Pennsylvania Code – Rules Rule 4003.3 and 4003.5

Reference Sources:
http://www.pacode.com/secure/data/231/chapter4000/s4003.3.html
http://www.pacode.com/secure/data/231/chapter4000/s4003.5.html

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.

Explanatory Note

The amended Rule radically changes the prior practice as to discovery of documents, reports and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent.

Former Rule 4011(d) expressly prohibited such discovery. The amended Rule permits it, subject to the limitation that discovery of the work product of an attorney may not include disclosure of the mental impressions, conclusions, opinions, memoranda, notes, legal research or legal theories of an attorney. As to any other representative of a party, it protects the representative's disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics. Memoranda or notes made by the representative are not protected.

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.

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 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.

In two respects the amended Rule differs materially from Fed. R.Civ.P. 26(b)(3). First, the Federal Rule permits discovery only when the party seeking discovery shows substantial need of the materials in the preparation of his case and is unable, without undue hardship, to obtain a substantial equivalent of the materials by other means. Under the general provisions of Rule 4003.3, such a showing of substantial need and undue hardship will not be required. Note, however, that under Rule 4003.5(a)(3), governing discovery of opinions of an expert who is not expected to be called as a witness at trial, a showing of exceptional circumstances under which it is impracticable to obtain facts or opinions on the subject matter by other means is required.

The federal draftsmen have justified the special showing of need on the ground that ''each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.'' The Committee, after long and careful deliberation, rejected this view which would impose more court time on lawyers and additional burdens on judges in the motion court. At the same time it also rejected a proposal to go to the opposite extreme and direct the mandatory exchange of all pretrial material, statements, medical reports and experts' reports under penalty of sanctions.

Second, the work product protection of the Rule distinguishes between that afforded the attorney and that afforded the party's representative. They are on an equal footing under the Federal Rules. The Committee viewed the work product privilege enunciated by the United States Supreme Court in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), as stating a special rule applicable to lawyers which need not necessarily be the same as that applied to other representatives, particularly insurance investigators. Under the Rule, a lawyer's notes or memoranda of an oral interview of a witness, who signs no written statement, are protected but the same notes or memoranda made by an insurance investigator will not be protected. A signed statement of the witness is, of course, always discoverable, no matter who took it or where it is filed.

Source

The provisions of this Rule 4003.3 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (209475) to (209476).

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 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.

Official Note

For additional provisions governing the production of expert reports in medical professional liability actions, see Rule 1042.26 et seq. Nothing in Rule 1042.26 et seq. precludes the entry of a court order under this rule.

(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, 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. However, the expert shall not be prevented from testifying

as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Explanatory Note

Rule 4011(f), which had protected a deponent, whether or not a party, from giving an opinion as an expert witness over his objection, has been rescinded. Discovery of these matters is now permitted by Rule 4003.5, which closely parallels Fed. R.Civ.P. 26(b)(4).

The Rule distinguishes carefully between an expert expected to be called as a witness and an expert not expected to be called.

With respect to the expert expected to be called, discovery of facts known and opinions held by him, acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) First, the inquirer can by interrogatories require his opponent to disclose the identity of expert witnesses he expects to call at trial. The opponent must not only identify such experts but also state the subject matter on which each is expected to testify.

If a party, in his answer to interrogatories, states that he has not yet retained his experts, he is under a duty to supplement his answer as provided by Rule 4007.4(1). In addition, the inquirer may obtain a stipulation that the party will supplement his response or ask the court for an order under Rule 4007.4(3) requiring the party to file a supplemental response when such experts are retained.

(2) In addition, the inquirer can require each expert to be called at the trial whose identity is disclosed to state the substance of the facts and opinion to which he will testify, and a summary of the grounds for his opinion. The answering party has the option of having the expert answer the interrogatories himself on this issue or prepare a separate report which the answering party may attach to his answers. The answer or separate report must be signed by the expert.

(3) If the answering party or the expert does not fully comply with the foregoing, the court under subdivision (b) or (c) may exclude or limit the testimony of such expert if offered at the trial. Sanction Rule 4019(i) also provides an independent sanction, excluding the testimony of a witness whose identity has not been revealed, unless the trial court determines there are extenuating circumstances beyond the control of the defaulting party.

(4) Supplemental oral questioning of the expert may be permitted only upon cause shown, and upon payment of such fees and expenses as the court may fix. The Rule specifically provides no fees and expenses to the expert for the time spent in preparing answers to interrogatories or his report. He will be entitled to fees and expenses only if the inquirer seeks further oral discovery after the answer or report has been filed.

(5) It should be emphasized that Rule 4003.5 is not applicable to discovery and deposition procedure where a defendant is himself an expert, such as a physician, architect or other professional person, and the alleged improper exercise of his professional skills is involved in the action. Such a defendant can be examined by written interrogatories under Rule 4005 or by oral

deposition under Rule 4007.1. If so examined, a defendant cannot assert that his opinion may not be discovered without his consent.

(6) 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 deposition and answer to interrogatories, separate report or supplements thereto. However, he may testify to anything regarding matters in which he was never questioned in the discovery proceedings. This is a new provision not expressly found in the Federal Rule. It is implicit in the Federal Rule.

Where the full scope of the expert’s testimony is presented in the answer to interrogatories or the separate report, as provided in subdivisions (a)(1) and (2), this will fix the permissible limits of his testimony at the trial. But, if the inquirer limits his inquiry to one or more specific issues only, the expert is free to testify at trial as to any other relevant issues not included in the discovery. Therefore, what happens at the trial may depend upon the manner in which the expert is interrogated. The inquirer may be well advised to conduct his discovery broadly, by paraphrasing the language of 4003.5(a), which will require the expert to state all his opinions and grounds, thus preventing surprise testimony at trial concerning grounds never raised during the discovery.

All of the foregoing discussion relates to the expert expected to be called at the trial.

If the expert is not expected to be called at the trial, the situation is quite different. The special procedures listed above will not be applicable. Under subdivision (a)(3) of the Rule, no discovery of such a witness is permitted, except discovery of a medical expert under Rule 4010(b) infra, unless there is an order of court. To obtain this order of court, the inquirer must prove ‘‘exceptional circumstances’’ under which there is no practical way to find the facts or opinions by some other means.

Therefore, even if the inquirer knows the name of this expert, or knows that there is a report, he is forbidden to seek discovery of facts known or opinions held, unless he convinces the court that he must have the discovery. This is a heavy burden, which explains the small use of this provision under the Federal Rule. We can anticipate an equally small use in Pennsylvania.

One instance would be where an object is given by a plaintiff to an expert for the defendant for testing and is destroyed in the testing. Then, if the defendant elects not to call that expert at the trial, the plaintiff must get his testimony since the object is destroyed.

The Rule provides no special procedures in this instance. It is anticipated that ordinary discovery will suffice. If the inquirer does not know the name of the expert, he can ask for it by conventional interrogatory or oral deposition. If he knows there is a report, he can ask for it under Rule 4009.

Another difference is that the court may require the inquirer to pay the expert for his fees and expenses in the discovery. In the case of the expert who is expected to be called at the trial, there is no such provision in subsections (a)(1) and (2).

The Rule says nothing about the rare situation when the inquirer is an indigent party and cannot pay the expenses of the expert. Any such situation will have to be handled by the courts ad hoc, under the general principles of litigation in forma pauperis.

This subdivision is not intended, as pointed out by the federal draftsmen, to permit discovery of experts who may have been informally consulted by a party. Finally, it applies only to experts ''retained or specially employed.'' A regular employe of a party who may have collected facts, prepared reports and rendered opinions, and who may be qualified as an expert, is not covered by this sub-section and has no immunity from discovery, simply because the party elects not to call him at the trial. He is not an ''expert'' within the meaning of the Rule; he is simply a witness, an employe of a party.

Source

The provisions of this Rule 4003.5 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended March 29, 2004, effective immediately, 34 Pa.B. 1926. Immediately preceding text appears at serial pages (255393) to (255396).
