



The goal of our monthly newsletter is to keep you abreast of changes in the legislature affecting your industry as well as important court decisions. Should you have any questions regarding any of this information, please feel free to contact us via phone or email.

## PA ADOPTS BRIGHT-LINE RULE BARRING ATTORNEY-EXPERT COMMUNICATIONS

On April 29, 2014, the Pennsylvania Supreme Court issued its long awaited decision in Barrick v. Holy Spirit Hospital, et al. By way of history, Barrick involved a personal injury action. The defense subpoenaed the records of plaintiff's treating orthopedic surgeon. Certain records were withheld as privileged pursuant to Rules 4003.3 and 4003.5 because the surgeon was designated as plaintiff's expert. Favoring full discovery, the trial court ordered the disclosure of correspondence between counsel and the physician.

On appeal, the plaintiff argued that letters and emails exchanged between counsel and the physician were protected because they were prepared in anticipation of litigation. The superior court agreed holding that such records were "beyond the permissive scope" of Rule 4003.5(a)(1), which allows discovery 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." Although the court stated that in some cases, an *in camera* review may be necessary, the Court broadly held that "the correspondence at issue in this case is not discoverable."

The defense appealed highlighting Pennsylvania's long history of liberal discovery to prevent unfair surprise at trial. The plaintiff countered that the communications fell within the broad purview of attorney work product and "privilege always trumps relevance." The plaintiff also argued that the privilege is not a document privilege, but a thought-process privilege stating that the correspondence helped counsel to strategize the case.

The Supreme Court interpreted Rules 4003.3 and 4003.5 as embracing liberal discovery, but protecting attorney work product. The Court acknowledged that some documents might contain an overlap of attorney work product and facts, but rejected an *in camera* review as an effective mechanism of deciphering between the two. The Court noted that it would be needlessly difficult for a court to extricate work product from related facts. Similarly, the Court characterized redaction after an *in camera* review to be a needless litigation expense and an impediment to judicial efficiency. As such, the Court adopted a bright-line rule barring discovery of attorney-expert communications.

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