

[J-26-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CARL J. BARRICK AND BRENDA L. BARRICK	:	No. 76 MAP 2012
	:	
	:	Appeal from the order of the Superior
	:	Court dated November 23, 2011 at Docket
v.	:	No. 1856 MDA 2009 reversing the order of
	:	Cumberland County Court of Common
	:	Pleas, Civil Division, dated October 16,
	:	2009 at No. 07-3604 and remanding.
HOLY SPIRIT HOSPITAL OF THE	:	
SISTERS OF CHRISTIAN CHARITY,	:	
INDIVIDUALLY AND DOING BUSINESS	:	ARGUED: April 10, 2013
AS HOLY SPIRIT HOSPITAL, SODEXHO	:	
MANAGEMENT, INC., SODEXHO	:	
OPERATIONS, LLC AND LINDA J.	:	
LAWRENCE	:	
	:	
	:	
	:	
APPEAL OF: SODEXHO MANAGEMENT	:	
INC., SODEXHO OPERATIONS LLC,	:	
AND LINDA J. LAWRENCE	:	

OPINION IN SUPPORT OF AFFIRMANCE

MR. JUSTICE BAER

DECIDED: April 29, 2014

This Court granted review to consider the application of the rules of civil procedure to the discovery of communications between attorneys and expert witnesses, specifically Pa.R.C.P. 4003.3, addressing the scope of discovery and attorney work product, and Pa.R.C.P. 4003.5, governing disclosures relating to expert witnesses. These rules attempt to balance the competing policies of promoting the truth-determining process through liberal discovery but also protecting attorney work product from discovery to encourage efficient and effective client representation. After considering these policies under the language of the current rules, we would affirm the

holding of the Superior Court and create a bright-line rule denying discovery of communications between attorneys and expert witnesses.

This personal injury action resulted from the serious injuries allegedly suffered by Carl Barrick when a chair in which he was sitting collapsed in the cafeteria of Defendant Holy Spirit Hospital, which is managed by Defendant Sodexho Management. After Plaintiffs Carl and Brenda Barrick filed suit, Defendants¹ served a subpoena in March 2008 to obtain the records (including relevant correspondence) of Dr. Thomas Green, Plaintiff's treating orthopedic surgeon. The doctor's practice group supplied the requested records without objection.

In May 2009, Defendants requested updated records from Dr. Green's practice. The practice disclosed some records but, on Plaintiffs' counsel's advice, withheld "[c]ertain records of this office that pertain to [Plaintiff Carl Barrick] but were not created for treatment purposes." Certificate of Compliance dated June 16, 2009, at 1, found at Reproduced Record ("R.R.") at 51. In response, Defendants filed a motion to enforce the subpoena, to which Plaintiffs objected, asserting, apparently for the first time, that they had designated Dr. Green an expert witness, subject to Pa.R.C.P. 4003.5, governing discovery for expert witnesses.² Given Dr. Green's altered status, Plaintiffs

¹ While Plaintiffs filed suit against Holy Spirit Hospital, Sodexho, and Sodexho's employee, only the Sodexho defendants are appellants before this Court. Nonetheless, the hospital filed a brief as appellee but in support of the Sodexho defendants and in favor of discovery of the correspondence.

² In relevant part, Rule 4003.5 provides:

Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1

(continued...)

contended that all communications between counsel and him constituted privileged material pursuant to Pa.R.C.P. 4003.3 and 4003.5. R.R. at 52-57.

(...continued)

and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Pa.R.C.P. 4003.5.

After reviewing the file in camera, the trial court granted Defendant's motion to enforce the subpoena. As explained in its subsequent opinion, the trial court considered and rejected the option of trial courts reviewing redacted correspondence, opining "that it is seldom possible to discern where the legal theory of counsel ends and the medical opinion being sought from the expert begins." Tr. Ct. Op. at 5. The court expressed particular concern with the in camera review process where the court does not have participation of the parties' counsel to provide context to the documents being reviewed. Adopting a bright-line rule favoring full discovery, the trial court granted discovery of the correspondence between counsel and Dr. Green, "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." Id. at 5-6 (footnote omitted). The trial court did not expressly analyze or apply the civil procedural rules concerning work product or expert witnesses, or make any factual findings as to whether Defendants had satisfied the "cause shown" requirement for additional discovery, pursuant to Pa.R.A.P. 4003.5(a)(2), above and beyond the expert's facts and opinions and a summary of the grounds for each opinion discoverable under Pa.R.C.P. 4003.5(a)(1).

Plaintiffs appealed to the Superior Court, asserting that the issue was subject to immediate appeal as a collateral order. See Pa.R.A.P. 313; see also Ben v. Schwartz, 729 A.2d 547, 552 (Pa. 1999) ("There is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material." (internal quotation marks omitted)). In their Rule 1925(b) statement, the Barricks argued that they should not be required to disclose records beyond those developed for diagnosis and treatment, and specifically, that letters and emails exchanged between their

counsel and Dr. Green are protected from discovery insofar as they were prepared in anticipation of litigation and address the role of the physician as an expert witness.

Initially, a panel of three judges affirmed the trial court's order, concluding that Defendants were entitled to discover whether the expert's conclusions were his own or guided by Plaintiffs' counsel.³ However, upon Plaintiffs' petition, an en banc panel of the Superior Court reversed the trial court. The court held that the records were "beyond the permissive scope" of Rule 4003.5(a)(1), which provides for discovery through interrogatories 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." Barrick v. Holy Spirit Hosp., 32 A.3d 800, 810 (Pa. Super. 2011). Moreover, the court concluded that the Defendants failed to satisfy Rule 4003.5(a)(2)'s provision allowing additional discovery "[u]pon cause shown," because Defendants did not show cause prior to serving the subpoena.⁴ Id. at 811.

³ In apparent reaction to the original panel decision, the Civil Procedural Rules Committee proposed an amendment to Rule 4003.5 which would provide protection for the correspondence between counsel and expert witnesses. Although the proposal is currently pending before this Court, we address this case under our current rules.

⁴ The panel also concluded that the Defendants improperly sought the records directly from Dr. Green, when under Rule 4003.5, the request should have been made through Plaintiffs' counsel. It appears that Defendants were not aware when they requested the documents that Dr. Green was an expert witness, rather than a treating physician. Presumably as a result of the lack of a designation, Defendants did not follow the required procedure for discovery of expert witnesses via interrogatories rather than subpoenas.

As they had not requested the records properly pursuant to Rule 4003.5(a)(1), the Superior Court found that the Defendants needed to show cause regarding the document request pursuant to subsection (a)(2). It is beyond the scope of our review to consider whether Defendants on remand may seek further discovery under Rule 4003.5, in light of the procedural history of this case involving the designation of Dr. Green as an expert witness.

Additionally, the Superior Court concluded that Rule 4003.3's protection of attorney work product shielded the correspondence from disclosure. In part, Rule 4003.3 provides, "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."⁵ The court, however, acknowledged that the comment to the rule provides that the protection applies to the listed items but "nothing more." Pa.R.C.P. 4003.3 cmt. The court also recognized, but deemed inapplicable, the limited exception for disclosure of attorney work product where the product itself is "relevant" to the underlying action, such as when a party raises the defense of good faith reliance on counsel. Accordingly, although the panel opined that in camera review may be necessary to determine what aspects of the communications are protected by the privilege, the court broadly held that "the correspondence at issue

⁵ In full, Rule 4003.3 provides:

Rule 4003.3. Scope of Discovery. Trial Preparation Material Generally

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. 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. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. 4003.3.

in this case is not discoverable” as it would violate the attorney work product under Pa.R.C.P. 4003.3 and 4003.5. Barrick, 32 A.3d at 813.

In a concurring and dissenting opinion, Judge Bowes agreed with the Superior Court majority’s application of Rule 4003.5 to the facts of the case barring discovery of the documents by subpoena, keeping in mind that as a discovery rule, Rule 4003.5’s protection would only extend until trial because “an expert’s file becomes available for an opponent’s inspection and use at trial.” Barrick, 32 A.3d at 815, 817 (Bowes, J., concurring and dissenting). While the dissent apparently would have joined the denial of discovery based upon Rule 4003.5, it “part[ed] company with the majority regarding the balance of its holding” addressing Rule 4003.3. Id. at 815. The dissent instead opined that Rule 4003.3 did not support a blanket protection for correspondence between counsel and an expert witness, but only protected the attorney’s work product as limited to the attorney’s mental impressions and “conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. She noted that if work product was deemed to apply to all the documents the protection would extend through trial, in contrast to any denial of discovery under Rule 4003.5. Barrick, 32 A.3d at 817.

This Court granted review of the following issue raised by Defendants:

Whether the Superior Court’s interpretation of Pa.R.C.P. No. 4003.3 improperly provides absolute work product protection to all communications between a party’s counsel and their trial expert?

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

Before this Court, Defendants highlight Pennsylvania’s long history of liberal discovery to prevent unfair surprise at trial. They observe that Pa.R.C.P. 4003.1(a) generally permits a party to “obtain discovery regarding any matter, not privileged,

which is relevant to the subject matter involved in the pending action” Defendants emphasize that the work product doctrine set forth in Rule 4003.3 is a departure from the general rule which should be narrowly construed. They note that the work product exception is not a creature of common law, like the attorney-client privilege, but instead is a convention created by rule.

Defendants acknowledge that the purpose of the work product doctrine in Rule 4003.3 is to provide the attorney privacy to develop theories and legal strategy without exposure to the opposing side. Defendants maintain, however, that the work product doctrine is not absolute but, rather, a limited exception to the general rule of liberal discovery. They contend that “an attorney providing a trial expert with facts or other information, or telling the expert what to say, does not result in counsel developing new legal theories or advancing a factual investigation,” and thus these exchanges should not be protected. Defendants’ Brief at 18. They resist the argument that the expert’s bias can be challenged on cross-examination, claiming instead that opposing counsel would not be able to scrutinize effectively the expert without having the documents disclosing the extent to which the expert had been influenced by counsel.⁶

Arguing that correspondence between counsel and an expert witness are not protected under Rule 4003.3, Defendants also assert that they could be discoverable under Rule 4003.5(a)(2) “[u]pon cause shown.” Defendants assert that “[w]ithout having access to this highly relevant documentation, the testimony of Plaintiffs’ expert at trial may be misleading and the truth-finding process and integrity of the judiciary process

⁶ To the extent Defendants argue that the correspondence falls under a “relevancy exception” to the work product doctrine, we note that the relevancy exception is limited to situations “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.” Pa.R.C.P. No. 4003.3 cmt. This case does not fall into such a category.

called into serious question.” Defendants’ Brief at 27. Defendants argue that they are not seeking discovery of all written communications between attorneys and experts, but rather only when a trial court in its discretion finds cause has been demonstrated pursuant to Rule 4003.5(a)(2). Indeed, they emphasize that the trial court, which reviewed the documents in camera, deemed the documents discoverable.

Defendants assert that the more restrictive, bright-line rule proposed by the Plaintiffs and adopted by the en banc Superior Court panel, is “untenable because it does not balance the important competing rights at issue, in this case, attorney work product protection and a party’s right to discover all of the facts and bases for a trial expert’s opinions.” Defendants’ Reply Brief at 3. Defendants assert that the Plaintiffs’ proposal “ignores the reality that sometimes it is necessary for a party to discover the opposing party’s expert file because there is cause to believe that the attorney provided the expert with additional or different facts, data, assumptions or grounds, which are not in the expert’s report.” Defendants’ Reply Brief at 11. Therefore, Defendants ask us to reverse the decision of the en banc Superior Court panel and reinstate the order of the trial court compelling discovery.⁷

In response, Plaintiffs argue that the communications between counsel and an expert witness fall within the broad purview of the work product doctrine, pursuant to Rule 4003.3. They contend that even if the correspondence may be relevant and useful for Defendants’ cross examination of the expert, “privilege always ‘trumps’ relevance.” Plaintiffs’ Brief at 1. Plaintiffs assert that many things may be relevant to an opponent’s case that are nonetheless shielded from discovery. For example, Plaintiffs assert that it

⁷ While in this case, it is Defendants who seek to discover communications between Plaintiffs’ counsel and expert, we note that the result here will impact plaintiffs and defendants equally to the extent they present expert testimony and correspondingly face discovery demands from the opposing party.

would be highly relevant to have a routine right to pre-trial depositions of experts, but that is not allowed in Pennsylvania. Moreover, Plaintiffs observe that Rule 4003.1 instructs that relevance must yield to privilege: “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter.” Plaintiffs’ Brief at 5 (quoting Pa.R.C.P. 4003.1) (emphasis removed).

Plaintiffs maintain that the work product privilege is not a document privilege but a thought process privilege. They include in the work product protection the correspondence between counsel and expert because it helps frame how counsel will strategize the case. They argue that the purpose of witness preparation is to discover what theories to advance and how to respond to cross-examination, actions that the work product doctrine was intended to protect.

They additionally note that the federal courts in 2010 adopted a new rule barring discovery of attorney-expert communication with three limited exceptions: if the discovery: “(1) relates to expert compensation; (2) identifies facts the expert relies upon; or (3) identifies assumptions the expert relies upon.” Plaintiffs’ Brief at 15 n.9. Plaintiffs assert that this change was supported by a wide spectrum of organizations, including the American Bar Association. Plaintiffs quote the rationale of the formal Advisory Committee Note:

The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts - one for purposes of consultation and another to testify at trial - because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Plaintiffs' Brief at 17.⁸

Plaintiffs contend that adopting the Defendants' argument will result in increased costs as counsel will have to hire two sets of experts, which creates an improper competitive advantage to the side that can afford the second set of experts. Moreover, Plaintiffs allege that the liberal discovery of correspondence between attorneys and experts will waste litigant and court time due to unnecessary review and will lead to "wild goose chases," and delay in case disposition through endless discovery motions. Plaintiffs' Brief at 18. Moreover, Plaintiffs argue that the disclosure of expert correspondence undermines the purpose of experts which is to allow counsel to get a full understanding of the strengths and weaknesses of their cases and to allow attorneys and experts to play devil's advocate when preparing for trial. Plaintiffs reason that there is no need for in camera review because our system is based on the assumption that counsel will respond truthfully to discovery requests. They argue that expert discovery is no different than standard document discovery.

As noted above, Plaintiffs highlight that the Civil Procedural Rules Committee drafted a proposed amendment to Rule 4003.5 with a similar prohibition. According to Plaintiffs,

The Proposed Amendment contains new subparagraph (a)(4) which states: "[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) regardless of the form of the communications." And new language in (a)(2) makes it clear that, except for information concerning fees paid to experts, the "for cause"

⁸ Defendants respond to Plaintiffs' reliance on the federal move toward more stringent protection of work product, asserting that the new limitation on work product discovery in federal court is not relevant to Pennsylvania discovery because the federal system provides far greater discovery related to expert witnesses than does Pennsylvania.

subsection is superseded by the earlier ban on attorney-expert discovery.

Plaintiffs' Brief at 19. Plaintiffs urge the adoption of the amendment which would result in a bright-line rule that attorney-expert communications are not discoverable.

In resolving this case, we must interpret the interaction of Pa.R.C.P. 4003.3, governing the scope of discovery and attorney work product, and Pa.R.C.P. 4003.5, entitled "Discovery of Expert Testimony." Accordingly, "[a]s questions regarding the interpretation of the Rules of Civil Procedure are questions of law, our standard of review is de novo and our scope of review is plenary." Marlette v. State Farm Mut. Auto. Ins. Co., 57 A.3d 1224, 1228 (Pa. 2012). "Within the ambit of the discretionary authority allocated by the rules to the trial courts, we review for abuse of discretion." Cooper v. Schoffstall, 905 A.2d 482, 488 (Pa. 2006).

Pennsylvania's rules of civil procedure broadly provide that a "party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Pa.R.C.P. 4003.1. Indeed, Rule 4003.3 furthers the liberal discovery rule, instructing that "a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney."⁹ Pa.R.C.P. 4003.3. These provisions advance the truth-determining process so essential to our judicial system and prevent unfair surprise at trial.

However, Rule 4003.3 balances the general rule of expansive discovery with the deep-rooted protection of attorney work product: "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." Pa.R.C.P. 4003.3. As has been observed, the work product protection supports our judicial

⁹ The full text of Rule 4003.3 is set forth, supra p.6 n.5.

system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client's interest, without fear that the documents in which the ideas, theories and strategies are written will be revealed to the opposing counsel. Allowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice. See Hickman v. Taylor, 329 U.S. 495, 511 (1947)(observing that without the protection, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.").

The explanatory comment to Rule 4003.3 describes the "broad category" of work product materials but also limits the work product exception as follows:

The essential purpose of the Rule is to keep the files of counsel free from examination by the opponent, insofar as they do not include written statements of witnesses, documents or property which belong to the client or third parties, or other matter which is not encompassed in the broad category of the "work product" of the lawyer. Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more.

Pa.R.C.P. 4003.3, cmt.

Rule 4003.5 specifically addresses discovery related to expert witnesses who are expected to testify at trial, where such information is "otherwise discoverable" under Rule 4003.1, which recognizes that privileged documents are not discoverable.¹⁰

¹⁰ Rule 4003.5(a)(3) provides, in part, that "[a] party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial" Pa.R.C.P. 4003.5(a)(3).

Generally, a party may discover “facts known and opinions held by an expert” through interrogatories requiring the party to identify the testifying expert witness, the subject matter on which the expert will testify, “the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” Pa.R.C.P. 4003.5(a)(1)(b); see supra p.2 n.2 for text of Rule 4003.5. Additionally, “[u]pon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.” Pa.R.C.P. 4003.5(a)(2).

This rule paradigm, thus, embraces both liberal discovery and protection of attorney work product. While simple to apply in the abstract, this case demonstrates the difficulty that arises when the two policies converge. At the extreme are documents that consist solely of attorney work product. Rule 4003.3 mandates that such documents be protected: “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.” Pa.R.C.P. 4003.3. Accordingly, if such a document was sent to the expert witness, it would be protected by Rule 4003.3's work product provision.

While some documents might solely contain an attorney's mental impressions and legal theories, 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. In contrast to our esteemed colleagues writing in support of reversal, we conclude that attempting to extricate the work product from the related facts will add unnecessary difficulty and delay into the discovery process. Redaction followed by in camera review would result in needless litigation

adding expense to the parties and tying up the trial courts. Indeed, the trial court below favored a bright-line rule, albeit in favor of discovery, because it expressed concern for imposing in camera review of these documents on trial courts when they do not have the benefit of counsel providing context to the documents in camera. Tr. Ct. Op. at 5. Moreover, the in camera review process could potentially result in the erroneous disclosure of attorney-expert witness correspondence, which will not only invade protected core work product but, in a worst case scenario, would also constitute prejudicial error necessitating an appellate court's grant of a new trial with all the inefficiencies, burdens, and costs attendant thereto.

Our colleagues in the Opinion in Support of Reversal (OISR) rely upon Cooper v. Schoffstall, 905 A.2d at 492-93, to discount our concern with burdening trial courts with redacting attorney work product from correspondence with expert witnesses, noting that we recognized “a particularized need for trial court involvement in determining the appropriate scope of discovery.” The OISR is undoubtedly correct that we approved of the involvement of trial courts in determining when the Rule 4003.5 “cause shown” requirement has been met; indeed, the language of the rule clearly provides that “[u]pon cause shown, the court may order further discovery.” Pa.R.C.P. 4003.5(a)(2). Our decision in Cooper, however, does not speak to a trial court's burden of redacting attorney work product.

Instead, Cooper involved a request for an expert witness's “federal form 1099 tax records associated with his performance of services as an independent contractor . . . in undertaking ‘defense-related reports, examinations, and depositions.’” Cooper, 905 A.2d at 485. We had no reason to consider the interaction of Rule 4003.5 and the protection of attorney work product in Rule 4003.3. Moreover, in contrast to the OISR's view that a party should turn over redacted attorney-expert correspondence, this Court

in Cooper did not require the expert witness to turn over his records, but instead opted for a more limited disclosure. Observing that “discovery along these lines should be of the least burdensome and intrusive kind possible,” we concluded that “the appropriate entry point, upon the showing of cause, is a deposition by written interrogatories under Rule of Civil Procedure 4004.” Id. at 495.¹¹

Similarly, we see no need for courts to draw fine lines between what should and should not be redacted when the properly discoverable information can be obtained through other discovery methods that do not intrude upon attorney work product, as set forth in Rule 4003.5 governing expert witnesses. Parties may seek discovery of information through interrogatories propounded under Rule 4003.5(a)(1) and where appropriate, may obtain further discovery “upon cause shown” as supervised by our trial courts in accord with 4003.5(a)(2). Additionally, the expert’s opinions can be challenged on cross-examination. Thus, we conclude that it is preferable to err on the side of protecting the attorney’s work product by providing a bright-line rule barring discovery of attorney-expert communications.¹²

We additionally recognize that the Procedural Rules Committee has proposed an amendment to Rule 4003.5 which would embrace unambiguously the bright-line rule

¹¹ We did not foreclose further discovery “after an assessment of the interrogatory responses,” if, for example, the responses indicated “a strong showing that the witness had been evasive or untruthful.” Id. at 496.

¹² While it is possible that correspondence might include no attorney work product, we view this category to be extremely limited given that it would be the unusual correspondence between an attorney and expert witness 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.” Pa.R.C.P. 4003.3. Moreover, allowing discovery of these documents could result in unnecessary litigation and in camera review as assertive counsel skirmish with each other to determine whether the documents contain any attorney work product. For all the reasons stated above, we would deny discovery as to this limited category of documents as well.

denying discovery of all attorney-expert communications: “[a] party may not discover the communications between another party’s attorney and any expert who is [expected to testify as an expert witness at trial] regardless of the form of communications.” 40 Pa. Bull. 7334 (Dec. 25, 2010). Without further comment, we acknowledge that the explanatory comment to the proposal indicates that the “[c]urrent practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert.” Id. Although we do not rely upon this statement as substantive justification for our analysis of the current rule, nonetheless, it would appear that the Rules Committee believes that adoption of a bright-line test for denying discovery of communications between counsel and expert witnesses would not result in a change of practice in Pennsylvania. Our consideration of the proposed amendment to the rule is entirely separate, however, from the determination of the case before us, which, as initially noted, is governed by the current rule.

For the reasons set forth above, we would affirm the decision of the Superior Court denying the Defendants’ discovery motion seeking correspondence between counsel and the expert witness based upon Pa.R.C.P. 4003.3, in conjunction with current Pa.R.C.P. 4003.5. We recognize that this case is before this Court on an interlocutory discovery motion, such that this Court’s affirmance by operation of law will result in remanding the case to the trial court for further pre-trial proceedings.

Madame Justice Todd and Mr. Justice McCaffery join.