order discovery of work product documents disclosed to the expert or to play it safe and forego the benefits of disclosure.").

can easily protect genuine work product by simply not divulging it to the expert."[150] A bright-line rule therefore promotes fairness among litigants by subjecting all parties who retain experts to the same disclosure requirements.

Perhaps most important to the Colorado judiciary, a bright-line disclosure rule advances the truth seeking function of the discovery rules. "If an adverse party is to determine the extent to which the expert's opinion has been shaped or influenced by the version of the facts selected and presented by the counsel retaining the expert, she must have access to the documents or materials that the expert considers."[151] Without such access, the opposing party will be unable to conduct a full and fair cross-examination of the expert.[152]

> A bright-line rule's promotion of the truth seeking function of discovery does not compromise the strong policies underlying the work product doctrine. The work product doctrine is intended to permit an attorney to prepare her case by distinguishing relevant from irrelevant facts, testing novel legal theories, and deliberating over tactics and strategy. These objectives are not undermined by a bright-line rule because divulging opinion work product to a testifying expert does not result in counsel developing new legal theories or in enhancing the conducting of a factual investigation. Rather, the work product either informs the expert as to what counsel believes are relevant facts, or seeks to influence him to render a favorable opinion.[153]

Similar to Colorado, Missouri utilizes a bright-line rule requiring that "[a]ll material given to a testifying expert must, if requested, be disclosed."[154] The rule controlling the scope of expert discovery merely states that "[d]iscovery of facts known and opinions held by

150. Karn v. Ingersoll-Rand Co., 168 F.R.D. 633, 641 (N.D. Ind. 1996).

151. *Gall*, 44 P.3d at 240.

152. *Id.*; *see also* Simon Prop. Grp. v. mySimon, Inc., 194 F.R.D. 644, 647 (S.D. Ind. 2000) ("[U]nder Rule 26, an attorney should not be permitted to give a testifying expert witness a detailed 'road-map' for the desired testimony without also giving the opposing party an opportunity to discover that 'map' and to cross-examine the expert about its effect on the expert's opinions in the case.").

153. *Gall*, 44 P.3d at 240 (citations and internal quotation marks omitted).

154. *See* State *ex rel.* Tracy v. Dandurand, 30 S.W.3d 831, 836 (Mo. 2000) (citing MO. SUP. CT. R. 56.01(b)(4)).

experts, otherwise discoverable . . . may be obtained" through interrogatories or by deposition.[155] However, the Supreme Court of Missouri has held that the rule should be read to require the production of all materials furnished to the expert, as holding otherwise "would allow the expert witness or the party retaining the expert witness to select which documents to produce after the expert has reviewed the documents in preparation for the expert's testimony."[156] The court further reasoned that

> [i]t is appropriate, at deposition or trial, to cross-examine an expert witness as to information provided to the expert that may contradict or weaken the bases for his or her opinion regardless of whether the expert relied upon or considered the information. Removing the privilege from the documents provided to the expert does not necessarily make the documents admissible at trial. As with other non-privileged documents, the law of evidence applies.[157]

III. ANALYSIS OF THE NEW RULE

The bright-line rule denying disclosure of attorney-client communications in Pennsylvania strikes the necessary balance between promoting the truth-determining process of obtaining the substance of an expert's opinions and the protection of an attorney's coveted mental impressions. The Pennsylvania principles are now consistent with the leading venues in the United States.

The goal of our litigation system is to have efficient, fair trials that allow the fact-finder the ability to evaluate the substance of an expert's testimony while also having the ability to see the expert's opinions properly tested by fair cross-examination. The point of an adversarial system is to arrive at the truth. To accomplish this goal, the focus of discovery should delve into the merits of the expert's opinions rather than collateral issues as to whether draft reports were developed and communications were exchanged between the expert and counsel. The discovery should focus on the inquiry into what facts and data the expert actually relied upon. This inquiry can be satisfied through the use of interrogatories before trial begins and does not require an investigation into the distracting collateral issues of whether there were pretrial communications between the expert and attorney.

155. MO. SUP. CT. R. 56.01(b)(4).

156. *Dandurand*, 30 S.W.3d at 835.

157. *Id.*

Discovering who said what to whom or how many drafts were exchanged does nothing to advance the discovery of the merits of the expert's opinion. Focusing on such extraneous matters obfuscates the caliber of the evidence, the weight it should be accorded, and its basis in theory and fact. It also increases litigation costs and prolongs litigation due to the inevitable witch-hunt that so often occurs with discovery requests for this information.

The attorney has a duty to his client to collaborate with the expert to test theories, so the expert's opinions are more reliable, relevant, and accurate. The attorney must know the strengths and weaknesses of the expert's opinions to accurately evaluate the merits of the case and to properly prepare for trial. Collaborating with experts allows the free-flow of creative ideas, strategies, and theories of the case. Interfering with this open process would stifle the ability to develop truthful, reliable opinions to be tested at trial and would also be an invasion into an attorney's work product. While the opponents of the current rule fear that experts would write opinions that are not factually sound and based solely on what an attorney told the expert to write, the Model Rules of Professional Conduct prevent that improper result. Under the rules, an attorney should not direct an expert to say something in a report that has no basis in fact or rely on a false statement of material fact in his report.[158] Following these rules prevents the attorney from improperly manipulating an expert's opinion.

Inquiry into the communications between experts and attorneys will cause very costly, time-consuming litigation that promotes duplicative expert retention. Operating under the old rule, attorneys would be compelled to hire two sets of experts: one for the purpose of consultation, whose communications are protected from discovery, and another to testify at trial. Countless hours and dollars will be spent working with these consulting experts, while conversations with the expert actually being called to testify would be guarded and quite possibly inadequate, for fear of being required to disclose strategy conversations. This scenario does no service for the "advancement of justice" contemplated by *Hickman*.[159] Without a bright-line rule regarding the discoverability of attorney-expert communication, court time will be wasted and trials will be delayed due to an onslaught of unnecessary discovery motions. Thus, it is essential that

158. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4 (1983).

159. Hickman v. Taylor, 329 U.S. 495, 510 (1947).

the expert-attorney communications be confidential to ensure that proper case analysis is done.

The benefits of the new rule extend beyond just practitioners themselves. One of the most costly and inefficient mechanisms under the previous incarnation of the rule was the common *in camera* review of expert communications. Such examinations are not only costly and time consuming, but often produce an unfair or unreasoned outcome as the judge inspects the documents without the aid of the attorneys. The *in camera* review process lacks the benefit of learned counsel putting the documents in context as to what were his "mental impressions" and what were not. Thus, the *in camera* inspections could potentially result in the erroneous disclosure of the attorney's protected core work product, potentially leading to prejudicial error and necessitating new trials.[160]

Many jurisdictions are already in line with Pennsylvania's policy reasons supporting the bright-line rule preventing such discovery. New Jersey, Pennsylvania's sister state, has had almost identical protections in place for over a decade. The Supreme Court of New Jersey, in a case that predated the change in its rule precluding discovery of draft reports, nonetheless upheld a lower court's ruling requiring disclosure of an expert's draft report, reasoning that

> [i]t is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. Too much scrutinizing of the collaborative process serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to ensure that the expert's opinion has been independently derived.[161]

In fact, the New Jersey Bar, having now for some time reaped the benefits of the protection of unfettered exchange of ideas between attorneys and experts, has been an advocate for encouraging other jurisdictions to follow suit. To that end, the New Jersey Bar Association sent a letter to the Federal Committee on Rules of Practice and Procedure in support of the then-proposed amendment to Federal Rule of

160. *See* Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 91 A.3d 680, 688 (Pa. 2014).

161. Adler v. Shelton, 778 A.2d 1181, 1190 (N.J. Super. Ct. Law Div. 2001) (citations omitted).

Civil Procedure 26.[162] Citing the Association's officers and board members, as well as the overwhelming majority of New Jersey practitioners, they lauded the state's overall positive experiences with the rule.[163] As a result, the success of this rule in New Jersey served as an impetus for the subsequent 2010 federal amendments, which were "crafted with an eye on the New Jersey experience."[164]

The Pennsylvania rule also follows the language and philosophy behind Federal Rule of Civil Procedure 26(b); however, the judiciary declined to adopt the three Rule 26(b) exceptions mentioned above. The 2014 Explanatory Comment of the Pennsylvania rule discusses why Pennsylvania has not adopted the federal court exceptions:

> In Pennsylvania, questions regarding the compensation of the expert have traditionally been addressed at trial; there is no indication that this procedure is not working well.
>
> In addition, the facts or data provided by the attorney that the expert considered, as well as the assumptions provided by the attorney that the expert relied on in forming his or her opinion, are covered by Rule 4003.5(a)(1)(B), which 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." If facts or data which the expert considered were provided by counsel or if the expert relied on assumptions provided by counsel, they must be included in the expert report.[165]

162. *See* Letter from Dennis J. Drasco, President, Ass'n of the Fed. Bar of N.J., to Peter G. McCabe, Secretary, Comm. on the Rules of Practice and Procedure (Jan. 21, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-153-Comment-Trustees%20of%20The%20 Association%20of%20the%20Federal%20Bar%20of%20New%20Jersey%20(Drasco).pdf.

163. *Id.* at 2 ("We believe the proposed amendment enhances the search for truth by focusing the fact finder's attention where it should be: on the substance of the expert's opinion. In so doing, it reduces collateral litigation on side issues that, both advertently and inadvertently, distract from the main issue, increase costs, and exacerbate the lack of professionalism infecting much litigation.").

164. *See* COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 231 (May 8, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf [hereinafter CIVIL RULES ADVISORY COMMITTEE].

165. PA. R. CIV. P. 4003.5 explanatory note (2014).

Accordingly, counsel will still have the information needed to question experts about alternative analyses, testing methods, or approaches that were or were not considered when the expert is on the witness stand subject to cross-examination at trial. Also, an attorney is still permitted to inspect an opponent's expert file at the time of trial, and an attorney may still challenge an expert's bias on cross-examination.[166] For instance, if there are terms or phrases that appear in the expert's report which are more consistent with "lawyer related" language, as opposed to words more commonly used by an expert in a given field, a trial judge is likely to permit inquiry into whether the opinion is that of counsel or of the expert.

States that feature a bright-line rule for disclosure of expert-attorney communications, such as Texas, appear to predicate this framework on assumptions that there will be impropriety in the development of expert reports. The thought is that the expert simply follows the marching order of the attorney and is little more than a ventriloquist dummy on the stand.[167] These states do not trust an attorney's mandate to properly and ethically collaborate with the expert to foster fair and reliable opinions based on reason. They also discount the costly and inefficient litigation process that ensues from such a broad discovery of attorney-expert communications. These antiquated systems need to be changed to allow the focus of the expert discovery to be on the merits of the opinions as opposed to whether the final report was edited by an attorney.

However, it is important to consider that the state courts that chose to interpret their rules of discovery in a manner mandating the absolute disclosure of attorney-expert communications did so relying on the condition of the Federal Rules at the time.[168] Although the Federal Rules are not binding on state courts, other jurisdictions do look to the Federal Rules as persuasive authority with great frequency, and the rules of the day now reflect a completely different attitude than they did prior to the federal amendments.[169] History would therefore suggest that the change in the federal rule is but the first domino to fall in the beginning of a nationwide trend toward the adoption of a bright-line rule barring the discovery of attorney-expert communications.

166. *See* Cooper v. Schoffstall, 905 A.2d 482, 494–95 (Pa. 2006).

167. *See, e.g.*, United States v. Brownlee, 744 F.3d 479, 482 (7th Cir. 2014) (describing an expert witness repeating an out-of-court statement as a "ventriloquist").

168. *See* Gall *ex rel.* Gall v. Jamison, 44 P.3d 233, 234–39 (Colo. 2002); *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 441–42 (Tex. 2007).

169. *See* CIVIL RULES ADVISORY COMMITTEE, *supra* note 164, at 14.

IV. PRACTICAL APPLICATION

A. Potential Exceptions to the New Rule

The amendments to Federal Rule of Civil Procedure 26(b)(4), while barring discovery of nearly all attorney-expert communications, contemplated three exceptions for which the work product protection would not apply.[170] As noted above, the Pennsylvania judiciary made a conscious decision not to adopt these exceptions in the new rule, seemingly granting attorney-expert communications absolute privilege. However, the amendment to Rule 4003.5 also states that the now-shielded communications would be discoverable "in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law."[171] The pertinent question becomes, then, what circumstances would warrant such disclosure? Although the new rule is in its infancy and there has been little litigation testing the breadth of its protection, there are certain instances in which the rule may not provide blanket work product protection to an attorney seeking to shield expert communication from discovery.

1. Relevancy

The Pennsylvania Superior Court has noted that "the work-product [sic] privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action."[172] The explanatory comments for Pennsylvania Rule of Civil Procedure 4003.3 elaborates on this standard:

> There are, however, situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action; for example, an action for malicious prosecution or abuse of process where the defense is based on a good faith reliance on a legal opinion of counsel. The opinion becomes a relevant piece of evidence for the defendant, upon which defendant will rely. The opinion, even though it may have been sought in anticipation of possible future litigation, is not protected against discovery. A defendant may not base his defense upon an opinion of counsel and at the same time claim that it

170. FED. R. CIV. P. 26(b)(4)(C)(i)–(iii).

171. PA. R. CIV. P. 4003.5(a)(4).

172. Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800, 812 (Pa. Super. Ct. 2011) *aff'd*, 91 A.3d 680 (Pa. 2014) (quoting Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. Ct. 2003)).

is immune from pre-trial disclosure to the plaintiff.

> As to representatives of a party, and sometimes an attorney, there may be situations where his conclusions or opinion as to the value or merit of a claim, not discoverable in the original litigation, should be discoverable in subsequent litigation. For example, suit is brought against an insurance carrier for unreasonable refusal to settle, resulting in a judgment against the insured in an amount in excess of the insurance coverage. Here discovery and inspection should be permitted in camera where required to weed out protected material.[173]

The Pennsylvania Supreme Court's opinion did not consider this exception in its ruling; in fact, the only mention of the relevancy exception at all is in a footnote that swiftly dismisses its application to the facts in the *Barrick* case.[174] However, where a cause of action implicating a defense is based upon the good faith reliance of counsel, the court may deem attorney-expert communications discoverable.

2. Bad faith

Additionally, courts may deem attorney-expert communications discoverable in an instance of bad faith. Bad faith actions typically arise where there is clear liability and insufficient insurance to cover the anticipated verdict potential of a given case and the defense unreasonably fails or refuses to promptly resolve the matter in advance of trial. In such a case, where an expert report unreasonably distorts facts, offers opinions unsupported by facts, or reaches conclusions that are inconsistent with basic principles in the expert's field, communications between the attorney and the reviewing expert are likely to become fair game in an ensuing bad faith action.

For example, assume there was a medical malpractice case where a physician negligently delayed the diagnosis and treatment of a severe bacterial spinal infection, resulting in permanent paralysis of the plaintiff's lower extremities. In that case, the parties stipulated that the plaintiff had $1.5 million in lost wages, and the plaintiff produced a life-care expert who concluded that it would cost $15 million to pay for medical expenses for the rest of the plaintiff's life.

173. PA. R. CIV. P. 4003.3 explanatory note (2014).

174. *See Barrick*, 91 A.3d at 684 n.6.

Suppose the doctor had limited coverage of only $1 million. Accordingly, after the plaintiff filed this lawsuit and learned of the limited coverage, plaintiff's counsel sent a "bad faith" letter to defense counsel demanding payment of the $1 million policy because the verdict potential was significantly greater than the available coverage. In that demand letter, plaintiff's counsel advised that if the matter was not promptly resolved, the plaintiff would also pursue an action for bad faith, in accordance with Title 42, Section 8731 of the Pennsylvania Consolidated Statutes, in the event the case proceeded to trial and the verdict exceeded the available coverage.[175]

Assume the defense refused to settle, and to justify its refusal, produced a report from an infectious disease specialist that defended the case on unsupported principles of medicine and a distortion of the facts. At trial, evidence established that the defense expert cooperated extensively with defense counsel for twenty years. He also wrote other reports on behalf of the same defendant physician in other medical malpractice matters involving poor medical care. Thus, it is evident that the expert's report has no merit, raising a suspicion as to who truly authored the words appearing in the report. In an ensuing bad faith action with this type of case, it would be highly probable that the written communications between that expert and the attorney would be discoverable, including any draft expert reports. In this type of case, discovery requests for information exchanged between the expert and the attorney would very likely fall under the "cause shown" exception elucidated in *Barrick* and Pennsylvania Rule of Civil Procedure 4003.5(a)(4).[176]

B. Cross-Examining to Impeach Credibility

It is also important to note that although draft expert reports are not discoverable in Pennsylvania, an attorney still has an arsenal of cross-examination materials accessible to him or her at trial. An attorney may still inquire into alternative theories and testing that the expert did or did not consider, as well as challenge the factual information provided to the expert and the basis for the opinions that were formulated based on the facts provided.[177] An attorney may also chal-

175. 42 PA. CONS. STAT. ANN. § 8371 (West 1990).

176. *See* PA. R. CIV. P. 4003.5(a)(4); *see also Barrick*, 91 A.3d at 680.

177. *See* PA. R. EVID. 703; *see also* PA. R. EVID. 705.

lenge the expert's bias, motive, interest in the outcome, and compensation that does not require disclosure of annual related income, unless otherwise available.[178] Any line of inquiry that raises a genuine issue of credibility should be permissible provided that it does not appear as though you are engaging in a "fishing expedition," or simply wasting time.[179]

An attorney may also explore the expert's choice of language in his expert report. For example, if an expert uses pure legal terms, such as opining that the case is justified by *res ipsa loquitor*, an attorney on cross-examination should be able to inquire as to whether the opponent attorney provided him with that language. Also, if opinions in the expert report were completely outside of the expert's area of expertise, again, an attorney on cross-examination may inquire as to whether that language came from the opposing expert.

Many courts, including the Third Circuit Court of Appeals, have echoed this sentiment in asserting the work product privilege in shielding attorney-expert communications from discovery:

> Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. Even if examination into the lawyer's role is permissible, an issue not before us, the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product.[180]

Additionally, the New Jersey Supreme Court, in the aforementioned *Adler* case, also factored in the value of cross-examination in arguing against the merits of the disclosure of expert drafts:

> The central inquiry on cross examination of an expert witness . . . . is not the question of if and to what extent the expert was influenced by counsel; rather it is this: what is the basis of the expert's opinion. Cross examination on the adequacy and re-

178. *See generally* PA. R. EVID. 607; *see also* PA. R. EVID. 705.

179. *See* Ecker v. Wisconsin Cent. Ltd., No. 07-C-371, 2008 WL 2705118, at *8 (E.D. Wis. 2008) (noting that the defendant's discovery motion seeking the amount of money plaintiffs paid to experts "could be quite probative of the expert's potential bias").

180. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984).

> liability of the stated basis of the expert's opinion can be conducted effectively absent a line of questioning on counsel's role in assisting the expert.[181]

Whatever the rationale, there is no question that even without access to the communications between an opposing attorney and his or her expert, cross-examination remains an extremely effective tool for a practitioner to challenge an expert's motives or techniques before the finder of fact.

C. Practice Tips

When you retain a testifying expert, advise that all communications with persons other than counsel will be discoverable.

If you send a letter to your expert, it is probably best not to include a discussion that includes facts and your theories. However, in most instances, if the letter solely includes your mental impressions, Rule 4003.5 should protect that correspondence. Nonetheless, it is more prudent to have a conversation about those theories as opposed to memorializing them in a letter. In sum, enclosure letters should be very brief and simply identify the enclosed documents and encourage telephone conversation about the case after the expert has reviewed the materials and reached an independent opinion.

Make sure that you label all draft reports with a title such as: "Draft Work Product Report Protected in Accordance with Rule 4003.5."

Make sure you label all correspondence: "Work Product Protected in Accordance with Rule 4003.5."

If you receive Expert Interrogatories or Request for Production of Documents seeking all correspondence or materials exchanged between an expert and counsel, object within thirty days of the request, citing the work product protections afforded by Rule 4003.5.

When drafting expert discovery to be served on opposing counsel, seek the expert's internal notes and documents that contain solely his or her own work product, or the facts upon which the expert has relied in support of his or her opinions.

When drafting your own expert discovery, you should inquire about communications that the expert had with persons other than

181. Adler v. Shelton, 778 A.2d 1181, 1190–91 (N.J. Super. Ct. Law Div. 2001) (quoting Nexxus Prods. Co. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass. 1999)).

counsel when formulating his or her opinion or the basis for that opinion.

When cross-examining an expert, you can inquire into alternative theories and testing that the expert did or did not consider, as well as challenge the factual information provided to the expert, and the basis for the opinions that were formulated based on the facts provided.

When cross-examining an expert, you can challenge the expert's bias, motive, interest in the outcome, and compensation that does not require disclosure of annual related income unless otherwise available.

Any line of inquiry that raises a genuine issue of credibility should be permissible provided that it does not appear as though you are engaging in a "fishing expedition," or simply wasting time.